

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**BERNARDO P. SMITH**

Complainant

and

**TRUMBULL METROPOLITAN  
HOUSING AUTHORITY**

Respondent

Complaint No. 9407  
(AKR) 73090701 (26392) 112301  
22A – A2 – 00467

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

**JIM PETRO  
ATTORNEY GENERAL**

Duffy Jamieson, Esq.  
Deputy Attorney General  
Civil Rights Section, 15<sup>th</sup> Floor  
30 East Broad Street  
Columbus, OH 43215-3428  
614 - 466 - 7900

**Counsel for the Commission**

Daniel P. Thomas, Sr., Esq.  
DeBene, LaPolla & Thomas  
155 Pine Avenue N.E.  
P. O. Box 353  
Warren, OH 44482-0353  
330 – 392 – 4176

**Counsel for Respondent**

**ALJ'S REPORT BY:**

Bernardo P. Smith  
3170 Randolph Street  
Warren, OH 44485

**Complainant**

Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
1111 East Broad Street, Suite 301  
Columbus, OH 43205-1379  
614 – 466 – 6684

## **INTRODUCTION AND PROCEDURAL HISTORY**

Bernardo P. Smith (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) November 23, 2002.

The Commission investigated the charge and found probable cause that Trumbull Metropolitan Housing Authority (Respondent, TMHA) engaged in unlawful employment practices in violation of Revised Code Section (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 October 31, 2002.

The Complaint alleged that Respondent discharged Complainant in retaliation for having engaged in activity protected by Revised Code 4112.02(I).

Respondent filed an Answer to the Complaint on November 25, 2002. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on April 23, 2003 at the Trumbull County Court House, Common Pleas Court, 160 North High Street, Warren, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing (119 pages); exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on July 28, 2003; filed by Respondent on August 18, 2003, and filed by the Commission on August 20, 2003 (a reply brief).

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the assessment of the Administrative Law Judge (ALJ) of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She 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 November 23, 2002.

2. The Commission determined on September 12, 2002 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 matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Complainant worked for Respondent for 22 years as a Maintenance Mechanic.

5. Complainant was placed on a Last Chance Agreement (LCA) for causing damage to one of Respondent's vehicles while using it to deliver a gift (a refrigerator) to his mother.

6. The LCA, dated January 23, 2001, was to remain in effect until April 15, 2003 and provided that "any violation of the work rules of TMHA policy will result in discharge from employment." (Tr. 91)

7. Complainant received a memo from Donald W. Emerson, Jr., Respondent's Executive Director, dated June 7, 2001. The subject of the memo is "Reminder of your Last Chance Agreement". (Comm. Ex. 2)

8. The above referenced memo pointed to "recent actions" by Complainant:

. . . i.e. engaging a subordinate employee in manipulative activity, questioning my authority and attempting to threaten me with litigation, frankly are tiresome and border on insubordination.

9. Mr. Emerson ended the memo by stating that:

I shall not tolerate any further acts of disrespect toward me or slander toward this organization. Be duly warned that I shall not provide you with another warning on this matter.

10. Complainant received a memo dated September 4, 2001 from Mr. Emerson. The subject of the memo is "Pre-disciplinary hearing and outline of charges". (Comm. Ex. 5)

11. The outline of charges reads as follows:

On Friday August 24, you participated in a public forum held at the Trumbull Community Action Program offices;

That this forum included members of the general public and representatives of the print and television media;

That at said forum, you are alleged to have stated during an open speaking time that TMHA was a racist organization;

You are further alleged to have stated that TMHA's policies are racist; You are further alleged to have stated that the Executive Director is a token;

You are further alleged to have engaged in conversation with Warren City Councilman-Elect Gary Fonce about a confidential personnel matter involving yourself and TMHA.

12. Complainant's attendance at the forum was not during his work hours.

13. An investigation of the charges was conducted by Rodger L. Dixon, Esq., Respondent's Director of Human Resources.

14. After discussions during a pre-disciplinary conference, Complainant was terminated from employment on September 7, 2001.

## 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.<sup>1</sup>

1. The Commission alleged in the Complaint that Respondent discharged Complainant in retaliation for having engaged in activity protected by Revised Code 4112.02(I).

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

---

<sup>1</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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.

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, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This

framework normally 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, 25 FEP Cases 113, 116, (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, 5 FEP Cases 969, 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) The alleged retaliator 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.*, 80 FEP Cases 835 (6<sup>th</sup> Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

*Aldridge v. Tougaloo College*, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6<sup>th</sup> Cir. 1989).

8. Employees engage in protected activity under the opposition clause when they oppose, in good faith, what they reasonably believed at the time was unlawful discrimination on the part of their employer.

It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful discriminatory practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.

*Little v. United Technologies, Carrier Transicold Div.*, 72 FEP Cases 1560, 1563 (11<sup>th</sup> Cir. 1997).

