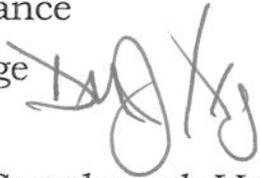


Memo

To: Desmon Martin, Chief of Enforcement and Compliance
From: Denise M. Johnson, Chief Administrative Law Judge 
Date: September 1, 2009
Re: *Ohio Civil Rights Commission [Richard A. Hahn] v. Guardsmark LLC*
(DAY) A6060705 (17412) 09192005 22A - 2006 - 00123
Complaint No. 10017

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT
ALJ RECOMMENDS CEASE & DESIST ORDER**

Report issued: August 13, 2009
Report mailed: September 1, 2009

**** Objections due: September 24, 2009**

DMJ:tg



Governor
Ted Strickland

Ohio Civil Rights Commission

Board of Commissioners

Eddie Harrell, Jr., Chair
Leonard J. Hubert
Altagracia Ramos
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

September 1, 2009

Patrick M. Dull, Esq.
Associate Attorney General
Civil Rights Section, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428

Judd F. Osten, Esq.
Associate General Counsel
Guardsmark
22 South 2nd Street
Memphis, TN 38103

Re: *Ohio Civil Rights Commission [Richard A. Hahn] v. Guardsmark LLC*
(DAY) A6060705 (17412) 09192005 22A – 2006 – 00123
Complaint No. 10017

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Thursday, September 24, 2009**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Chief of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. All parties and the Administrative Law Judge should receive copies of your Statement of Objections.

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Chief of Enforcement and Compliance

DM:tg

Enclosure

cc: Lori A. Anthony, Esq. – Civil Rights Section
Denise M. Johnson, Chief Administrative Law Judge

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614 - 466 - 2785 • TOLL FREE: 1 - 888 - 278 - 7101 • TTY: 614 - 466 - 9353 • FAX: 614 - 644 - 8776

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OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

**OHIO CIVIL RIGHTS COMMISSION
[RICHARD A. HAHN]**

Complainant

v.

GUARDSMARK LLC

Respondent

Complaint No. 10017
(DAY) A6060705 (17412) 09192005
22A - 2006 - 00123

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

**RICHARD CORDRAY
ATTORNEY GENERAL**

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Counsel for the Commission

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Counsel for Respondent

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 - 466 - 6684

INTRODUCTION AND PROCEDURAL HISTORY

Richard Hahn filed a charge affidavit in accordance with R.C. 4112.05(B)(1) on September 19, 2005, alleging that Guardsmark, LLC (Respondent) terminated his employment (laid him off) due to his age.

The Commission investigated the charge and found no probable cause regarding Mr. Hahn's charge of discrimination. However, the Commission's investigation, conducted in accordance with R.C. 4112.05(B)(2), resulted in a probable cause finding that Respondent's application for employment form (AEF) elicits or attempts to elicit information in violation of R.C. 4112.02(E).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint and Notice of Hearing No. 10017 on May 11, 2006.

The Complaint alleged that Respondent utilizes an AEF which elicits or attempts to elicit information including, but not limited to, an applicant's race, date of birth, and place of birth.

Respondent filed an Answer to the Complaint on June 13, 2006. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

The public hearing in this matter was waived in lieu of Stipulations of Fact agreed to by the Commission and Respondent. All stipulated facts were considered by the Administrative Law Judge (ALJ) but only those facts relevant for purposes of the legal conclusions recommended herein are included in this Report.

The record consists of the previously described pleadings; Joint Stipulations, filed March 20, 2007; and the post-hearing briefs filed by the Commission on April 19, 2007; by Respondent on May 10, 2007; and a reply brief filed by the Commission on May 30, 2007.

FINDINGS OF FACT

1. Robert Hahn filed a charge of discrimination on September 19, 2005, alleging that Respondent terminated his employment (laid him off) due to his age.

2. The Commission conducted a preliminary investigation and found no probable cause as to Mr. Hahn's charge of age discrimination.

3. During its investigation the Commission determined it was probable that Respondent's AEF elicited or attempted to illicit information prohibited by R.C. 4112.02(E).

4. The Commission attempted to conciliate this matter with Respondent but was unsuccessful.

5. Respondent is a licensed private security services provider subject to the rules and regulations of the Division of Ohio Homeland Security.

6. Respondent is headquartered in New York, New York, with administrative offices in Memphis, Tennessee. Respondent has approximately 155 branch offices, including branches in Columbus and Dayton, Ohio.

7. Respondent's official AEF contains a request for the applicant's date of birth, place of birth, and race.

8. Respondent's official AEF is its standard form and is utilized by Respondent throughout the United States.

9. Before Respondent employs an individual as a security officer and registers him or her with the Division of Ohio Homeland Security, a copy of the individual's arrest and conviction record from the files of the Ohio Bureau of Criminal Investigation must be obtained and sent to the Department of Public Safety, which requires the submission by Respondent of the Ohio Civilian Background Check Fingerprint Card.

