

Memo

To: Desmon Martin, Director of Enforcement and Compliance
From: Denise M. Johnson, Chief Administrative Law Judge 
Date: April 22, 2011
Re: *Frank Weatherspoon v. Cherryhill Management*
(CIN) 76 (17791) 0607200722A-2006-19812-C
Complaint No. 07-EMP-CIN-17791

✦*

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT**

ALJ RECOMMENDS CEASE & DESIST ORDER

Report issued: April 22, 2011

Report mailed: April 22, 2011

✦✦ **Objections due: May 17, 2011** ✦✦

DMJ:tg

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

FRANK WEATHERSPOON

Complainant

v.

CHERRYHILL MANAGEMENT

Respondent

Complaint No. 07-EMP-CIN-17791
(CIN) 76 (17791) 06072007
22A-2006-19812-C

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

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Complainant

ALJ'S REPORT BY:

Denise M. Johnson
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INTRODUCTION AND PROCEDURAL HISTORY

Frank Weatherspoon (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on June 7, 2006.

The Commission investigated the charge and found probable cause that Cherryhill Management, Inc. (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 May 10, 2007.

The Complaint alleged Respondent subjected Complainant to different terms, conditions, and privileges of employment, including termination, based on his race.

Respondent filed an Answer to the Complaint on June 7, 2007. 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 May 20, 2008 at the Commission's Dayton Regional Office, 40 West 4th Street, Suite 1900, Dayton, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 199 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on June 1, 2009; by Respondent on June 22, 2009; and a reply brief filed by the Commission on July 1, 2009.

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 June 7, 2006.

2. The Commission determined on April 19, 2007 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. Respondent is a corporation doing business in Ohio and an employer.

5. Complainant is African-American.

6. Complainant began working for Respondent as a driver on March 10, 2004.

7. Respondent is a thrift store business and operates three (3) stores located in Kettering, Fairfield, and Evandale, Ohio.

8. Respondent solicits donations of clothing and household goods.

9. Drivers who work for Respondent pick up the donated items which are the inventory sold at the stores.

10. Respondent's president is Pat Walsh (Walsh), who is also a co-owner along with his wife.

11. Approximately 200 employees work at Respondent's stores.

12. Diane Alsdorf (Alsdorf), Caucasian, who managed the Fairfield store, hired Complainant to work at the Kettering store. Judy Negrete (Negrete), Hispanic, became the manager after Alsdorf left to manage another store. Connie Johnson (Johnson), Caucasian, is the manager at the Evandale store.

13. Drivers who are picking up donations in route put the donated items in the back of the truck. Respondent's written rule is that drivers are to clean the cabs after unloading. (Comm. Ex. 1)

14. It was an unwritten practice that if the back of the truck was full or there was a donated item that was breakable, the driver would put the item in the cab. (Tr. 82)

15. The managers periodically checked the cabs to determine whether drivers were cleaning the cabs out after the trucks were unloaded.

16. On or around May 9, 2006, one of the drivers from the Fairfield store found a box of jewelry in one of the glove boxes of a truck. (Tr. 83)

17. It was brought to management's attention that a box of jewelry was found in one of the glove boxes of a truck.

18. At a lunch meeting the managers discussed the discovery of the jewelry box and decided they could not determine who put the box of jewelry in the truck's glove box.

19. The managers decided they would start checking the cabs of the trucks every day.

20. The managers did not tell the drivers about the new procedure.

21. Prior to the managers' meeting, drivers were not automatically terminated if they failed to clean out the cab before they unloaded the back of the truck. (Tr. 84)

22. On May 11, 2006, Complainant picked up donations on his route.

23. When Complainant returned to the store he got out of the truck and started unloading the back of his truck.

24. While he was unloading his truck, Complainant saw Negrete talking on her cell phone in the cab of his truck. (Tr. 32)

25. Complainant went to the front of the truck to clean out the cab. When he removed the donations from the cab Negrete instructed her assistant to take the items from him. Negrete then instructed Complainant to go home and to return to work the next day at 6:00 a.m. (Tr. 33)

26. The next day, May 12, 2006, Respondent terminated Complainant's employment.

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 the Respondent subjected the Complainant to different terms, conditions, and privileges of employment, including termination, based on his race.

