

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

TERESA FAYE SMITH

Complainant

and

Complaint No. 9281
(CIN/DAY) E6040201 (14879) 040601

DR. JOHN JORDAN, D.D.S.

Respondent

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

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INTRODUCTION AND PROCEDURAL HISTORY

Teresa Faye Smith (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 2, 2001.

The Commission investigated the charge and found probable cause that Dr. John Jordan, D.D.S. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02 (A) and (I).

The Commission attempted but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on March 21, 2002.

The Complaint alleged that Respondent subjected Complainant to a sexually offensive, intimidating and hostile work environment, and constructively discharged her, for reasons not applied equally to all persons without regard to their sex, and in retaliation for having complained of the alleged acts of sexual harassment.

Respondent filed an Answer to the Complaint on April 6, 2002. 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 March 19¹ and 21, 2003 and on September 10 and 11, 2003 in Washington Court House, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 895 pages, exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on March 29, 2004, by Respondent on April 28, 2004, and a reply brief filed by the Commission on May 7, 2004.²

¹ An onsite inspection of Respondent's office was conducted to give the Administrative Law Judge (ALJ) the opportunity to view the premises.

² Respondent filed a Motion to Strike the Reply Brief of the Ohio Civil Rights Commission on May 12, 2004. The Commission did not file a response. Respondent's motion objects to the Commission referencing proffered evidence regarding Elizabeth Vinion in the Commission's Post Hearing Brief. At the hearing, Respondent objected to admitting testimony by Elizabeth Vinion, and the ALJ sustained Respondent's objection. Any references to the proffered testimony in the Commission's brief were not considered by the ALJ in the recommendation to the Commission. Respondent's Motion to Strike is denied.

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 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 April 2, 2001.

2. The Commission determined on January 31, 2002 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02 (A) and (I).

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

4. Respondent has operated a dental practice in Washington Court House, Ohio for forty-two (42) years.

5. Joan Rizzo, Respondent's daughter, knew that her father was looking for a new chair side dental assistant (CSDA) and encouraged Complainant to contact Respondent about the open position.³

6. Ms. Rizzo told her sister, Linda Douds, about Complainant. Ms. Douds, who works part-time at her father's office, told Respondent about Complainant.

7. Complainant met with Respondent about the position. Complainant did not provide Respondent with a résumé or fill out an employment application.

³ Complainant is a licensed nail technician and performed that service for Ms. Rizzo at her home.

8. Complainant's work experience as a CSDA included working for a dental practice in Columbus, Ohio. One of the dentists she worked for was Dr. Rick Singel.

9. At the time that Complainant met with Respondent she was working part-time for Dr. Singel who had left the Columbus practice and opened a solo dental practice in Cincinnati, Ohio.⁴

10. The Ohio State Dental Board requires CSDAs to have hepatitis shots. Complainant told Respondent that she had started the series of three shots but needed one more.

11. Her job with Dr. Singel did not provide healthcare benefits. Complainant asked for a wage of \$13.00 an hour, in addition to healthcare benefits. Respondent agreed to Complainant's terms and hired her.

12. Complainant started working for Respondent as his CSDA on Monday, February 19, 2001.

⁴ Complainant and Dr. Singel began a personal relationship during the time that they worked in Columbus. They stopped the personal relationship prior to Complainant taking the job with Respondent.

13. At the time that Complainant began her employment the following individuals worked for Respondent:

- Nancy Stuhldreher – office worker, part-time (8:30-noon): confirmed appointments, pulled ledgers, pulled charts, helped out basically in the front;
- Melissa (Missy) Brown – dental hygienist, 8:00-5:00;
- Tara Bateson – office manager, 8:00-5:00: readied the patients and their folders, confirmed appointments, prepared day sheets and deposits (peg board ledger); and
- Linda Douds (Respondent's daughter) – came in around 4:00 to help out at the front desk.