CONCLUSIONS OF LAW

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.

1. The Commission alleged in the Complaint that Respondent utilizes an application for employment form that elicits or attempts to elicit information including, but not limited to, an applicant's race, date of birth, and place of birth.

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:

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

- (1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, military status, national origin, disability, age, or ancestry of an applicant for employment or membership;
- (3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, military status, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes.

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(E) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G), 4112.06(E).

4. Respondent's AEF does seek to elicit the following information:

- a. Race: White, Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native
- b. Date of Birth, Age

(Jt. Stips, Ex. 1)

5. The information elicited by Respondent on its AEF is a direct violation of R.C. 4112.02(E)(1) and (3).

6. R.C. 4112.02(E) gives the employer the means to seek certification from the Commission in advance of eliciting the prohibited information from a job applicant:

The BFOQ defense to a facially discriminatory employment policy requires the employer to initially demonstrate that the hiring criteria utilized involve the "essence" of its business.

Dothard v. Rawlinson, 433 U.S. 321 at 333, 97 S.Ct. 2720 at 2729, 53 L. Ed. 2d 786 at 800 (1977).

7. The "essence of the business" requirement is not satisfied merely because the facially discriminatory criteria further some peripheral function of the employer. *Little Forest Medical Center v. Ohio Civil Rights Com.*, 61 Ohio St. 3d 607 at 612.

8. Ohio law requires all security officers employed in the state be registered with the Division of Ohio Homeland Security. O.R.C. Sec. 4749.06(A).

9. The registration is of “security guard employees” and the registration form is titled “Employee Registration Application”.
(Ex. 3)

10. The Employee Registration Application requires disclosure of the applicant’s date of birth and city and state of birth, and includes a photograph of the applicant.

11. The employer is required to file an application to register a new employee no sooner than three (3) days nor later than seven (7) calendar days after the date on which the employee is hired.

12. Respondent did not apply for a BFOQ from the Ohio Civil Rights Commission prior to including the prohibited inquiries in its standardized application form. *See, O.A.C. 4112-3-15.*

13. Even if Respondent applied for a BFOQ from the Commission, using/considering race as a criteria when hiring individuals for employment is illegal. *See, Knight v. Nassau County Civil Serv. Comm’m., 649 F.2d 157, 162 (2d Cir. 1981)* (noting that

"Congress specifically excluded race from the list of permissible bona fide occupational qualifications".)

14. Respondent's blurring of the distinction between "applicant" and "employee" in regard to the legal requirements imposed by state and federal law on employers that hire security guards does not provide legal justification of inclusion in its employment application of information prohibited by R.C. 4112.02(E)(1) and (3).

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 10017 that:

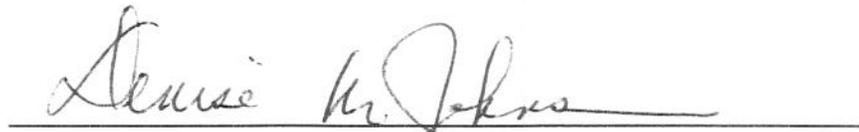
1. Respondent Cease and Desist from using an employment application form that elicits information prohibited by R.C. 4112.02(E), *et.seq.*;

2. That Respondent, within one hundred and twenty (120) days after receipt of the Commission's Final Order, provide a copy of its employment application form which complies with R.C. 4112.02(E) to the Commission's Office of Special Investigations (OSI); and

3. That Respondent receive training within ninety (90) days from an agency certified to provide training to employers on Ohio's anti-discrimination law;¹ and

¹ The Ohio Civil Rights Commission provides training to employers on Ohio's laws against discrimination, especially regarding employment and housing issues. There is no cost for this service. The Commission's Compliance Department oversees these trainings.

4. The Commission order Respondent, within ninety (90) days of receipt of the Commission's Final Order, to provide to OSI documentation of completion of the employer training received on Ohio's anti-discrimination law.

A handwritten signature in cursive script, reading "Denise M. Johnson", is written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 13, 2009

**STATEMENT
OF
OBJECTIONS**

**STATE OF OHIO
CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:)	COMPLAINT NO 10017
)	
OHIO CIVIL RIGHTS COMMISSION,)	ADMINISTRATIVE LAW JUDGE
)	DENISE JOHNSON
Complainant)	
)	
vs.)	
)	
GUARDSMARK, LLC,)	
)	
Respondent)	

RECEIVED
O.C.R.C. COMPLIANCE DIV
SEP 24 2009

STATEMENT OF OBJECTIONS OF RESPONDENT GUARDSMARK, LLC

Respondent, GUARDSMARK, LLC, respectfully submits the following objections to the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations:

I. RESPONDENT DOES NOT DISCRIMINATE ON THE BASIS OF RACE, AGE, OR PLACE OF BIRTH.

This matter originally arose out of the Commission's investigation of charges of age discrimination filed by Richard Hahn (Findings of Fact 1.) The Commission conducted a preliminary investigation and found no probable cause as to Mr. Hahn's charge of age discrimination. (Finding of Fact 2.) The Commission has no record of any charges having been filed against Respondent claiming discrimination in the employment application

process on the basis of age (Stipulation, B 17); place of birth (Stipulation, B 18); or race (Stipulation, B 19).