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, 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.²

McDonnell 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 254-255, 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 the employment action.

Hicks, supra at 511, 62 FEP Cases at 100.

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 termination; ... 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).

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 Complainant's discharge 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. Respondent met its burden of production with the introduction of evidence that Complainant was terminated from employment for stealing donated items he had picked up on his truck route in violation of Respondent's policy.

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated

against Complainant. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for discharging Complainant was not the true reason, but was "a pretext for discrimination." *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 discrimination" unless it is shown *both* that the reason is false, *and* that discrimination is the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

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, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer 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 terminating Complainant for stealing donated items. The Commission may directly challenge the credibility of the Respondent's articulated reason by showing 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 fact-finder 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 ... [n]o additional proof is required.³

Hicks, supra at 511, 62 FEP Cases at 100 (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, 62 FEP Cases at 100, n.4.

12. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reason 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.*

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged Negrete treated comparable employees who are not in the protected group and who engaged in conduct of a similar nature better than Complainant was treated.

14. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects":

Thus to be deemed “similarly situated”, the individuals with whom ... [Complainant] seeks to compare ... her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.

Mitchell v. Toledo Hospital, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

15. To be deemed similarly situated, “a precise equivalence in culpability” is not required; misconduct of “comparable seriousness” may suffice. *Harrison v. Metro. Gov’t. of Nashville and Davidson Cty.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted). Likewise, similarly situated employees “need not hold the exact same jobs; however, the duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.” *Hollins v. Atlantic Co., Inc.*, 76 FEP Cases 553, 557 (N.D. Ohio 1997), quoting *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

16. Respondent maintains security cameras in different areas of the store. Security cameras are inside the store and are also in the area where the trucks are unloaded.

17. Respondent has successfully used this method to terminate employees for stealing. (Resp. Ex. G, F)

18. In Complainant's case, Negrete did not use the security cameras to determine whether the items in plain view in the truck driven by Complainant were taken from the truck and put into Complainant's personal automobile or otherwise removed from Respondent's property.

19. Negrete's conduct was not consistent with Respondent's policy that permits drivers to put items in their cabs under certain circumstances and the requirement that the back of the truck be unloaded before cleaning out the cab.

20. The credible evidence in the record supports the determination that Negrete's investigation of Complainant for theft

and the subsequent decision to terminate his employment was not just bad business judgment.

21. An “employer’s business judgment is not an absolute defense to unlawful discrimination.” *Wexler v. White’s Fine Furniture, Inc.*, (6th Cir. 2003), 317 F.3d 564, 576.

Although it is true that a factfinder should refrain from probing an employer’s business judgment, a decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision.

EEOC v. Yenkin-Majestic Paint Corp., 112 F.3d 831, 835 (6th Cir. 1997).

22. Complainant was the only African-American truck driver who worked for Respondent.

23. Some of the most compelling testimony that sheds light on Negrete’s motivation for the rushed investigation she conducted on Complainant came from Mark Byanski (Byanski), a Caucasian truck driver who trained Complainant:

Ms. Terrell: Okay. And when you worked at Cherryhill um how did Judy treat Mr. Weatherspoon compared to other employees?

Mr. Byanski: Um, there, I mean in general when Frank would come into the room he was very polite ... he would say hi to everybody. I would watch her turn away from him, not respond to him and then in particular after I trained Frank we had got a truck for him. He had a small route the following day and had some other things he had to do before the route and um this was his first day on his own. And um, he um, we were sitting at some tables and I was mapping my route, he was looking at his and he asked Judy uh okay so I'm doing this, I'm doing this and she kind of just snapped and said you weren't even listening to me, you know, you are doing it! This is what you are doing! And I don't want to hear a word out of you kind of thing. And it took me aback because um you know in this job it is a very physical job, you have a lot of turnover. I mean I would probably train eight guys before I would get a guy that would stay for a number of months. And Frank was a guy that had an enthusiasm for the job and for her to snap at him and this was in the first few weeks of being there, kind of took me aback. And I did approach her but she just walked away and I ... so ... there was something between them that, you know, I don't know what it was but I didn't see Frank do anything to her so I have no idea.

(Tr. 126)

24. Byanski also gave credible testimony that Negrete was giving Complainant less favorable routes than the other drivers.

