

INTRODUCTION AND PROCEDURAL HISTORY

Leslie Hatem (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 11, 2002.

The Commission investigated the charge and found probable cause that BMAVS, Inc. (Respondent BMAVS) engaged in unlawful employment practices in violation of Revised Code Sections (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 October 9, 2003.

The Complaint alleged that Respondent subjected Complainant to disparate terms and conditions of employment including but not limited to, acts of sexual harassment for reasons not applied equally to all persons without regard to their sex, and discharged her in retaliation for having complained about the sexual harassment.

Respondent BMAVS filed an Answer to the Complaint on November 7, 2004.¹ Respondent BMAVS denied that it engaged in any unlawful discriminatory practices. Respondent BMAVS also pled affirmative defenses. On December 11, 2004, Counsel for the Commission filed a Motion to Amend the Complaint to Join Additional Respondent, Graham Francis (Respondent Francis). Respondent Francis did not file an Answer.²

A public hearing was held on May 14, 2003 at the Central Office of the Ohio Civil Rights Commission, 1111 East Broad Street, Columbus, Ohio.

¹ The Answer was filed by BMAVS's statutory agent.

² At one point in the Commission's investigation of the charge of discrimination, Attorney Bruce L. Cameron (Cameron) represented Respondent Graham Francis. Cameron informed the ALJ by letter dated March 5, 2004 that he never represented Respondent BMAVS and that Respondent Francis had elected to proceed *pro-se*. However, Cameron appeared at the hearing and asked that he be permitted to represent Respondent Francis at the hearing. The Administrative Law Judge (ALJ) granted the request over the objection of Counsel for the Commission. Respondent Francis had exchanged witness information with Counsel for the Commission. The Commission was not surprised by witnesses and, therefore, was not prejudiced by Respondent Francis's request to have legal representation at the hearing.

The record consists of the previously described pleadings, a transcript of the hearing (185 pages), exhibits admitted into evidence during the hearing, and the post-hearing brief filed by the Commission on December 10, 2004. Respondents did not file post hearing briefs.

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 October 11, 2002.

2. The Commission determined on August 21, 2003 that it was probable that Respondents 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 Francis is the Representative and Director of Respondent BMVAS, Inc. (Tr. 12-13, 16-17; Comm. Ex. 1, 2)

5. Respondent Francis is also the owner and manger of Dalt's Restaurant. (Tr. 14-15, 17, 145)

6. Respondent Francis met Complainant when she was working at a restaurant called Bravo where she was the manager behind the bar.

7. Respondent Francis asked Complainant if she would be interested in running a restaurant in Columbus that he was planning on opening.

8. Complainant was hired by Respondent Francis to be the general manager of Dalt's Restaurant.³ Her first day of work was May 29, 2002.

9. As general manager Complainant was responsible for overseeing the day-to-day operations of the restaurant. This included ordering inventory and supplies, managing the books, advertising, and dealing with employee issues.

10. On September 11, 2002, Complainant and Respondent Francis had a disagreement, among other things, about the assistant manager, David Stallings (Stallings).

11. As a result of the disagreement, Respondent Francis asked Complainant why she was not quitting her position.

³ The salary agreed upon was \$1,000.00 per week, plus health benefits.

12. Complainant told Respondent Francis that she would not quit, that he would have to fire her.

13. Respondent Francis looked at Complainant and told her that she needed to leave at that moment.

14. Complainant gathered up her personal belongings from the office and left the premises.

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.⁴

1. The Commission alleged in the Complaint that Respondents subjected Complainant to disparate terms and conditions of employment including, but not limited to, acts of sexual harassment, for reasons not applied equally to all persons without regard to their sex, and discharged her in retaliation for having complained about the sexual harassment.

⁴ 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. 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. 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 R.C. 4112 against an employer for hostile work environment sexual harassment, the Commission must establish that:

- (1) Complainant is 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. The record is replete with testimony by Complainant regarding unwelcome conduct where Respondent Francis made statements of a sexual nature and touched Complainant in inappropriate places (breast and buttocks areas).

13. Although there were no eye witnesses to this behavior, the Commission presented credible evidence from two witnesses, Vonna Hayes and Steve Wagner, whom Complainant talked to (by telephone or in person) within a short period of time from when the incidences occurred.⁵ Complainant also kept a personal calendar, which in addition to personal appointments and business information, contained documentation of Respondent Francis's inappropriate behavior of a sexual nature. (Comm. Ex. 3)

14. Complainant testified that Respondent Francis's inappropriate behavior of a sexual nature interfered with her ability to do her job because she was usually always looking to find out where Respondent Francis was in order to avoid an encounter so that he could not "hassle" her. (Tr. 117)

⁵ Vonna Hayes has known the Complainant for twenty (20) years and is a human resources generalist for the City of Columbus and also teaches human resources and business courses at Columbus State Community College. Complainant attempted to get Respondent to talk to Ms. Hayes about implementing personnel policies, including a sexual harassment policy. These attempts failed. The other witness, Steve Wagner, is in advertising and is a broadcast producer. He has known Complainant for twenty-three (23) years.

15. The Commission introduced a letter from Complainant's physician who treated her for a skin rash on July 16, 2002. The letter stated:

She confided with me that she has experienced significant sexual harassment at her work place. It is likely that the infection she experienced was as a result of an id reaction due to the sexual harassment.