14. Complainant worked Monday, Tuesday, Thursday, and Friday, from 8:00-5:00. The office closed for lunch between the hours of 12:00-1:00.⁵

15. From March 16 through March 23, 2001 Respondent went on vacation. When Respondent takes his spring vacation, Missy Brown still performs dental hygienist services for patients.

⁵ The office is closed on Wednesdays.

16. Normally, the CSDA would not work during that week and would not receive pay.

17. Respondent asked Complainant if she wanted to work at the front desk during that week, in addition to performing cleaning chores in the office. Complainant agreed and worked during that week.

18. Respondent returned to the office on Monday, March 26, 2001.

19. Shortly after Complainant came to work, Respondent confronted her about long distance telephone calls to a Cincinnati, Ohio number.

20. Complainant left work around noon and did not return. She taped a handwritten note on Respondent's office door which read, "You'll never crap on me again. Loser."

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.⁶

1. The Commission alleged in the Complaint that Respondent subjected Complainant to a sexually offensive, intimidating and hostile work environment, and constructively discharged her, for reasons not applied equally to all persons without regard to their sex, and in retaliation for having complained of the alleged acts of sexual harassment.

⁶ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. These allegations, if proven, would constitute a violation of R.C. 4112.02 (A) and (I), which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the . . . sex, . . . 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.
- (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(A) and (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 discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

SEXUAL HARASSMENT

5. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Adm. Code (O.A.C.) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment is sex discrimination under Title VII). There are two forms of sexual harassment: *quid pro quo* and hostile work environment. *Id.*, at 65. The latter form of sexual harassment, which the Commission alleges in this case, recognizes that employees have the “right to work in an environment free of discriminatory intimidation, ridicule, and insult.” *Id.*

6. O.A.C. 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

(J) Sexual harassment.

(1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

7. To establish a claim brought under O.R.C. 4112 against an employer for hostile work environment sexual harassment, the Commission must establish that:

- (1.) Complainant was a member of a protected class;
- (2.) Complainant was subjected to unwelcome harassment;
- (3.) the harassment complained of was based upon sex;
- (4.) the harassment had the purpose or effect of unreasonably interfering with the employee's work performance or creating an intimidating, hostile, or offensive work environment; and
- (5.) the existence of respondeat superior liability.

Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998).

8. There is no dispute that the Commission established the first element of a *prima facie* case of sexual harassment/sex discrimination: Complainant is a female.

9. The second and third elements are not so obvious because the conduct complained of was not observed by a third party.

10. When credibility is an issue in a sexual harassment case, corroboration or the lack of corroboration of the alleged victim's testimony, is often crucial.

We note that in a case of alleged sexual harassment[,] which involves close questions of credibility and subjective interpretation, the existence of corroborative evidence or the lack thereof is likely to be crucial.

Henson v. City of Dundee, 29 FEP Cases 787, 800, n.25 (11th Cir. 1982) (citations omitted).

11. However, there is no explicit corroboration requirement in either R.C. Chapter 4112 or Title VII.

The credibility determinations are for the finder of fact. The finder of fact may credit either side's version of disputed facts whether or not there is corroboration if they find one witness's version more credible than the other witness's version.

Durham Life Insurance Co. v. Evans, 78 FEP Cases 1434, 1440, n.2 (3d Cir. 1999).

12. Complainant's testimony regarding incidents of inappropriate comments and conduct of a sexual nature can be summarized as follows:

1. Over a period of six work days, from Monday, February 19, her first day on the job, until Tuesday, February 27, Complainant testified that Respondent engaged in the following types of sexual behavior:
 - i. sexual comments, both innuendo and explicit: sixteen (16) single incidents, and four (4) incidents where the same comments or acts were made on more than one occasion,
 - ii. physical contact of a sexual nature, one (1) incident, where Respondent tried to hug Complainant from behind.

