

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

JENNIFER WAHOFF

Complainant

and

**AERO FULFILLMENT
SERVICES CORPORATION**

Respondent

Complaint No. 9292
(CIN) 75071701 (29146) 072001
22A – A1 – 01936

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

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INTRODUCTION AND PROCEDURAL HISTORY

Jennifer Wahoff (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 20, 2001.

The Commission investigated the charge and found probable cause that Aero Fulfillment Services Corporation (Respondent) engaged in unlawful employment practices 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 April 11, 2002.

The Complaint alleged that Respondent failed and refused to reinstate Complainant to her previous position of Account Executive, and demoted her, for reasons not applied equally to all persons without regard to their sex (condition of pregnancy).

Respondent filed an Answer to the Complaint on May 1, 2002. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

The Commission and Respondent submitted Joint Stipulation of Facts and waived a hearing.

The record consists of the previously described pleadings, the Joint Stipulation of Facts, and the post-hearing briefs filed by the Commission on May 16, 2003 and by Respondent on June 16, 2003.

FINDINGS OF FACT

1. Complainant filed a sworn charge affidavit with the Commission on July 20, 2001.

2. The Commission determined on December 20, 2001 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 engaged in the business of preparing, assembling, and distributing marketing and promotional materials for approximately 300 clients.

5. Respondent is headquartered in Mason, Ohio, where it also operates a production facility. Respondent also has other facilities in Lebanon, Ohio and Baltimore, Maryland.

6. Complainant was hired by Respondent as a Consumer Affairs Agent and began working for Respondent on September 28, 1998.

7. Complainant was promoted to Account Executive, effective June 14, 1999, and primarily worked as one of three Account Executives on Respondent's team performing services for Great American Insurance (GAI).

8. As an Account Executive, Complainant worked at Respondent's Mason headquarters. She was one of eight Account Executives working there. Complainant was responsible for maintaining inventory of materials, processing orders, and overseeing the assembly and distribution of kits for clients like GAI. (Joint Ex. 1)

9. In January 2001, Complainant's annual salary was \$30,000, the lowest of the eight Account Executives employed by Respondent in Mason.

10. On November 1, 2000, Respondent revised its leave of absence policy in its Associate Handbook. Copies were distributed to all employees in November 2000. (Joint Ex. 2)

11. In mid-January, 2001, Complainant began missing her scheduled workdays. After initially calling in on a daily basis, Complainant twice notified Respondent that she would be unable to work for an entire week. She then submitted a medical statement with a disability claim form, dated January 21, 2001, and certified by her doctor on February 12, 2001. (Joint Ex. 3)

12. Respondent granted Complainant's leave of absence, retroactive to January 17, 2001.

13. Complainant gave birth to a healthy baby on April 24, 2001. She subsequently had two operations for gallstones. Her gall bladder was removed in surgery on June 1, 2001.

14. On July 18, 2001, Complainant's husband faxed to Respondent a doctor's statement, which stated:

Jennifer has been under my care since June 5, 2001 due to anemia, pneumonia and gall bladder disease.

(Joint Ex. 6)

15. On July 24, 2001, Complainant faxed to Respondent a doctor's statement, dated July 23, 2001, which stated that Complainant "may return to work 7/25/01." (Joint Ex. 7)

16. No Account Executive positions were available when Complainant wanted to return to work on July 25, 2001.

17. Respondent did not have a reduction in force during 2001, nor did it abolish any Account Executive positions.

18. Respondent's Human Resources Manager gathered information on open positions at its Mason and Lebanon facilities before meeting with Complainant to review a list of the hours and the pay rate for each open position.

19. After Complainant went on leave, Respondent's GAI team went from three Account Executives to two Account Executives in early 2001. No Account Executives were hired, promoted, or transferred to fill Complainant's position on Respondent's GAI team during her FMLA and medical leaves of absence in 2001.

20. As Respondent administers its leave of absence policy, if an employee who has exhausted or was not eligible for FMLA leave seeks to return to active employment at the end of a medical leave, the employee will be returned to the position that she or he held before the leave began if that position is open; otherwise, the employee returning from the medical

leave will be given an opportunity to select from open positions that the employee is able to perform.