The Commission cites no evidence to show that Respondent uses or has used any information solicited from applicants as to their race, age, date of birth, or place of birth to discriminate against the applicant in violation of R.C. 4112.02 (A). To the contrary, as part of Respondent's response to the discrimination charges filed by Mr. Hahn, Respondent submitted to the Commission a copy of Respondent's *Equal Opportunity Policy Statement* ("Policy Statement"). The Policy Statement, which was first established in 1965, and revised thereafter, states as follows:

"It is the policy of Guardsmark to be an equal opportunity employer. It is our policy to recruit, hire, train and promote into all job levels the most qualified applicants without regard to **race**, color, religion, sex, **national origin**, citizenship, **age**, disability, or veteran status, except where these may be bona fide occupational qualifications. All such decisions concerning employment will be directed toward furthering the principle of equal employment opportunity."

(Emphasis added)

Respondent actively monitors hiring, promotion and disciplinary practices in all branch offices to ensure that the objectives of the Policy Statement are achieved. Respondent also rewards the branch offices that are the most successful in promoting diversity goals. Not only does Respondent not discriminate on the basis of race, age or place of birth, it actively promotes equal opportunity in the work place through the Policy Statement.

II. RESPONDENT DOES NOT SEEK A BONA FIDE OCCUPATIONAL QUALIFICATION EXEMPTION UNDER R.C. 4112.02 (E).

The finding that Respondent did not seek to a bona fide occupational exemption under R.C. 4112.02 (E) is correct. (Conclusions of Law, 7) Respondent does not contend that race, age, or place of birth are or should be bona fide occupational qualifications for the position of security officer.

III. RESPONDENT MUST INQUIRE OF THE APPLICANT'S RACE, AGE AND PLACE OF BIRTH IN ORDER TO REGISTER THEM WITH THE DIVISION OF OHIO HOMELAND SECURITY.

The Division of Ohio Homeland Security must duly register all private security officers employed in the State of Ohio. O.R.C. §4749.06 In order to complete the process to permit the applicant to be hired as a security officer, he or she must first be registered with the Division of Ohio Homeland Security. This is part of the application process, in addition to the Employment Application. The forms necessary to obtain the registration are prescribed by the State of Ohio, and are the Ohio Civilian Background Check fingerprint card and the Employee Registration Application. (Exhibits 2 and 3 to the Joint Stipulation).

A. Division of Ohio Homeland Security Employee Registration Application.

Respondent must inquire of the applicant to obtain the information needed to complete the Employee Registration Application. (Joint Stipulation, Exhibit 3) That information includes the applicant's date of birth and city and state of birth. Moreover, Respondent can not merely provide this blank form to the applicant and have him or her fill it in, add the photograph and submit, as Respondent's qualifying agent is required to review and sign the form, certifying that he has no reason to believe it is false or misleading. (Stipulation, B 15) That certification can not occur if Respondent does not have the information included in the application.

B. Ohio Civilian Background Check fingerprint card.

Along with the Employee Registration Application, Respondent is required to prepare and submit to the Bureau of Criminal Investigations the Ohio Civilian Background Check fingerprint card (Exhibit 2 to the Joint Stipulation). That card requires information on the applicant, including but not limited to (i) date of birth, (ii) race, (iii) and place of birth. (Stipulation, B 11) The card must be complete for the background check to be run, the results of which are provided to the Division of Ohio Homeland Security to determine eligibility for registration as a security officer.

IV **R.C. 4112.02 (E) MUST BE CONSTRUED CONSISTENT WITH THE REQUIREMENTS OF REGISTRATION WITH THE DIVISION OF OHIO HOMELAND SECURITY.**

Clearly, the State of Ohio has a compelling interest in ensuring that employers in the State do not discriminate on the basis of race, age, or place of birth in the hiring process.

However, at least since “9/11”, there is no less a compelling State interest in ensuring the private security officers, tasked with front line responsibility for the security of major industrial sites, commercial developments, and critical infrastructure, are fully screened to confirm they do not pose a risk to the very facilities and people they are tasked to guard.

Respondent respectfully submits that neither §4112.02 (E) (1) nor §4112.02 (E) (2) should be construed to prohibit Respondent from eliciting or recording information on applicants’ age, place of birth, or race that is necessary to complete and submit applications for their registration with the Division of Ohio Homeland Security; nor should §4112.02 (E)(3) be construed to prohibit the use of the Respondent application, the Ohio Civilian Background Check finger print card, or the Division of Ohio Homeland Security Employee Registration Application, each of which calls for the recording or disclosure of age, place of birth and race.