(Comm. Ex. 8)

13. Complainant on two separate occasions told her coworkers, Tara Bateson and Missy Brown, that Respondent made comments to her that she was uncomfortable with and had asked her to go to dinner with him at the Dock.

14. As a CSDA, Complainant worked directly with Respondent in an operatory where Respondent performed dental procedures on his

patients. If Complainant was not in the operatory she was in the room where the auto-clave was located.⁷

15. A part of Respondent's defense to the allegations of sexual harassment rests upon the assertion that Respondent's dental office is not a large area; and if Respondent were making inappropriate comments to Complainant, a coworker would have overheard or observed such conduct. I disagree.

16. Respondent has a very busy dental practice. Separate operatories within the office were partitioned off from one another. Dental instruments and the autoclave were in use during business hours. Background music was played during the office's business hours. In such a scenario it is not difficult to see how coworkers would be unable to hear or see what was happening between Respondent and Complainant whose jobs required them to work in very close proximity to one another.

⁷ The auto-clave is a machine that sterilizes instruments.

17. Complainant's position as a CSDA to Respondent made her one of the only employees in the office who spent the majority of her working hours in close proximity to Respondent.

18. I find that Respondent made statements to Complainant that are of a sexual nature, in addition to the one occurrence where Respondent physically touched Complainant. However, this determination is only the first part of the inquiry as to whether or not Respondent's conduct rose to the level of actionable sexual harassment.

19. In order to create a hostile work environment, the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor, supra* at 67. The conduct must be unwelcome. *Meritor, supra* at 68. The victim must perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris* at 21-22. If the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the

conditions of the victim's employment, and there is no Title VII violation.

Id.

20. In examining the work environment from both subjective and objective viewpoints, the fact-finder must examine "all the circumstances", including the employee's psychological harm and other relevant factors, such as:

. . . the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id., at 23.

Rabidue v. Osceola Refining Div., 42 FEP Cases 631 (6th Cir. 1986) (plaintiffs must show that a hostile work environment resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency).

A hostile work environment is usually "characterized by multiple and varied combinations and frequencies of offensive exposures."

Rose v. Figgie International, 56 FEP Cases 41, 44 (8th Cir. 1990).

Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. These standards are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attached to the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing. We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Court of Appeals has heeded this view.

Faragher, supra at 2283-84.

21. As previously stated, the inappropriate comments and gestures of a sexual nature occurred over six (6) work days. Complainant testified that Respondent showed her his tongue at least twenty-five (25) times over a three-day period. She also testified that Respondent inappropriately touched her on one occasion when he attempted to hug her from behind.

22. Respondent's practice was busy and Complainant testified that Respondent's demeanor toward her affected her work:

(. . .) I mean, he—followed me around the office. He—he—the first week there I—mean, I couldn't—I couldn't hardly clean because he wouldn't leave me alone.

And he for—the second day he came up to me, and grabbed me from behind and pulled against me—pulled me against him. And—and he would—he would just make comments about his friends. He—He had a couple friends that would buy me a leather coat and—if I—I can't remember his exact words, but if I—if I did oral sex he would give me a leather coat.

Q: Okay.

A: —And he would drop money on me. He had another friend who'd drop money on me.

(Tr. 180)

23. She told two other coworkers that she was uncomfortable with the inappropriate comments that Respondent was making to her, in addition to telling them about Respondent asking her to go to dinner with him.

Q: Did Missy ever talk to you about anything Terri might have talked to her about?

A: Yes.

Q: Can you tell me what that conversation was regarding?

A: Well, apparently that Dr. Jordan had asked Terri out, and Terri was kind of upset about it and she didn't know exactly what she wanted to do or—and she told Missy about it and Missy told me.

Q: Okay.

A: And then later on—I don't know—maybe within that afternoon or a couple of days later—Terri did—I mean, she was open with both me and Missy about it.

Q: And do you remember what she said ?

A: Just that she was just—she didn't know what she was going to do. I mean she was very upset about him asking her out.