9. As a threshold matter, the Commission must prove that Complainant engaged in activity protected by R.C. 4112.02(I). A wide array of conduct, including verbal complaints to management, may constitute opposition to unlawful discrimination. See *Reed v. A.W. Lawrence & Co., Inc.*, 72 FEP Cases 1345 (2d Cir. 1996) (employee engaged in protected activity by complaining about a co-worker's allegedly unlawful conduct to an officer of company and maintaining same complaint throughout internal investigation); *EEOC v. Hacienda Hotel*, 50 FEP Cases 877 (9<sup>th</sup> Cir. 1989) (employee engaged in protected activity when she complained to management about her supervisor's refusal to accommodate her religious beliefs). Similarly, sending letters protesting unspecified "racism" and "discrimination" by an employer also constitute protected activity. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1012-13 (9<sup>th</sup> Cir. 1983).

10. In determining whether a causal connection exists, the proximity between the protected activity and the adverse employment action is often "telling." *Holland v. Jefferson Natl. Life Ins. Co.*, 50 FEP Cases 1215, 1221 (7<sup>th</sup> Cir. 1989), quoting *Reeder-Baker v. Lincoln Nat'l Corp.*, 42 FEP Cases 1567 (N.D. Ind. 1986). The closer the proximity

between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes. See *Johnson v. Sullivan*, 57 FEP Cases 124 (7<sup>th</sup> Cir. 1991) (court held that plaintiff showed causal connection and established *prima facie* case of retaliation where plaintiff was discharged within days of filing a handicap and race discrimination lawsuit);

A causal connection may be established with evidence that the adverse employment action closely followed the protected activity.

*Holland v. Jefferson National Life Ins. Co.*, 50 FEP Cases 1215 (7<sup>th</sup> Cir. 1989).

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

*Gonzales v. State of Ohio, Dept. of Taxation*, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

11. In the instant case, the Commission has established that Complainant engaged in protected activity, and there is a causal connection between the protected activity and the termination. The termination letter states that Complainant's statements at the public rally,

where he called Respondent a racist organization with racist policies, were reasons for his termination.

12. The Commission also established that Complainant had a good faith belief that he was advocating against discriminatory practices :

Q: Now, would you agree that Bernardo Smith advocates or supports the rights of African/Americans?

A: I don't know that I would agree with that. I agree that he believes he supports the rights in—in those items as it refers to African/Americans, Yes.

Q: All right, -

A: He – He is considered an activist. He considers himself an activist, certainly.

Q: Okay. But you would agree that he believes that he supports the rights of African/Americans?

A: Yes. I will agree with that statement.

Q: Would you agree that he is passionate about his beliefs against racism?

A: Yes.

Cross Examination of Donald W. Emerson, Jr.  
(Tr. 32, lines 7 – 20)

13. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to “articulate some legitimate, nondiscriminatory reason[s]” for the employment action. *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 of unlawful retaliation created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates legitimate, nondiscriminatory reasons for the employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

14. Respondent met its burden of production by stating that Complainant violated his Last Chance Agreement by violating the following policies: (1) failure to conduct himself in a manner to preserve public confidence and respect for authority, and (2) unauthorized speaking to the public regarding TMHA business and policies.

15. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because he engaged in protected activity. *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 its true reasons, but were a "pretext for . . . [unlawful retaliation]." *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 . . . [unlawful retaliation]" unless it is shown *both* that the reason was false, *and* that . . . [unlawful retaliation] was the real reason.

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

16. 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 . . . [unlawful retaliation] is correct. That remains 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 unlawful retaliation.

17. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for terminating Complainant's employment. 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). 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.<sup>2</sup>

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

---

<sup>2</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* 2749, 62 FEP Cases at 100, n.4.

18. A reasonable inference can be drawn that Respondent concluded that Complainant's statements are tantamount to the failure to preserve public confidence and respect for authority.

19. As the court in *EEOC v. Crown Zellerbach Corporation, supra* at 1019, reasoned:

Almost every form of "opposition to an unlawful employment practice" is in some sense "disloyal" to the employer, since it entails a disagreement with the employer's views and a challenge to the employer's policies. Otherwise the conduct would not be "opposition." If discharge or other disciplinary sanctions may be imposed based simply on "disloyal" conduct, it is difficult to see what opposition would remain protected under section 704(a).

20. Similarly, in the instant case, Complainant's opposition to what he believes to be unlawful discriminatory practices at a public forum will most certainly have the effect of inviting public scrutiny of Respondent's employment practices.

21. Additionally, the other basis stated in Respondent's termination letter to Complainant is not credible. The statements made by Complainant at the public forum to a public official were about his own personnel record.

No other employee with TMHA has ever been terminated for disclosing information about their own personnel record.

22. After a careful review of the entire record, ALJ disbelieves the underlying reasons that Respondent articulated for Complainant's discharge and concludes that, more likely than not, they were a pretext or a cover-up for unlawful retaliation. Such action constitutes unlawful retaliation and entitles Complainant to relief as a matter of law.

## RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9407 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of Maintenance Mechanic. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage he would have been paid had he been employed as a Maintenance Mechanic on September 7, 2001 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall 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 as a

Maintenance Mechanic on September 7, 2001 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less his interim earnings, plus interest at the maximum rate allowed by law.<sup>3</sup>

---

DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

June 30, 2004

---

<sup>3</sup> Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.