

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Samuel J. Byrom v. Village of Newcomerstown
[AKR] 73012103 [27856] 061303 22A – A3 – 02731 – C
Complaint No. 9706

Ohio Civil Rights Commission v. Village of Newcomerstown and Mitch Wise
[OSI] S7051304 [00518] 051304 22A – A3 – 02731 – C
Complaint No. 9866

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

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INTRODUCTION AND PROCEDURAL HISTORY

Samuel J. Byrom (Complainant) is an African-American who filed a charge of discrimination with the Ohio Civil Rights Commission (the Commission) in accordance with Revised Code (R.C.) 4112.05(B)(1) on June 13, 2003.

The Village of Newcomerstown (Respondent Village) is a political subdivision of the state of Ohio and is an “employer” as defined by R.C. 4112.01(A)(2).

The Commission conducted an investigation and on May 13, 2004 found probable cause that Respondent Village had engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

The Commission attempted, but failed to resolve this matter through informal methods of conciliation. The Commission subsequently issued Complaint No. 9706 on June 3, 2004.

Complaint No. 9706, *inter alia*, alleged that Respondent laid off Complainant, and eliminated his position, for reasons not applied equally to all persons without regard to their race.

On May 13, 2004, the Commission self-initiated a charge of discrimination against Respondent Village and Mitch Wise (Respondent Wise) in accordance with R.C. 4112.04(B)(2).

Respondent Wise is a “person” as defined by R.C. 4112.01(A)(1).

The Commission conducted an investigation and on April 14, 2005 found probable cause that Respondent Village and Respondent Wise engaged in unlawful employment practices in violation of R.C. 4112.02(A). The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued Complaint No. 9866 on May 5, 2005.

Complaint No. 9866 alleged, *inter alia*, that Respondent Wise used his position and influence as a member of the Village Council

and Finance Chairman to persuade Respondent Village to terminate Complainant's employment on or about January 21, 2003 for reasons not applied equally to all persons without regard to their race.

Additionally, Complaint No. 9866 alleged that Respondents Village and Wise engaged in behaviors that had the purpose or effect of creating a racially hostile, offensive, and intimidating work environment.

Respondents filed Answers to Complaint No. 9706 on June 28, 2004, and to Complaint No. 9866 on May 18, 2005.

In response to both Complaints Respondents admitted certain procedural allegations,¹ but denied that they had engaged in any unlawful discriminatory practices. Respondents also pled affirmative defenses.

¹ Respondents denied that the Commission made an attempt to conciliate in answer to Complaint No. 9866, but stipulated to the Commission having undertaken the jurisdictional prerequisite at the hearing.

A public hearing was held on August 3-4, 2005 at the Newcomerstown Municipal Building at 124 West Church Street, Newcomerstown, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 485 pages;² exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on September 26, 2005; by Respondent on November 2, 2005; and a reply brief filed by the Commission on November 20, 2005.

² Pursuant to the Ohio Administrative Code [O.A.C.] 4112-3-07(I)(2), Respondents provided the services of a court reporter to record and transcribe the testimony at the public hearing.

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. Paragraphs 5 and 9 of the Procedural History herein are fully incorporated as Findings of Fact.

2. Complainant started working for Respondent Village as a full-time custodian on June 23, 1998.

3. Prior to June of 1998, the custodial function was done on a part-time basis. When there was no part-time custodian, employees in their respective departments performed janitorial-related duties. Respondent Village also had janitorial services performed by individuals as a result of court-ordered community service.

4. Complainant's work responsibilities included four separate buildings: the Municipal Building, Street Department, Water Department and Sewage Department.

5. Complainant's job duties were cleaning windows, walls, floors, heat vents, light covers, showers and restrooms. He also performed minor maintenance and drove Respondent Village vehicles.

6. Respondent Wise was the Chairman of the Finance Committee in 2002.

7. During the year 2002, Respondent Village had \$220,000 more in expenses than it had in receipts. (Tr. 215)

8. Adding to the budgetary problems, the State of Ohio notified Respondent Village that local governments would be receiving significant cuts in the amount of monies they were to receive. The reduction was estimated to be between \$37,000 to \$47,000 less that year than what would have come from the State.