(Tr. 455 - Tara Bateson)

24. I find that the conduct complained of by Complainant involved “multiple and varied combinations and frequencies of offensive exposures” and, therefore, altered the conditions of Complainant's workplace environment.

SUPERVISOR HARASSMENT

25. An employer is vicariously liable for a hostile work environment created by a supervisor with immediate or higher authority over the employee. *Faragher, supra at 2275* (1998). If no tangible employment action is taken against the employee, then the employer may raise an affirmative defense to liability or damages.⁸ *Ellerth, supra at 2270; Faragher, at 2293.*

26. To be successful, the employer must establish the following two elements by a preponderance of the evidence:

- (1) The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and
- (2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id.

⁸ In *Ellerth*, the Supreme Court described a tangible employment action as:

. . . a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.

Id., at 2268.

27. This affirmative defense is unavailable when the supervisor's harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.* (On the same pages, *Ellerth* and *Faragher* stated the following about the affirmative defense:)

While proof that an employer has promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.

And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

(See also O.A.C. 4112-5-05(J)(3))

28. Although Respondent attempted to show that he had a sexual harassment policy, it was all form with no substance, merely illusory.

29. Even though Nancy Stuhldreher was the office manager she did not have any authority from Respondent to address employment issues raised by Complainant or other employees.

30. Respondent did not disseminate the sexual harassment policy to the employees. Nor was there any assurance that Respondent, the offending harasser, could be bypassed in registering a complaint.

31. In the case sub judice, the *Faragher* defense would not be available to Respondent because Respondent had sole authority over the terms and conditions of Complainant's employment. She had no one else to complain to other than Respondent.

32. However, Complainant did tell Respondent that she did not appreciate the comments that he was making to her. She took the step, even though there was no complaint procedure in place, to avoid the occurrence of a tangible employment action from the hostile work environment that had been created by Respondent. She testified that she wanted to keep her job because she needed the benefits.

33. At the urging of Dr. Singel, she confronted Respondent on February 27, 2001, and he stopped making inappropriate comments of a sexual nature to her. It is at this point that the Commission alleges that Respondent began to retaliate against Complainant.

34. Complainant testified that from that point on, until she terminated her employment, Respondent's conduct toward her created a hostile work environment; and, as a result of the hostile work environment, she was constructively discharged.

RETALIATION

35. In order to establish a *prima facie* case of retaliation under R.C. 4112.02(I), the Commission must prove the following elements:

- a. Complainant engaged in a protected activity;
- b. Respondent knew of Complainant's participation in the protected activity;
- c. Respondent engaged in retaliatory conduct; and
- d. a causal link exists between the protected activity and the adverse action.

Hollins v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

36. The Commission has proven the first and second elements of a *prima facie* case of retaliation.

37. To establish the third and fourth elements, the Commission must prove that Respondent's actions after Complainant asked him to stop created a hostile work environment.

38. Further, the Commission must prove that Respondent's actions forced Complainant to resign.

39. The test for determining whether an employee was constructively discharged is whether the employer's actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign. *Mauzy v. Kelly Services, Inc.*, (1996), 75 Ohio St. 3d 578, 1996 Ohio 265, 664 N.E. 2d 1272. *Hampel v. Food Ingredients Specialties, Inc.*, (2000), 89 Ohio St. 3d 169, 176, 2000 Ohio 128, 729 N.E. 2d 726.

40. Whether the discriminatory conduct unreasonably interfered with Complainant's work performance is one factor to be considered. The Commission, however, is not required to show that Complainant's "tangible productivity . . . declined as a result of the harassment." *Harris*, 63 FEP Cases at 229. (Justice Ginsburg's concurrence) *quoting Davis v. Monsanto*

Chemical Co., 47 FEP Cases 1825, 1828 (6th Cir. 1988). Instead, the Commission must demonstrate that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to “ma[k]e it more difficult to do the job.” *Id.*

41. To support a retaliation claim, the Commission must show that the change in Complainant’s employment conditions was more disruptive than a mere inconvenience or an alteration of job responsibilities. *Bowers v. Hamilton City Sch. Dist. Bd. of Educ.*, 12th Dist. No. CA2001-07-160, 2002 Ohio 1343, citing *Kocsis*, 97 F. 3d at 886.

