

INTRODUCTION AND PROCEDURAL HISTORY

Ross W. Lavender (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 7, 2002.

The Commission investigated the charge and found probable cause that the City of Steubenville (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 September 17, 2003. The Complaint alleged that Respondent failed and refused to hire Complainant for reasons not applied equally to all persons without regard to their race.

Respondent filed an Answer to the Complaint on October 22, 2003. 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 April 29, 2004 at the Steubenville City Annex, Second Floor Conference Room, 300 Market Street, in Steubenville, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (271 pages); exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 12, 2004; by Respondent on December 21, 2004; and a reply brief filed by the Commission on December 30, 2004.

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 October 7, 2002.

2. The Commission determined on July 31, 2003 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. Complainant saw an advertisement in the newspaper that Respondent had positions available for Maintenance Worker.

5. In order to be considered for the position, individuals had to take a Civil Service Examination (CSE).

6. Complainant took the CSE on September 29, 2001. He scored seventh (7th) out of forty-five (45).

7. The eligibility list for the position was valid until October 22, 2002.

8. Joe DeSantis (DeSantis) is the Superintendent of Streets, Sanitation, and Electrical and the hiring manager for the position in question.

9. Someone from DeSantis's office contacted Complainant regarding the position.

10. The individual asked Complainant if he had a commercial driver's license (CDL), stating that it was a requirement in order to interview for the position. Complainant did not have one. The individual indicated that there was no need to schedule an interview at that time.

11. Complainant took an exam for and received a CDL. He called DeSantis's office to inform them that he had obtained his CDL license.

12. Complainant had an interview with DeSantis on June 19, 2002.

13. Craig Mason (Mason), Caucasian, who ranked fourteenth (14th) on the eligibility list, was interviewed in July of 2002 and hired for the position of Maintenance Worker II in August of 2002.

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 failed and refused to hire Complainant for reasons not applied equally to all persons without regard to their race.

¹ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the . . . race,. . . 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 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802. 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 (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. 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.

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.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the refusal to hire; 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., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations and footnote omitted).

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993), quoting *Burdine*, *supra* at 254-55.

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.

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 not hiring Complainant 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 (1983), quoting *Burdine*, *supra* at 255.

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.

8. Respondent met its burden of production by stating that Craig Mason, the successful candidate, was hired for the position because of his

interview, and his experience driving large trucks, in addition to carpentry skills.

9. Respondent having met its burden of production, the inquiry moves to the ultimate issue of the case, i.e., whether Respondent failed and refused to hire Complainant because of his race. *Hicks, supra* at 511. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for the refusal to hire Complainant was not the true reason, but was "a pretext for discrimination." *Id.*, at 515, *quoting Burdine, supra* at 253.

[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.

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 . . . [race] is correct. That remains a question for the factfinder to answer

Id., at 524.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of race discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for refusing to hire 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 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. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of discrimination is *required*.³

Hicks, supra at 511, (bracket removed); See also *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108 (2000). (Emphasis added.)

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* 511, n.4.

12. In disparate treatment cases, R.C. 4112 only prohibits adverse employment actions that are motivated by unlawful discrimination. Thus, the statute does not cover unsuccessful job applicants whose failure to hire was unfair or unjust but nondiscriminatory. The inquiry here is necessarily limited to whether Respondent treated Complainant differently because of his race.

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, 87 F.3d 795, 801 (6th Cir. 1996).

13. The Commission attempts to show pretext in this case by showing that Respondent added job qualifications that were not a part of the posted job qualifications and were not necessary to the performance of the job in question.

14. 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*, 116 F.3d 361, 364 (8th Cir. 1997) (citations omitted).

The distinction lies between a poor business judgment and a reason manufactured to avoid liability. Thus, facts may exist from which a reasonable jury could conclude that the employer's business judgment was so lacking in merit as to call into question its genuineness.

Hartzel, supra at 955, (citation and quotation marks omitted).

15. Procedural irregularities that do not “directly and uniquely” disadvantage the employee are not evidence of illegal discriminatory motive. *Randle v. City of Aurora*, 69 F.3d 441, 455 (10th Cir. 1995), n.20 (citations omitted).