9. To compensate for the shortfall Respondent Village liquidated various investments to transfer money into the General Fund.

10. During Finance Committee meetings in 2001-2002 Respondents considered budget measures to reduce expenses, including the issue of getting custodial services for less money.

11. On January 7, 2003, the Village Council unanimously voted to make a variety of budget cuts, which eliminated six positions, including Complainant's janitorial position.

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.³

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

1. In the cases at bar the Commission has alleged, respectively, in Complaints Nos. 9706 and 9866, the following:

- (i) Respondent laid off Complainant, and eliminated his position for reasons not applied equally to all persons without regard to their race;
- (ii) that Respondent Wise used his position and influence as a member of the Village Council and Finance Chairman to persuade Respondent Village to terminate Complainant's employment on or about January 21, 2003 for reasons not applied equally to all persons without regard to their race; and
- (iii) that Respondents Village and Wise engaged in behaviors that had the purpose or effect of creating a racially hostile, offensive, and intimidating work environment.⁴

2. These allegations, 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.

⁴ In the Commission's brief, the separate claim of a racially hostile, offensive, and intimidating work environment was not addressed as a separate claim or violation.

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.⁵ *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondents 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.

⁵ Although the burden of production shifts to Respondents 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 layoff; 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. Respondents’ articulation of a legitimate, nondiscriminatory reason for Complainant’s layoff 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. Respondents met their burden of production with the introduction of evidence that layoffs were necessary as a part of a budgetary plan to limit expenses to offset a decrease in revenue.

9. Under Title VII case law, two evidentiary frameworks have emerged in disparate treatment cases. If an employee proves by a preponderance of the evidence that an impermissible factor “played a motivating part” in an employment decision, the burden of persuasion shifts to the employer to show that it, more likely than not, would have taken the same action even without the impermissible factor. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

10. Evidence that calls for a shift in burden under the *Price Waterhouse* analysis includes policy documents and evidence of statements or actions by decision-makers “that may be viewed as directly reflecting the alleged discriminatory attitude.” *Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.2d 171, 182 (2d Cir. 1992).

11. The more a remark evinces a discriminatory state of mind and the closer the remark's relation to the allegedly discriminatory behavior, the more probative that remark will be. *Danzer v. Norden Sys., Inc.*, 151 F. 3d 50, 56 (2d Cir. 1998).

12. The Commission asserts that the word "nigger" used by Respondent Wise is direct evidence of his discriminatory motive and intent.⁶

13. The evidence introduced by the Commission established that Wise's use of the word "nigger" and his close scrutiny of Complainant came during the time period that Respondent Wise, in his capacity as Chairman of the Finance Committee, was discussing the budget with other council members and the need to make cuts.

⁶ The evidence came from hearsay testimony provided by Mayor Carr:

Well, Mr. Byrom, if I remember correctly, was on his lunchtime, and it was in winter, and he had gone over to Mr. Jordan's and had shoveled some snow for Mr. Jordan. And a council member came up to my office, seen Mr. Byrom shoveling the snow for Mr. Jordan. And he came to my office quite mad, and made a comment that we wasn't paying Mr. Byrom to be over there shoveling Mr. Jordan's snow. And he used a racial epitaph ("nigger") at that time on Mr. Byrom. And so at that point I felt it was racially motivated.

(Tr. 97)

14. The evidence introduced by the Commission regarding Respondent Wise convinced me that he harbored a discriminatory animus toward African-Americans. It is also undisputed that Respondent Wise was involved in the decisional process.

15. Once there is a determination that there is circumstantial evidence that the decision to lay off Complainant was motivated in part by a discriminatory animus (impermissible factor), the next level of inquiry is whether the discriminatory animus was a motivating factor in Respondents' decision. *Price Waterhouse, supra*.

16. Accordingly, Respondents have the burden to show that the same decision, to eliminate the custodial position, would have resulted even had the impermissible factor (Respondent Wise's discriminatory animus toward Complainant) not been a part of the decisional process.