42. Complainant testified that she was worried about returning to work on Thursday, the next work day after she told Respondent that she did not appreciate his comments.

Q: Why were you worried?

A: Because he—he already that you—you don’t cross him. He had already told me that about Liz. And I—I was just—I was just concerned that—that my job there was—and I needed it so much. And I—I was worried that I wouldn’t be able to stay.

(Tr. 273)

43. Complainant testified that Respondent showed her his gun when he was talking about an ex-female employee⁹ who had filed a sexual harassment law suit against Respondent. He stated to Complainant, “You don’t want to mess with me.” This implied threat was made prior to Complainant telling Respondent that she did not appreciate him making statements of a sexual nature to her.

44. Complainant’s coworkers testified that the relationship between Respondent and Complainant changed. In their presence they noticed that Respondent ignored Complainant and did not engage in and avoided having conversations with her.

45. Tara Bateson’s testimony:

Q: Okay. Did you happen to notice change in Dr. Jordan’s treatment of Terri throughout her employment?

A: Yes.

Q: Can you explain that?

A: Well, they were very friendly in the beginning. And, I mean, she was even really friendly with his daughter and so forth. And then it just—he got to the point where he wasn’t really communicating with her very well anymore and just kind of just ignoring her toward the end.

⁹ See footnote 2, *supra*.

Q: What do you mean?

A: I mean, just strictly business, you know, no talking, friendliness or nothing like that anymore. It just kind of ended.

(Tr. 460-461)

(His treatment of the other employees continued in a friendly manner.)

46. Before Complainant asked Respondent to stop making inappropriate comments of a sexual nature to her, he often made positive comments to her about her job performance.

47. After Complainant asked Respondent to stop making inappropriate comments of a sexual nature to her, his opinion regarding her job performance was negative.

48. Complainant testified she noticed an immediate change in Respondent's behavior toward her. He ignored her, would not greet her in the morning as he greeted her coworkers, continuously changed the way he wanted her to assist him in terms of procedure, yelled at her in front of patients, slammed instruments into her hands, and caused a patient's blood to be spattered on her. (Comm. Ex. 9)

49. Respondent asserted that he based his negative opinion of her job performance on his belief that she misled him about her previous experience working in a busy dental practice.

50. When Respondent went on vacation the week of March 19, 2001, he arranged for Complainant to work in the office at the front desk and to do some cleaning of the office. Complainant had never been trained to work at the front desk and experienced difficulty in handling the peg board. She also accidentally caused the alarm system to go off.

51. When Complainant came to work on Monday, March 26, Respondent confronted her about making long distance calls to Cincinnati.

52. Tara Bateson testified that Respondent was yelling, screaming, and cussing at Complainant regarding the calls that Complainant had made to Cincinnati.

Q: Okay, okay. Do you remember what happened on the day that Teresa left Dr. Jordan's employment?

A: Well, that morning Dr. Jordan was very upset about the phone bill and he had Nancy call these numbers that were on there that he didn't know about.

Q: Okay.

A: And when she came in that morning, he just absolutely bombarded her as soon as she walked in and—

Q: And what was his demeanor like?

A: He was very mad, very upset.

Q: Was he yelling?

A: He was irate. Yes.

Q: Was he yelling?

A: Yes, He was yelling.

Q: Screaming?

A: Cussing.

Q: Cussing?

A: Yes.

(Tr. 459)

Q: Had you ever seen Dr. Jordan respond like that to any other employee before?

A: We—we had our fair share of arguments, but nothing like that.

Q: What do you mean, nothing like that?

