OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

SHERONDA BOYD

Complainant

v.

TOLEDO PUBLIC SCHOOLS,
BOARD OF EDUCATION

Respondent

Complaint No. 9523
(TOL) 72031502 (26795) 071202
22A – A2 – 03483

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

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Sheronda Boyd (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on July 12, 2002.

The Commission investigated the charge and found probable cause that Toledo Public Schools, Board of Education (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 10, 2003.

The Complaint alleged that Respondent terminated Complainant's position as Volleyball Coach in retaliation for her having filed a previous charge of discrimination with the Commission against Respondent.

Respondent filed an Answer to the Complaint on July 24, 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 January 27, 2005 at the DiSalle Government Center in Toledo, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (295 pages), exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on March 1, 2006, by Respondent on April 14, 2006, and the Commission's reply brief filed on May 1, 2006.

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 July 12, 2002.

2. The Commission determined on June 12, 2003 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(I).

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

4. Complainant has been employed by Respondent as a special education teacher at Libbey High School (LHS) since 1995.

5. In addition to her teaching responsibilities Complainant was the head girls basketball and volleyball coach at LHS for the 1997-98 through 2001-02 school years.

6. The volleyball season runs from August through October, and the basketball season runs from November through February.

7. The employment of Respondent's athletic coaches is governed by the Collective Bargaining Agreement (CBA) between Respondent and the Toledo Federation of Teachers.

8. Pursuant to the CBA, athletic coaching contracts are for one (1) year.

9. The CBA also requires each school's Athletic Committee to review the performance of each person with an athletic coaching contract between February 15 and March 15 for fall and winter sports and between May 15 and June 15 for spring sports.

10. Contracts can be terminated for "just cause" during the term of the contract and can be non-renewed for "reasonable cause".

11. During the 2001 volleyball season, while at Bowsher High School (BHS), Complainant had a vocal disagreement with a parent of a student-athlete that was observed by David Erdman (Erdman), BHS Athletic Director.

12. Erdman interceded multiple times in the heated discussion between Complainant and the parent before the game.

13. Erdman contacted, Ron Zak (Zak), LHS Athletic Director, to report Complainant's behavior.

14. Zak discussed the Bowsher incident and others with Complainant on September 12, 2001. He told Complainant that he

could not support her being out of control, and that she would be subject to removal from her position if she got out of control again.

15. Zak also gave Complainant a note on September 13, 2001, directing her to allow the student whose parent was involved in the confrontation at BHS to ride the team bus.

16. During the 2001 volleyball season Complainant continued to have difficulty working with peers, parents, and the school's custodial and secretarial staff. (Tr. 115-116, 118-119)

17. School Improvement Leader Marcia Helman (Helman) and Deputy Superintendent Shelia Austin (Austin) both told Harold Brown (Brown), Principal of LHS, they thought Complainant's volley ball contract should have been terminated after the BHS incident.

18. Brown and Zak did not want to make a mid-season termination recommendation to the Athletic Committee; therefore, they did not consider or act on Helman's and Austin's suggestion.

19. During the basketball season Complainant was concerned about the security of the student athletes at a basketball game scheduled to take place on November 28, 2001 between LHS and a rival school, Scott High School (SHS).

20. Prior to the date of the game Complainant communicated her concerns to Ed Scrutchins, Director of Athletics and Extra-Curricular Activities for the Toledo Public Schools.

21. Scrutchins made arrangements for additional security at the game.

22. The arrangements included the hiring of four to six police officers (usually there are two), supplemented with additional school board security personnel, the attendance of four school administrators from each school, and Scrutchins.

23. Zak apprised Complainant of Scrutchins' steps to provide additional security.

24. Brown and Zak gave all coaches a written directive on November 27, 2001 indicating that if any coach intentionally forfeited an

athletic contest, the coach was subject to immediate suspension and possible termination.

25. On November 28, 2001, Complainant refused to attend and prevented the varsity, junior varsity, and freshmen girls basketball teams from attending the scheduled basketball games without giving advanced notice to Zak or Brown.

26. As a result of Complainant's actions, she was immediately suspended from her basketball coaching position on November 29, 2001 and was notified that the Libbey Athletic Committee would meet on December 7, 2001 to consider her basketball coaching contract.

27. The Committee voted on December 7, 2001 to terminate Complainant's basketball coaching contract immediately.

28. Two of Complainant's assistants, Pou (Pou) and Dodge (Dodge), did not appear at the game. Pou and Dodge disclosed that they were acting on their own when they did not attend the game.

29. The Athletic Committee voted unanimously on December 12, 2001 to recommend that Pou's contract be terminated immediately. Dodge resigned before the Committee could act upon his termination.

30. On December 10, 2001, Complainant filed a charge of discrimination with the Commission alleging sex discrimination.

31. On March 8, 2002, Brown and Zak notified Complainant that the Athletic Committee would meet on March 15, 2002 to determine whether her volleyball coaching contract would be renewed.

32. Brown and Zak related to Complainant the following concerns:

1. Your consistent inability to keep yourself under control;
2. Your inability to respect and get along with fellow teachers and staff members; and
3. Your lack of control prohibits you from growing professionally and as a coach.

(Tr. 76, Comm. Ex. 11)

33. The Athletic Committee met with Complainant and her union representative on March 15, 2002, then voted 7-1 to recommend to

Scrutchins that Complainant's volleyball coaching contract not be renewed.

34. Scrutchins met with Complainant and her union representative on April 16, 2002 and, thereafter, upheld the decision of the Athletic Committee.

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

1. The Commission alleged in the Complaint that Respondent terminated Complainant's position as Volleyball Coach in retaliation for her having filed a pervious charge of discrimination with the Commission against Respondent.

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:

> (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(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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802, 5 FEP Cases 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 its employment action.[2] *McDonnell*

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[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 contract non-renewal; 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

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.

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 its 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 legitimate, nondiscriminatory reasons for the non-renewal of Complainant's volleyball coaching contract 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*

> 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).

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 which showed Complainant's conduct during the previous volleyball and basketball season was deemed unprofessional and inappropriate and reflected poorly on Respondent's athletic program.

9. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because she engaged in protected activity. *Hicks*, *supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for not renewing Complainant's contract were not the true reasons, but were "a pretext for … [unlawful retaliation]." *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 [unlawful retaliation]" unless it is shown *both* that the reason is false, *and* that … [unlawful retaliation] is the real reason.
>
> *Hicks*, *supra* at 515, 62 FEP Cases at 102.

10. Thus, even if the Commission proves that Respondent's articulated reasons are 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 … [unlawful retaliation] 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 unlawful retaliation.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for the non-renewal of Complainant's volleyball coaching contract. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or they were *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 reasons 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 (emphasis added).

12. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reasons did not actually motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

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[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.

13. The Commission attempted to show that Respondent's reasons for the non-renewal of Complainant's volleyball contract were not worthy of credence. I was not persuaded by the Commission's evidence.

14. The employment of Respondent's athletic coaches is governed by the CBA between Respondent and the Toledo Federation of Teachers.

15. The CBA requires each school's Athletic Committee to review the performance of each person with an athletic coaching contract between February 15 and March 15 for fall and winter sports and between May 15 and June 15 for spring sports.

16. Complainant's filing of a charge of discrimination in December 2001 was not the motivation for the review of her performance in March 2002.

17. The evidence introduced by Respondent persuaded me that Complainant's unprofessional conduct during both the 2001 volleyball and basketball seasons was the basis for Respondent's non-renewal determination in March 2002.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9523.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 23, 2007