17. Respondent Wise started as a member of the Village Council in January of 2002 and was the Chairman of the Finance Committee.

18. As Chairman of the Finance Committee, Respondent Wise provided credible testimony on direct examination regarding the fiscal circumstances that led to the decision to lay off employees in 2003:

Q: And was there a point in time in '02 where you started to become concerned with respect to the finances in the Village?

A: Normally, the Village had to send reports to the county early in the year, but that year they changed that, so if the county would not have changed their system, we would have been looking at the financial records probably in March and April. But since they did the changes, we still looked at March and April, but May is when I really started calling the meetings of the finance committee to try to study some of this.

We had a big meeting in June of that same year to discuss a lot of things that we had found up to that point, and it was even then in June that we started talking about making cuts.

Q: And why was it in June that you started talking about making cuts?

A: Just because we could see the direction that we were headed. We could see by that, then that if we don't make some changes, we're going to lose a lot of money that year and years to come, so it was just—it was a time—you know, it was after 9-11 and the economy was really going south, and, you know, we needed to make sure that we were heading in the right direction and didn't get in trouble. (Tr. 431)

19. I was persuaded by Respondent Wise's explanation, especially the reference regarding the affect that September 11 had on the economy.

20. Respondent Village lost approximately \$225,000 of income during the years 2001-2002. (Tr. 436-439)

21. The Village Tax Administrator, Kimberly Lyons, explained that the State of Ohio notified the Village that local governments would be receiving significant cuts in the amount of monies they were to receive. (Tr. 180)

22. In regard to the village finances for fiscal year 2002 she testified:

Q: If we look at the year end of 2002, which is Commission Exhibit 21, is this a document that you prepared?

A. Yes.

Q: Okay. With regard to this document and the year 2002 is there—as you recall—any point in time where a concern was raised about the way in which expenses and receipts were flowing for this year?

A: Just in reviewing this I would be able to look at that and say that we had over \$200,000 more in expenses than we did in receipts. Looks like investment went from \$400,000 down to \$175,000. If it were my personal finances I would be very concerned.

(Tr. 176)

23. The evidence offered by Respondent Village was clear and convincing regarding the anticipated budget shortfall for the Village. Thus, I believe that even if Respondent Wise harbored a discriminatory animus toward Complainant based on his race, the same decision, (to eliminate Complainant's position along with five other non-minority employees' positions and other cuts to expenses), was supported by the overwhelming weight of the evidence.

24. 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).

25. When asked what his responsibilities were as Chairman of the Finance Committee, Respondent Wise stated the following:

Just the overall financial outlook of the Village, keep an eye on the expenses and the revenues and make sure we weren't getting in any trouble, to set the budget for the year and just watch the overall finance.

(Tr. 428)

26. Respondent Wise's answer reflects his understanding of his role as a steward of public funds.

27. Prior to hiring Complainant as a full-time janitor in 1998, Respondent Village only had janitorial services on a part-time basis. Before hiring a part-time individual to perform janitorial services, departmental employees performed janitorial functions in their respective departments. (Tr. 405-406)

28. The history of janitorial service provided by the testimony in the record supports the reasonable inference that having paid janitorial services was not given high priority in regard to Respondent Village's expenses.

29. As of the date of the hearing, janitorial services were being done, as it had been in the past, by individual employees in their respective departments, in addition to community services work performed at no cost to Respondent Village by individuals who are working off time a judge imposed as punishment.

30. The Commission attempted to show that Respondent's seniority policy was changed to preclude Complainant from being able to bump into a less senior employee's job in another department. Again, there was no credible evidence introduced by the Commission to support this assertion.

31. Before the janitorial position was eliminated, Complainant was offered a full-time midnight dispatcher position with benefits in the Police Department.

32. Complainant declined the position because it would prevent him from responding to an emergency regarding his wife's health problems. (Tr. 45)

33. Based on the foregoing reasons I find the decision by Respondent Village was based on a legitimate business reason.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended that the Commission issue Dismissal Orders in Complaint No. 9706 and Complaint No. 9866.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

May 29, 2008