The fact that the legislature specially addressed the bona fide occupational qualification exemption in R.C. 4112.02 (E) should not be interpreted to mean they intended to precluded employers from obtaining information for non-discriminatory purposes necessary for compliance with other State laws or regulations.

The Commission is not being asked to decide between prohibiting discrimination and the security protection needs of the State. It is only being asked to determine that the eliciting and collection of age, place of birth and race information should not be prohibited where the information is needed for a legitimate State purpose and is not being used in any discriminatory manner.

V. **R.C. 4112.02 (E) (1), (2) AND (3) RELATED TO RACE, NATIONAL ORIGIN, AND AGE ARE PREEMPTED BY THE PRIVATE SECURITY OFFICER EMPLOYMENT AUTHORIZATION ACT OF 2004 (“PSOEAA”).**

On December 17, 2004, Congress enacted the PSOEAA, as part of the Intelligence Reform and Terrorism Act of 2004- Public Law 108-458. The PSOEAA authorizes a fingerprint-based criminal history check of the state and national criminal history records maintained by the FBI to screen prospective and current private security officers. Regulations for implementing the PSOEAA were promulgated in January 2006 as 28 CFR 105.21-105.27.

The employer first obtains the fingerprints of the prospective security officer and then makes application through the State Identification Bureau (“SIB”) for a background check. If the SIB check does not disclose a record, the fingerprints and application are then submitted by the SIB to the FBI for a check of their records. The FBI will report the results to the SIB. See 28 CFR 105.23.

The fingerprint card prepared by the employer under the PSOEAA has the same information included on the card used for the Division of Ohio Homeland Security—age, race, and place of birth. (See Stipulation, Exhibit 2).

To the extent Ohio Revised Code §§ 4112.02 (E) (1), (2), or (3) would preclude Respondent from collecting and recording the information it would need to request both the

state and FBI criminal record check authorized by the PSOEEA, those prohibitions must be deemed to be preempted by the PSOEEA.

VI. R.C. 4112.02 (E) (1), (2) AND (3) RELATED TO RACE, NATIONAL ORIGIN, AND AGE ARE PREEMPTED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND THE AGE DISCRIMINATION IN EMPLOYMENT ACT.

Title VII prohibits employment discrimination, inter alia, on the basis of race or national origin and the ADEA prohibits discrimination on the basis of age. This includes discrimination in the hiring process. However, neither Title VII nor the ADEA prohibit inquires in the application process as to the race, national origin, or age of the applicant, so long as that information is not used for discriminatory purposes. To the contrary, the Title VII regulations specifically reorganize the importance of this information by providing that any State or local laws prohibiting such inquires shall not apply to inquires required under the Title VII regulations. 29 CFR § 1602.29

Both Title VII and the ADEA recognize that a policy or procedure used in the hiring or selection process (such as tests), even though neutral on its face, may be discriminatory if it has a disparate impact on a protected group (race, national origin, age) in the absence of legitimate business purpose for the policy or practice. Disparate impact is shown by a comparison of the impact of the policy or procedure on those inside and outside of the protected group. If the employer is prohibited from collecting the data with respect to the protected group, it will be precluded from demonstrating a lack of any disparate impact.

Discrimination in the hiring process can also be established by showing of disparate application of policies. Under Title VII and the ADEA, a prima facie case is established if the charging party can demonstrate that he or she is in a protected a group, and suffered an adverse employment action. The employer then must establish a non-discriminatory, non-pretextual reason for the action. Without comparative data on other applicants' race, national origin, or age an employer would be unable to establish that the charging party did not receive disparate treatment in the application of the policy or procedure toward him or her.

Since 1965, Respondent has had an Equal Opportunity Policy Statement (Stipulation B16), a copy of which is attached as Exhibit 4 to the Stipulation. That Policy prohibits discrimination in recruiting and hiring of employees, and tasks the Manager, Human Resource with monitoring for compliance. Again, without recorded data in the application process on areas covered by the Equal Opportunity Policy, Respondent is not able to audit its results to ensure compliance with the Policy Statement, as well as with Title VII and the ADEA.

The prohibition on the eliciting, collection and recording of information on race, national origin, and age in Ohio Revised Code §4112.02 (E) (1), (2), and (3) prevents an employer from ensuring compliance with Title VII and the ADEA, and further prevents the employer from responding to discrimination charges filed with the EEOC under either of those Acts. Accordingly, the prohibitions in §4112.02 (E) (1), (2), and (3) must be deemed to be preempted by Title VII and the ADEA and of no force or effect with respect to employers covered by those Acts.