The mere fact that an employer failed to follow its own internal procedures does not necessarily suggest that the employer was motivated by illegal discriminatory intent or the subjective reasons given by the employer for its employment decision were pretextual . . . (‘To the extent there is any inconsistency at all [in following the employer’s internal procedures], it only goes to process and not to purpose or motivation,’)

Id., at 492.

16. The Commission’s argument that Complainant was more qualified than the successful applicant is based on Complainant’s higher score on the CSE and irregularities in the selection process.

17. However, the evidence in the record does not support the conclusion that Complainant's higher score on the CSE and the irregularities in the selection process made Complainant more qualified than the successful applicant.

18. The procedural irregularities complained of did not "directly and uniquely" affect Complainant. Although the job posting did not specifically state that a CDL was required, there were other applicants on the exam list who did not have a CDL who were also given the opportunity to obtain one in order to interview for the position.

19. Since the position required the successful applicant to drive a variety of heavy trucks, the CDL requirement was consistent with the duties of the job.

20. DeSantis testified that Complainant's interview made him question his experience driving heavy trucks; therefore, he contacted Complainant's former employer. The employer related that Complainant had never had a position as a heavy truck driver or had a position that required him to perform heavy truck driving.

21. The Commission also argued that Respondent's articulation that the successful applicant had carpentry skills, and Complainant did not, was a pretext for unlawful discrimination because the position description did not include "carpentry skills".

22. I was not convinced that Respondent's preference to hire someone who had carpentry skill was a pretext for discrimination.

[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).

23. The Maintenance Worker II position description contains a list of "typical tasks" that would require the successful applicant to have some carpentry skills:

- Rebuilds catch basins and manholes, constructs new catch basins and manholes;
- Builds forms for sidewalks and works as a cement finisher;
- Performs general building maintenance and repair;

- Performs a variety of other heavy manual work in connection with the maintenance and construction of sidewalks, streets, sewers, water mains, and parks.

(Resp's Ex. 5)

24. The testimony regarding Complainant's interview with Respondent revealed a lackluster résumé that cited a list of positions held (*See attached* Comm's Ex. 11) and no attempt on Complainant's part to "sell himself" as the best candidate for the job. The successful candidate's résumé contained specific skills that he had performed in previous positions (*See attached* Comm's Ex. 1).

25. DeSantis's letter to Dominic Mucci, Acting City Director, dated July 11, 2003, states the basis for his selection of Mason for the position of Maintenance Worker II:

After contacting the first twenty names certified by the Civil Service Commission I have concluded interviews with all qualified applicants. (...) I am recommending the City of Steubenville Street Department hire Craig Mason for the position of Maintenance Worker II. This person's interview was most impressive and he has very positive recommendations. (...)

(Resp's Ex. 6)

26. While interviews are subjective in nature, they are “a rational and accepted means of assessing an applicant’s qualifications.” *Morton v. City School Dist.*, 742 F.Supp. 145, 148 (S.D.N.Y. 1990). Thus, a poor interview may constitute a legitimate, nondiscriminatory reason for refusing to promote an employee. In other words, an employer’s reliance on interviews and other subjective criteria does not necessarily convert otherwise legitimate, nondiscriminatory reasons into illegal ones. See *Dodd v. Singer Co.*, 669 F.Supp. 1079, 1084 (N.D. Ga. 1987) (“subjective qualification assessment does not convert an otherwise legitimate reason into an illegitimate one”).

27. Complainant also testified about the civil service eligibility list, of which he was a part, that he received from Delores Wiggins.

28. Wiggins, African American, is a member of the Civil Service Commission.

29. When Complainant received the list it contained the words “black”, “race”, and “handicap”. It upset and offended Complainant. (Tr. 103)

30. Wiggins testified at the hearing that she wrote “black”, “race”, and “handicap” on the eligibility list that she faxed to Complainant.⁴ The markings on the list were, therefore, not made by Respondent.

31. I am persuaded that Respondent’s reasons for not hiring Complainant for the Maintenance Worker II were not an illegal cover-up for race discrimination.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9558.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

February 28, 2006

⁴ Wiggins is a longtime resident of Steubenville. She is not only a member of the Civil Service Commission, but she is also a member of the NAACP and has been active and vocal in addressing issues of discrimination in Steubenville.