A: I mean, he was mad. I mean, he was really upset.

Q: So before this instance with Ms. Smith you had never seen him react that—in that manner before?

A: No.

(Tr. 460-461)

53. Respondent asserts that the reason that he questioned Complainant about the long distance telephone calls to Cincinnati is because she called on a line that is for incoming calls for patients, and that according to office policy, employees are prohibited from using that line.

54. I find Respondent's assertion lacks credibility. Other employees made long distance calls from the phones in the office; however, Respondent did not confront them about their long distance calls.

55. Complainant's original license was hanging in Dr. Singel's office. Complainant stated that after she asked Respondent to stop making inappropriate sexual comments to her, he began putting pressure on her to get the original license.

56. When Complainant started working for Respondent she provided him with a copy and told him that the original was in Dr. Singel's office. Therefore, Respondent was already aware that Complainant was making calls to Cincinnati, in part, to get her original license.

57. In cases involving coworker sexual harassment or supervisor sexual harassment, the employer can investigate and take steps to ameliorate an uncomfortable and intolerable situation. In this case the same actor who made threats and engaged in inappropriate conduct of a sexual nature prior to Complainant asking him to stop was the only person to whom she could complain. Respondent was also in control of the work environment after Complainant asked him to stop, and he unfortunately sought to make her work environment unbearable because she opposed his unwelcome and inappropriate behavior.

58. The evidence in the record supports the finding that Respondent singled Complainant out for treatment that became unbearable and intolerable and unreasonably altered the terms and conditions of her employment which forced Complainant to resign.

59. After a careful review of the entire record, the ALJ disbelieves the underlying reasons articulated by Respondent for his treatment of Complainant and concludes that, more likely than not, it was a pretext or a cover-up for illegal retaliation.

60. Therefore, Complainant is entitled to relief.

DAMAGES

61. The Commission has the authority to order Respondent to pay equitable damages, which includes but is not limited to, back pay and reinstatement when there is a finding of discrimination pursuant to R.C. 4112.05(G)(1). However “in instances in which it has been decided that an effective employment relationship could not be reestablished, the courts have excluded reinstatement from the forms of relief granted.” *EEOC v. Pacific Press Publishing Association*, 482 F. Supp. 1291 at 1320 (1979).

62. It has also been recognized by the courts that it would be unjust to deny reinstatement without offering some quantum of monetary relief or “front pay” as a substitute.

63. This alternative relief has been deemed necessary not only to grant discharged employees a reasonable opportunity to find comparable employment, but also to deter future improper employer action. *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp 919 at 927 (1976), *Burton v. Cascade School District No. 5*, 512 F. 2d 850 at 854 (1975).

64. The testimony and demeanor of both Complainant and Respondent justifies the ALJ in making the determination that reinstatement would be an inappropriate remedy.¹⁰

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9281 that:

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

¹⁰ Dr. Singel and Complainant filed additional retaliation charges against Respondent.

2. The Commission order Respondent to pay front pay to Complainant within 10 days of the Commission's Final Order. Complainant shall be paid the same wage she would have been paid as a chair side dental assistant with benefits and raises that she would have been entitled to for a total of four (4) months, less interim earnings, calculated from the date of the Commission's Final Order;

3. Commission order Respondent to pay within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a chair side dental assistant on April 2, 2001 and continued to be so employed up to the date of the Commission's Final Order, including any raises and benefits she would have received, less interim earnings, plus interest at the maximum rate allowed by law;¹¹ and

¹¹ Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

4. The Commission order Respondent to receive sexual harassment training and submit to the Commission of copy of its sexual harassment policy within six (6) months of the date of the Commission's Final Order. As proof of participation in sexual harassment training, Respondent shall submit certification from the sexual harassment trainer or provider of services that Respondent has successfully completed sexual harassment training. The letter of certification shall be submitted to the Commission's Office of Special Investigations within seven (7) months of the date of the Commission's Final Order.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 19, 2005