VII. R.C. 4112.02 (E) (1), (2) AND (3) RELATED TO RACE AND NATIONAL ORIGIN ARE PREEMPTED BY EXECUTIVE ORDER No. 11246.

Executive Order No. 11246, Sec. 202, requires every Federal Government contract agency to include in all non-exempt Government contracts specific provisions prohibiting the contractor from discriminating against any employee or applicant for employment because of race, creed, color or national origin. The Order goes on to require the contractor to furnish all information and reports required by the rules, regulations, and orders issued thereunder. It additionally requires the contractor to pass-down and include these provisions in every non-exempt subcontract or purchase order.

Government contractors, and by virtue of the pass-down requirements, those to which it issues subcontracts or purchase orders, are required, where possible, to maintain records sufficient to be able to identify the race and ethnicity of each applicant for employment. See 41 CFR 60-1.12 (c) (1) (ii). This requirement applies with respect to all the employees or applicants of the covered government contractor, sub contractor, or vendor; not just those who work or apply for work on the government contract or subcontract.

Although R.C. 4112.02 includes an exemption for employment applications where the employer holds a contract with the government of the United States, or an agency thereof, that exemption is limited to providing proof of United States citizenship, and photographic or finger print identification for security purposes. However, this exemption does not address the applicant record keeping requirements of Executive Order No. 11246. Even

this narrow exemption does not apply to subcontractors of a government contractor, which are subject to the same requirements because of the pass-down requirements of Executive Order No. 11246. Again, as with the bona fide occupation qualification exemption, this omission can not be reasonably interpreted as the legislature's conscious decision to exempt only prime contractors, and not subcontractors subject to the same Federal requirements, and not allow compliance with the record keeping requirements.

Respondent is not currently a government contractor; however, it has a number of contracts to provide security services for Government contractors that contain the pass-down provisions of Executive Order No. 11246, Sec 202. Respondent is, therefore, required to obtain and maintain information on the gender, race, and ethnicity of its applicants.

Accordingly, the prohibitions in §4112.02 (E) (1), (2), and (3) with respect to information on gender, race, and ethnicity must be deemed to be preempted by Executive Order No. 11246, and the regulations thereunder.

VIII REVISING THE APPLICATION FORM WOULD NOT RESOLVE THE COMPLIANCE ISSUES.

The ALJ recommends that Respondent Cease and Desist using its employment application form that elicits information prohibited by R.C. 4112.02(E). (Recommendation 1.) While R.C. 4112.02(E) (3) covers only applications for employment, R.C. 4112.02(E) (1) and (2) covers eliciting any information and keeping any records prior to employment related to , *inter alia*, age, race, or national origin Even IF there were no reference to age, race or national origin in the employment application, the requirement of completing the Division

of Ohio Homeland Security Registration Application, the fingerprint card, and PSOEAA clearance before employment entails the eliciting and recording of information otherwise prohibited by R.C. 4112.02(E)(1) and (2). Likewise, the obtaining and recording of this information, otherwise than in the employment application, necessary for EEOC and Executive Order No. 11246 compliance purposes, as discussed above, would be prohibited by those sections.

The only way to resolve these inconsistencies is to construe R.C. 4112.02 (E) as to not preclude the eliciting or recording of information in the pre-employment process where such information is necessary to meet other, non-discriminatory, legal requirements. To interpret it otherwise is to find a legislative intent to preclude employers from meeting their other legal obligations.

IX CONCLUSION.

For the foregoing reasons, Respondent objects to the conclusion that it is in violation of R.C. 4112.02 (E), and requests findings that:

1. Obtaining race, age, and place of birth information by Respondent in the application process necessary to complete registration with the Division of Ohio Homeland Security does not violate R.C. 4112.02 (E).
2. In so far as R.C. 4112.02 (E) would preclude Respondent from collecting and recording the information it would need to request both the state and FBI criminal record check authorized by the PSOEAA, those prohibitions are deemed to be preempted by the PSOEAA.

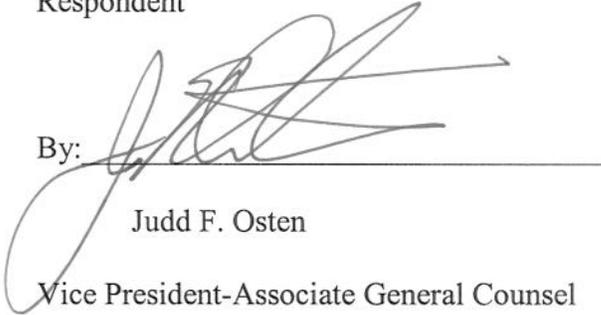
3. In so far as R.C. 4112.02 (E) (1) (2) and (3) would preclude Respondent from collecting information necessary for an employer to ensure compliance with Title VII and the ADEA in the application process, the prohibitions in R.C. §4112.02 (E) (1), (2), and (3) must be deemed to be preempted by Title VII and the ADEA and of no force or effect with respect to employers covered by those Acts.
4. In so far as R.C. 4112.02 (E) (1) (2) and (3) would preclude Respondent from collecting and retaining information with respect to the race or ethnicity of its applicants, the prohibitions in R.C. §4112.02 (E) (1), (2), and (3) must be deemed to be preempted by Executive Order No. 11246.