(Tr. 129)

25. This was confirmed by Alsdorf:

Ms. Terrell: Okay. And did Frank Weatherspoon ever complain to you about the size of the routes that Judy Negrete gave him?

Ms. Alsdorf: Yes.

Ms. Terrell: And what did he say?

Ms. Alsdorf: Um he would say that when Connie and I dispatched the trucks he would make money. When Judy did he wasn't making enough money to feed his family.

Ms. Terrell: And was there any merit to Mr. Weatherspoon's complaints about the size of his routes?

Ms. Alsdorf: Um, yes.

Ms. Terrell: Why?

Ms. Alsdorf: Uh, there were drivers that hadn't been there as long that were probably equal to Frank that were getting full routes. Frank would receive a lot of partial routes.

Ms. Terrell: And what were the races of the other drivers?

Ms. Alsdorf: Uh, White or Hispanic.

(Tr. 106)

26. Byanski was in an accident with one of Respondent's trucks which caused major damage. Negrete did not require Byanski to be drug tested pursuant to Respondent's policy.

27. Complainant was in a minor accident with one of Respondent's trucks where he was driving down an alley and a tree branch scraped the side of the truck. Although it was considered a minor accident under Respondent's policy (where Respondent could waive the requirement that the employee take a drug test), Negrete required Complainant to take a drug test.

28. Byanski also testified that he put donated items in the cab of the truck he was driving all the time:

Ms. Terrell: So you are saying that sometimes if the back wasn't full you would toss stuff into the cab?

Mr. Byanski: Oh yeah. Like uh, well you know, like I said you are going to 150 houses a day. You are in and out of that truck 150 times. You reach your last stop and they got a little Kroger bag with a couple of shirts in it, you just throw it in the cab. I've had stuff sit in the cab for a couple of days.

[...]

Ms. Terrell: And did you ever unload items from the back of the truck before you unloaded stuff from your cab?

Mr. Byanski: Yes. I would um ... if my cab was full, there were times where you'd come in the store, fax your sheets to the office and start unloading your truck, which was normal process. But if you had a big day and your cab was full, you had stuff in your cab as well. Sometimes I would do it first, sometimes I would forget and just start unloading, you know, normal process type deal and then get it afterwards. Sometimes I would have a bag that sat in there for a couple of days just cause I would you know, cause I am on the go, I am ready to get out of there everyday. And so.

(Tr. 132)

29. Negrete told Martha Kehoe (Kehoe), an employee, that if it was up to her she would not have African-Americans working for her.

[T]he impact and relevance of racial remarks must be determined on a case-by-case basis after consideration of the totality of the circumstances.

Cassells v. University Hosp., 62 FEP Cases 963, 966 (D.C. Cir. 1992) (citations omitted). *EEOC v. Alton Packing Corp.*, 52 FEP Cases 1734 (11th Cir. 1990) (general manager's statement that if it were his company he would not hire blacks is direct evidence of discriminatory animus in failing to promote the plaintiff).

30. Denise Cauley (Cauley), an employee, observed that after an African-American employee used the telephone Negrete sprayed the phone with disinfectant.

31. Cauley observed that Negrete treated African-American employees “rougher” than other employees. (Tr. 154-155)

32. As if to ensure Complainant would be viewed in a bad light, Negrete opened up Complainant’s personal backpack in which she found a condom, and took a picture of it.

33. I find Negrete was motivated by a discriminatory animus toward African-Americans when she used techniques to investigate Complainant that were inconsistent with Respondent’s policies and past practices.

34. Although the decision to terminate Complainant was made by Patrick Walsh, Respondent's owner, Walsh accepted Negrete's determination that Complainant put the donated items in the cab with the intent to steal them without conducting an independent investigation.

35. Alsdorf agreed to Negrete's determination without questioning her about the investigation or allowing Complainant to explain, even though he attempted to call. Alsdorf knew Complainant felt Negrete treated him differently than other truck drivers based on his race:

Ms. Terrell: Did Mr. Weatherspoon ever complain to you that he thought Ms. Negrete didn't like him because he was Black?

Ms. Alsdorf: Yes.

Ms. Terrell: And how often - how many times did Mr. Weatherspoon tell you that?