21. Respondent offered Complainant an opportunity to select from among numerous positions that were open and that she appeared to be qualified to perform. (Joint Ex. 8)

22. Complainant was returned to active employment with Respondent on July 25, 2001, when she started working for Respondent as a Fulfillment Associate in the Hand Assembly Department in Mason at a pay range of \$9.00 per hour. (Joint Ex. 9)

CONCLUSIONS OF LAW AND DISCUSSION ¹

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.

1. The Commission alleged in the Complaint that Respondent failed and refused to reinstate Complainant to her previous position of Account Executive, and demoted her, for reasons not applied equally to all persons without regard to their sex (condition of pregnancy).

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

¹ 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:

- (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.

3. The term “because of sex” for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions.

R.C. 4112.01(B). This division further provides that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work

4. 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).

5. 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. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads “almost verbatim to the Pregnancy Discrimination Act” of 1978 (PDA). *Priest v. TFH-EB, Inc. d/b/a Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; See 42 U.S.C. § 2000e(k). Thus, 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), as amended by the PDA.

COMMISSION’S PREGNANCY REGULATIONS

6. As further guidance, the Commission has adopted regulations on written and unwritten employment policies relating to pregnancy and childbirth. Ohio Administrative Code (O.A.C.) 4112-5-05(G). One of the central purposes of these regulations is to ensure that female employees are not “penalized in their employment because they require time from work on account of childbearing.” O.A.C. 4112-5-05(G)(5). Such protection is necessary because only females bear the unique burden of childbearing which inevitably involves some period of disability.

7. The Commission's pregnancy regulations in O.A.C 4112-5-05(G) provide, in pertinent part, that:

- (1) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. *Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave of absence policy.* (Emphasis added.)

Like the PDA, R.C. 4112.01(B) requires that female employees, affected by childbirth in their ability or inability to work, be treated the same as workers not so affected.

8. 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).

9. 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.² *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.

² Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the failure to return the Complainant to the same job she had before going out on leave; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

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.

10. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of a legitimate, nondiscriminatory reason for its failure to return Complainant to her previous position 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.

11. Respondent met its burden of production by stating that after Complainant went on leave, Respondent's GAI team went from three Account Executives to two Account Executives in early 2001. No Account Executives were hired, promoted, or transferred to fill Complainant's position on Respondent's GAI team during her FMLA and medical leaves of absence in 2001.

12. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex (condition of pregnancy). *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for not returning Complainant to her previous position was not the true reason, but was "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.

13. Thus, even if the Commission proves that Respondent's articulated reason is 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 . . . [sex] 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 sex discrimination.

14. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for failing to return Complainant to the position of Account Executive. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *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 reason 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.³

Hicks, supra at 511, 62 FEP Cases at 100.

15. The Commission has failed to show that Respondent's articulated reason is a pretext for unlawful discrimination.

16. The Commission cannot prove pretext through disparate treatment without evidence that a similarly-situated comparative was treated more favorably than Complainant.

17. Joint Exhibit 10 (ten) is a list of all employees at Respondent's Mason facility that have taken a leave of absence, the position that the employee held prior to going on leave, the duration of the leave, the position to which that person returned, and the circumstances surrounding the leave. This list supports the determination that there were female employees who went out on maternity and were returned to previously held positions, as well as to different positions.

³ 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* at 511, 62 FEP Cases at 100, n.4.

18. There is no evidence that Respondent treated similarly-situated, non-pregnant employees who returned from leave differently than Complainant.

19. The inquiry here is necessarily limited to whether Respondent treated Complainant differently because of her condition of pregnancy.

The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons.

Hartsel v. Keys, 72 FEP Cases 951, 955 (6th Cir. 1996).

20. In general, neither the ALJ nor the Commission is in a position to second-guess an employer's business judgment, "except to the extent that those judgments involve intentional discrimination." *Krumwiede v. Mercer Co. Ambulance Service*, 74 FEP Cases 188, 191 (8th Cir. 1997) (citations omitted).

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9292.

**DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE**

September 20, 2004