Respectfully submitted,

GUARDSMARK, LLC

Respondent

Dated: September 22, 2009

By: 

Judd F. Osten

Vice President-Associate General Counsel

DECLARATION OF SERVICE BY MAIL

I, the undersigned, hereby declare:

I am over eighteen years of age and not a party to the within cause. My business address is 22 South Second Street, Memphis, TN 38103.

On September 22, 2009, I served the original of the attached **STATEMENT OF OBJECTIONS OF RESPONDENT GUARDSMARK, LLC** by placing the same in an envelope and depositing it for next-day delivery by Federal Express at 22 South Second Street, Memphis TN 38103, addressed as follows:

Desmon Martin
Chief of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 42315-3414

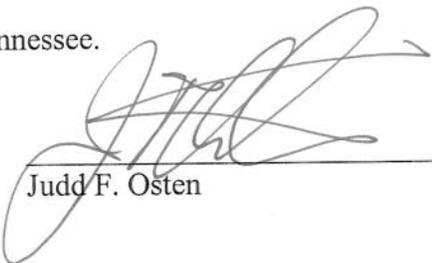
On September 22, 2009, I served copies of the attached **STATEMENT OF OBJECTIONS OF RESPONDENT GUARDSMARK, LLC** by placing the same in an envelope and depositing them in U.S. Mail at 22 South Second Street, Memphis TN 38103, addressed as follows:

Patrick M Dull, Esq. Esq.
Associate Attorney General
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414

I declare under penalty of perjury under the laws of the State of Tennessee that the foregoing is true and correct.

Executed on September 22, 2009 at Memphis, Tennessee.



Judd F. Osten

**RESPONSE
TO
OBJECTIONS**



RICHARD CORDRAY
OHIO ATTORNEY GENERAL

September 29, 2009

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
30 E. Broad Street, 5th Floor
Columbus, Ohio 43215

Re: *Ohio Civil Rights Commission v. Guardsmark, LLC*
Case No. 10017

Dear Judge Johnson:

Enclosed please find the *Response of the Ohio Civil Rights Commission to Guardsmark, LLC's "Statement of Objections"* to be filed in the above-referenced action.

I have enclosed an additional copy to be time-stamped and returned via interoffice mail.

If you have any questions, please do not hesitate to contact me. Thank you for your assistance in this matter.

Very truly yours,

RICHARD CORDRAY
Attorney General of Ohio

Patrick Dull

PATRICK DULL
Assistant Attorney General
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
614-466-7900 (telephone)
614-466-2437 (facsimile)
Patrick.dull@ohioattorneygeneral.gov

PD/jkd

Enclosures

cc: Judd F. Osten, Esq.
Desmon Martin

STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:)
)
OHIO CIVIL RIGHTS COMMISSION,) COMPLAINT NO. 10017
)
Complainant,)
)
vs.) ADMINISTRATIVE LAW JUDGE:
) DENISE JOHNSON
)
GUARDSMARK LLC.)
)
Respondent.)

**RESPONSE OF THE OHIO CIVIL RIGHTS COMMISSION
TO
GUARDSMARK, LLC'S "STATEMENT OF OBJECTIONS"**

PATRICK M. DULL, ESQ.
Assistant Attorney General
Civil Rights Section
30 East Broad Street, 15th floor
Columbus, Ohio 43215-3428

Counsel for Ohio Civil Rights Commission

1. Guardsmark blurs the distinction between “applicant” and “employee.”

Contrary to Ohio law, Guardsmark requires all job applicants to reveal their race, date of birth, and place of birth prior to hire. These inquiries clearly violate Ohio Revised Code 4112.02(E)(1) and 4112.02(E)(3), which prohibit employers from eliciting such information from applicants, or requesting such information on application forms.

In its Objections, Guardsmark repeats the arguments it made at the evidentiary hearing, claiming that it *must* elicit this information due to the requirements of state and federal law. However, as the Administrative Law Judge found, Respondent’s argument is merely an attempt at “blurring of the distinction between ‘applicant’ and ‘employee’ in regard to the legal requirements imposed by state and federal law.” (ALJ Recommendation, Conclusion of Law No. 14).

It is true that Guardsmark is required to submit information regarding an *employee’s* (as opposed to an *applicant’s*) race, date of birth, and place of birth to the government “no sooner than three (3) days nor later than seven (7) calendar days *after the date on which the employee is hired.*” (see R.C. Section 4749.06(A), emphasis added – see also ALJ Recommendation, Conclusion of Law No. 11). Obviously, this information can be obtained *after* hiring the applicant.

