

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

KAREN S. PALL

Complainant

v.

WAYNE-DALTON CORPORATION

Respondent

Complaint No. 9718
(AKR) 73102903 (28420) 122303
22A – A4 – 00897

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

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INTRODUCTION AND PROCEDURAL HISTORY

Karen S. Pall (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 23, 2003.

The Commission investigated the charge and found probable cause that Wayne-Dalton 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 July 22, 2004.

The Complaint alleged that Respondent discharged Complainant for reasons not applied equally to all persons without regard to their sex.

Respondent filed an Answer to the Complaint on August 11, 2004. 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 May 3, 2005.

The record consists of:

- the previously described pleadings;
- a transcript of the hearing (111 pages);
- exhibits admitted into evidence during the hearing; and
- the post-hearing briefs and the reply brief filed:
 - by the Commission on November 28, 2005;
 - by Respondent on December 13, 2005; and
 - by the Commission on December 19, 2005.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) 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 December 23, 2003.

2. The Commission determined on June 3, 2004 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 manufactures garage doors.

5. Complainant started working for Respondent in 1998 as a temporary employee.

6. After a few months of temporary work with Respondent, Complainant applied for and was hired as a full-time employee.

7. Complainant worked on the Steel Door Line as a Fabricator B.

8. On October 23, 2003 Complainant and a co-worker, Ken LaRocca (LaRocca), were engaged in a verbal altercation.

9. Respondent has a Zero Tolerance Workplace Violence Policy (ZTWVP). The policy states that “any employee determined to have committed such acts will be subject to disciplinary action, up to and including termination.” (Comm. Ex. 4)

10. The employee's supervisor whether or not termination is the appropriate action. The supervisor then approaches his manager and explains the situation.

11. The matter regarding the appropriate action for the situation is raised at the daily management meeting that occurs at 8:00 a.m. (Tr. 83-84)

12. The manager then decides whether or not to contact the H.R. Manager to discuss the situation. Respondent terminated both Complainant and LaRocca on October 29, 2003 for violation of the ZTWVP.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.¹

1. The Commission alleged in the Complaint that Respondent discharged Complainant for reasons not applied equally to all persons without regard to their sex.

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 Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP

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

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action.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 termination; 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.

7. 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 Complainant’s discharge removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), quoting *Burdine, supra* at 255, 25 FEP Cases at 116.

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

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

8. Respondent met its burden of production with the introduction of evidence that it had a zero tolerance workplace violence policy (ZTWVP) in effect; and both Complainant and the male co-worker were terminated for violation of the policy.

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex. *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 Complainant's discharge 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.

10. 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 fact-finder to infer that Complainant was, more likely than not, the victim of sex discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for discharging Complainant. 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 fact-finder 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 2749, 62 FEP Cases at 100 (emphasis added).

12. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reason did not *actually*

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* 2749, 62 FEP Cases at 100, n.4.

motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged Ken LaRocca, the male employee terminated along with Complainant, and Art Hanni (Hanni) were progressively disciplined prior to their termination. The Commission asserts that because Complainant did not initiate the argument and her conduct was less egregious than LaRocca's and Hanni's conduct, she should not have been terminated.

14. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects":

Thus to be deemed "similarly situated", the individuals with whom ... [Complainant] seeks to compare ... her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hospital, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

15. To be deemed similarly situated, “a precise equivalence in culpability” is not required; misconduct of “comparable seriousness” may suffice. *Harrison v. Metro. Gov’t. of Nashville and Davidson Cty.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted). Likewise, similarly situated employees:

... need not hold the exact same jobs; however, the duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.

Hollins v. Atlantic Co., Inc., 76 FEP Cases 553, 557 (N.D. Ohio 1997), quoting *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

16. Respondent argues that the Commission failed to prove that Complainant was treated differently than similarly situated male employees. This argument is well taken. The disciplinary action used as comparative evidence by the Commission took place before the enforcement of the ZTWVP. Additionally, one of the comparatives, Hanni, worked for a different supervisor than Complainant and LaRocca.

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

18. In disparate treatment cases, R.C. Chapter 4112 only prohibits discharges motivated by unlawful discrimination. Thus, the statute does not cover employees whose terminations are unfair or unjust but nondiscriminatory.

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).

19. 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).

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

Combs v. Meadowcraft, Inc., 73 FEP Cases 232, 249 (11th Cir. 1997).

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9718.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 29, 2006