(Comm. Ex. 5)

16. I found Complainant and the Commission's corroborating witnesses and documentation to be credible.

17. A part of Respondent Francis's defense to the allegations of sexual harassment was based on his assertion that Complainant's statement's regarding him asking her to touch him while he was having an erection ("hard on") could not be true. To support his assertion Respondent Francis testified that he is incapable of having an erection because he had a medical procedure.⁶ (Tr. 174)

⁶ Although Mr. Cameron made reference to having a doctor's report from 2001, he did not introduce the report as evidence at the hearing. (Tr. 174)

18. I did not find the testimony of Respondent Francis to be credible.

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).

21. 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.

22. The testimony of the repeated comments of a sexual nature, and inappropriate touching (breast and buttocks) of Complainant are sufficient to support a finding of a hostile work environment.

SUPERVISOR HARASSMENT

23. 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.⁷ *Ellerth, supra at 2270; Faragher, at 2293.*

24. 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.

⁷ 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.

25. 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).)

26. Respondents did not have a sexual harassment policy. Complainant testified that she attempted to have a friend who is a human resources professional work with herself and Respondent Francis to develop a sexual harassment policy.

27. The evidence submitted by the Commission is credible and convincing regarding Respondent Francis's disinterest in developing a sexual harassment policy.

28. In the case sub judice, the *Faragher* defense would not be available to Respondent BMVAS because it had no sexual harassment policy. Respondent Francis is the Representative and Director of Respondent BMAVS, Inc. Respondent Francis had sole authority over the terms and conditions of Complainant's employment. She had no one else to complain to other than Respondent Francis.

29. Complainant took the initiative to stop the harassment by Respondent Francis.

30. On August 4, 2002, Complainant begged Respondent Francis to stop harassing her.

31. Respondent Francis told Complainant that he would not touch her any more unless it was by invitation.

RETALIATION

32. 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).

33. The Commission has proven the first and second elements of a *prima facie* case of retaliation. Complainant testified that she asked Respondent Francis to stop making inappropriate comments of a sexual nature to her. I found Complainant's testimony and the Commission's supporting evidence on this issue to be credible.

34. To establish the third and fourth elements, the Commission must prove that Respondent Francis's actions after Complainant asked him

to stop created a hostile work environment in retaliation for Complainant opposing what she believed were discriminatory practices.

35. Additionally, the Commission alleges that Complainant was constructively discharged. In order for the Commission to prevail on this claim, the Commission must prove that Respondent Francis's actions forced Complainant to resign.

36. 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.

37. 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.*

38. 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.

39. After Complainant begged Respondent Francis to quit making inappropriate sexual comments to her, Complainant was very vigilant in making sure that Respondent Francis did not invade her personal space. She would no longer be in the office alone with him.

40. If Complainant wanted to have a conversation with Respondent Francis she would ask another employee to be present during the conversation.

41. Respondent Frances would make comments around Complainant, "Oh yeah, that's right, I'm not allowed to comment that you have nice tits or a nice ass, that's sexual harassment." (Tr. 108)

42. On September 11, 2002, Complainant attempted to talk to Respondent Francis about David Stallings, an assistant manager. Complainant wanted to talk about inappropriate comments that Stallings made to employees that she believed to be sexual harassment.

43. Complainant testified that Respondent Francis responded by saying that he did not want to hear her bring anything up about sexual harassment. He did not want to hear her say anything disparaging about his behavior or David's behavior. (Tr. 128)

44. He also asked her why she did not quit.

45. Complainant told Respondent Francis she was not going to quit; he would have to fire her.

46. Respondent Francis said to Complainant, "Then fine, you need to leave, you need to leave at this moment." (Tr. 128)

47. Complainant gathered her belongings and left the restaurant.

48. A reasonable inference can be drawn from evidence introduced by the Commission that Respondent Francis was unhappy about Complainant's request that he stop making comments of a sexual nature to her. Thereafter, Respondent Francis made comments to Complainant that were both mocking and sarcastic, and showed that he was contemptuous of her request.

49. Complainant testified that from August 4, 2002 until she terminated her employment, Respondent Francis's conduct toward her created a hostile work environment; and, as a result of the hostile work environment, she was constructively discharged.

50. There is a nexus between Complainant's opposition to sexual harassment by Respondent and Respondent's conduct which, thereafter, created a hostile work environment for Complainant.

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

52. Additionally, the testimony of Complainant regarding Respondent Francis's conduct on her last day of work supports the conclusion that Complainant's termination was not voluntary. Complainant was forced with the choice of enduring further inappropriate sexual behavior from Respondent Francis or quitting.

53. Complainant is entitled to relief.

DAMAGES

54. The Commission has the authority to order Respondents to pay equitable damages, which include but are 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).

55. 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.

56. 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).

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

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9569 that:

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

2. The Commission order Respondent BMAVS and Respondent Francis 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 general manager with benefits and raises that she would have been entitled to for a total front pay of four (4) months, less interim earnings, calculated from the date of the Commission's Final Order;

3. The Commission order Respondent BMAVS and Respondent Francis within 10 days of the Commission's Final Order to issue a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a general manager from September 11,

2002 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;⁸ and

4. The Commission order Respondent Francis to receive sexual harassment training and submit to the Commission of copy of his 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 Francis shall submit certification from the sexual harassment trainer or provider of services that he 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

February 23, 2006

⁸ 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 Francis. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent Francis.