The use of the word “employee” within R.C. Section 4749.06(A) also demonstrates that the information can be obtained after hire, without eliciting the prohibited information when the person is still just an applicant for hire. Obtaining the information after hire will accomplish the purpose of Ohio’s law – to avoid the appearance (or actuality) of the prohibited information being used to impact the employment decision – while still providing Guardsmark with the opportunity to collect the data *after* the employment decision has been made.

As a result, there is no conflict between the pre-hire requirements of R.C. 4112.02(E)(1) and 4112.02(E)(3), and the post-hire requirements claimed by Guardsmark. Simply put, Guardsmark is required to submit the information “no sooner than three days” *after* an employee is hired. This does not require eliciting the prohibited information from an applicant *prior* to hire.

2. Fingerprint checks do not require Guardsmark to elicit the prohibited information on applications forms.

Guardsmark also argues that since an employee must undergo a criminal records check – which uses a fingerprint card asking for race, date of birth, and place of birth – Guardsmark therefore must also ask for this same information on their employment application. This is simply not true.

The fingerprint card itself clearly reveals that it is to be filled out by the person submitting the fingerprints – *not* by the employer. In fact, there is no part of the card that requires any input from the employer. Furthermore, R.C. 4749.06(B)(2) requires the *employee* to submit the set of fingerprints directly to the Bureau of Criminal Investigation. Again, Guardsmark simply does not need to elicit the person’s race, date of birth, and place of birth at the pre-hire application stage.

3. Ohio law is not preempted by Title VII or the ADEA.

Next, Guardsmark claims that Ohio law is preempted by Title VII of the Civil Rights Act of 1964. It is not. *California Federal Sav. & Loan Ass’n v. Guerra* (1987) 479 U.S. 272, 282; 107 S.Ct. 683 (“*** there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of Title VII.”). Likewise, the Age Discrimination in Employment Act itself clearly states that “Nothing in this Act shall affect the jurisdiction of any agency of any

State performing like functions with regard to discriminatory employment practices on account of age ***.” 29 USCS § 633. Thus, Ohio law is not preempted by Title VII or the ADEA.

4. Defending against discrimination claims does not provide an excuse for violating the law.

Next, Guardsmark claims that it must maintain statistics concerning the entire applicant pool in order to preserve an affirmative defense against future allegations of disparate impact discrimination. In essence, Guardsmark’s argument claims that it must violate Ohio law today in order to defend itself against potential allegations of discrimination in the future.

This argument does not even address the issue – Ohio law prohibits Guardsmark from requesting the prohibited information on their applications for employment. Just because Guardsmark might find the prohibited information *useful* does not override the requirements of Ohio law.

As suggested above, such information can be collected *after* the employment decision has been made. Again, this will accomplish the purpose of the law – to avoid the appearance of prohibited information being used to taint the employment decision – while still providing Guardsmark with the opportunity to collect data if it so desires.

5. The final argument raised by Guardsmark in its Objections was not raised before the closing of the evidentiary record.

Finally, Guardsmark attempts to introduce a new, previously un-alleged justification for why it requested the prohibited information. Guardsmark now claims that an Executive Order mandates that it provide the information required to be retained by 41 CFR 60-1.12(c)(1)(ii). This argument was not raised before the close of evidence, nor was it raised in Guardsmark’s post-hearing reply brief. As a result, this argument was waived. Further, the very fact that this

argument was not previously raised demonstrates that it had nothing to do with why Guardsmark elicited the information – in short, this reason has been concocted after the fact.

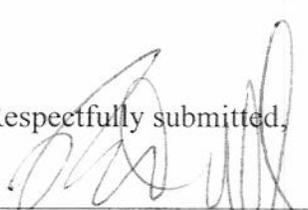
Nevertheless, assuming the argument is not waived, Guardsmark does not even allege that all of its employment-related activities are under government contracts. The Federal Regulation – even if applicable – simply would not apply to Guardsmark’s non-governmental contracts.

Further, even if the Federal Regulation cited by Guardsmark requires government contractors to elicit the prohibited information from “applicants” instead of “employees,” it only requires such information “*where possible*.” As a result, even if the argument was not already waived, and even if it applies to “applicants,” and even if Guardsmark works exclusively under government contracts, the Federal Regulation clearly states that it only requires obtaining the information “*where possible*.” In Ohio, it is *not possible* to elicit the race, date of birth, and place of birth on an application without violating Ohio law. Therefore, the Federal Regulation simply does not require Guardsmark to elicit the prohibited information contrary to Ohio law.

CONCLUSION

Based on the above, it is respectfully requested that the Commission reject Guardsmark’s Objections, and adopt the Report and Recommendation of the Administrative Law Judge.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon:

Judd F. Osten, Esq., Vice President
Associate General Counsel, Guardsmark LLC
22 South Second Street
Memphis, TN 38103

and

Desmon Martin
Chief of Enforcement and Compliance
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414

via U.S. Mail this 29th day of September, 2009.



Patrick Dull, Esq.



Governor
Ted Strickland

Ohio Civil Rights Commission

Board of Commissioners

Eddie Harvell, Jr., Chair
Leonard J. Fluhert
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

December 23, 2009

Remailed on February 3, 2010

Judd F. Osten, Esq.
Vice President – Associate General Counsel
Guardsmark LLC
22 South Second Street
Memphis, TN 38103

Re: *Ohio Civil Rights Commission v. Guardsmark, LLC*
DAYA6060705(17412)09192005 22A-2006-00123C
Complaint No. 10017

This was originally mailed on December 23, 2009, but contained the wrong address on the envelope. The following information is being remailed today.

Enclosed is a certified copy of the Commission Order issued in the above captioned matter. This Order requires Respondent to Cease & Desist from any and all practices involving the violation of Chapter 4112 of the Ohio Revised Code.

Respondent is herewith notified of its right to obtain judicial review of this Order, as set forth in Revised Code § 4112.06.

FOR THE COMMISSION

Desmon Martin / cjs

Desmon Martin
Director of Enforcement and Compliance

DM:cjs
Enclosure

Lori A. Anthony, Esq. – Chief, Civil Rights Section
Denise M. Johnson, ALJ – Division of Hearings
Compliance [EEOC/HUD]

Certified No. 7003 – 1010 – 0000 – 4149 – 5001 [Judd F. Osten, Esq. – Guardsmark]

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TED STRICKLAND
GOVERNOR

IN THE MATTER OF:)	
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)	
Complainant,)	
)	ADMINISTRATIVE LAW JUDGE:
vs.)	DENISE JOHNSON
)	
GUARDSMARK LLC.)	
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FINAL ORDER

This matter comes before the Commission upon the sworn charge affidavit of Richard A. Hahn filed with the Ohio Civil Rights Commission; and Complaint and Notice of Hearing No. 10017.

FACTS

Richard A. Hahn filed a charge alleging that Respondent Guardsmark LLC terminated him due to his age. The Commission found No Probable Cause with regard to this allegation. However, during its investigation the Commission found that Respondent's application form requested information related to an applicant's age, race, and national origin, in violation of R.C.

4112.02(E), and accordingly found Probable Cause with regard to the unlawful application form.

After conciliation efforts failed, the Commission issued Complaint No. 10017.

DISCUSSION

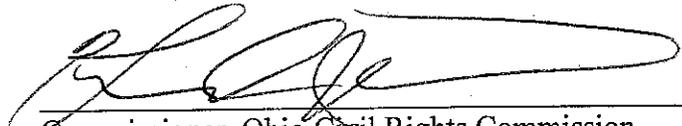
All facts were stipulated, and the case was submitted to the Commission's Administrative Law Judge. The Administrative Law Judge subsequently issued a recommendation to the Commission. After careful consideration of the entire record, the Commission adopted the Administrative Law Judge's recommendations at its public meeting on October 22, 2009.

CONCLUSION

The Commission incorporates the findings of fact, conclusions of law, and the recommendations for relief contained in the Administrative Law Judge's report as if fully rewritten herein, and hereby issue an Order requiring:

- 1) that Respondent Cease and Desist from using an employment application form that elicits information prohibited by R.C. 4112.02(E), *et.seq.*;
- 2) that Respondent, within one hundred and twenty (120) days after receipt of the Commission's Final Order, provide a copy of its employment application form which complies with R.C. 4112.02(E) to the Commission's Office of Special Investigations (OSI);
- 3) that Respondent, within ninety (90) days after receipt of the Commission's Final Order, receive training from an agency certified to provide training to employers on Ohio's anti-discrimination law, and;
- 4) that Respondent, within ninety (90) days after receipt of the Commission's Final Order, provide OSI with documentation of completion of the employer's training on Ohio's anti-discrimination law.

This ORDER issued by the Ohio Civil Rights Commission this 12th day of November, 2009.



Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Director of Enforcement and Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Final Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.



DESMON MARTIN
DIRECTOR OF ENFORCEMENT AND COMPLIANCE
OHIO CIVIL RIGHTS COMMISSION

DATE: 11-12-09



Ohio Civil Rights Commission

Governor
Ted Strickland

Board of Commissioners

Liddie Harvell, Jr., Chair
Leonard J. Hubert
Tom Roberts
Rashmi N. Yajnik

G. Michael Payton, Executive Director

December 23, 2009

Judd F. Osten, Esq.
Vice President – Associate General Counsel
Guardsmark LLC
22 South Second Street
Memphis, TN 38103

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FOR THE COMMISSION

Desmon Martin / cjs

Desmon Martin
Director of Enforcement and Compliance

DM:cjs
Enclosure

Lori A. Anthony, Esq. – Chief, Civil Rights Section
Denise M. Johnson, ALJ – Division of Hearings
Compliance [EEOC/HUD]

Certified No. 7005 – 1160 – 0004 – 7287 – 2886 [Judd F. Osten, Esq. – Guardsmark]
November 12, 2009 Commission Meeting

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