Ms. Alsdorf: I'm gonna say ten/twelve, usually when Judy dispatched the trucks and he didn't make any money that week is when he would call or when he was unloading he would say something.

(Tr. 107)

36. Although Negrete did not have the authority to terminate Complainant's employment, it was her recommendation that influenced the termination.

“When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, (...) the employer may be held liable under a ‘rubber-stamp’ or ‘cat’s paw’ theory of liability.”

Arendale v. City of Memphis, (6th Cir. 2008), 519 F.3d 587 at 604.

37. After a careful review of the entire record, ALJ disbelieves the underlying reason Respondent articulated for Complainant's discharge and concludes that, more likely than not, it was a pretext or a cover-up for race discrimination.

38. Complainant is entitled to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 07-EMP-CIN-17791 that:

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

2. Complainant is awarded reinstatement and back pay, pursuant to R.C. 4112.05(G)(1). Within ten (10) days of the Commission's Final Order, Respondent is thereby ordered to make an offer of employment to Complainant for the position of truck driver. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage he would have been paid had he been employed as a truck driver on May 12, 2006 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the Commission's Final Order a certified check payable to

Complainant for the amount he would have earned had he been employed as a truck driver on May 12, 2006, and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less his interim earnings, plus interest at the maximum rate allowed by law;⁴

4. The Commission's calculations of back pay based on Complainant's wage statements and his federal W-2 Form for 2005 are as follows:

2006: \$27,051.08

2007: \$41,372.24

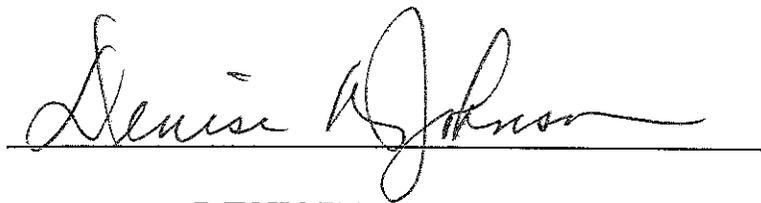
2008: \$15,912.00

The amount of back pay from the date of Complainant's termination until the date of the hearing is \$84,335.32, which continues to accrue from the date of the hearing, plus interest until the date of the offer of employment;

⁴ Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

5. The Commission order Respondent to receive training regarding the anti-discrimination laws of the State of Ohio. As proof of participation in anti-discrimination training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the anti-discrimination training. The letter of certification shall be submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order; and

6. Respondent shall post state and federal prohibitions against discrimination in the workplace in a conspicuous location on its premises.⁵

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

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 22, 2011

⁵ Downloadable, printable materials for employers may be accessed at www.crc.ohio.gov.

Statement
of
Objections

RECEIVED

MAY 17 2011

BEFORE THE OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

FRANK WEATHERSPOON,

COMPLAINANT,

v.

Complaint No. 07-EMP-CIN-17791
(CIN) 76 (17791) 06072007
22A-2006-19812-C

CHERRYHILL MANAGEMENT,

RESPONDENT

**RESPONDENT'S STATEMENT OF OBJECTIONS TO
ADMINISTRATIVE LAW JUDGE'S DECISION**

I. The ALJ Improperly Imputed The Discriminatory Intent Of A Subordinate To The President Of The Company's Decision To Terminate.

At paragraph 33 of her decision, Judge Johnson found that Judy Negrete was motivated by a discriminatory animus towards African-Americans. Then at page 34 of her decision, found that Mr. Walsh accepted Judy Negrete's determination that the Complainant put the donated items in the cab with the intent to steal them despite the fact that Mr. Walsh did not even speak to Ms. Negrete regarding the decision to terminate Mr. Weatherspoon.

A proper analysis of the "rubber stamp" or "cat's paw" theory of liability referenced by Judge Johnson in paragraph 36 of her decision will establish that it is completely improper to impute any discriminatory motive of Ms. Negrete to Mr. Walsh. Mr. Walsh testified:

"What happened in this particular case, Judy found these articles. They got pictures of the articles. A phone call was made to Diane. Diane came out. She reviewed it all, okay. Then Diane called me because she had more experience at this than Judy did because of the number of years that Diane has been working for me compared to the number of years that Judy has been working for me. The one has been working the longest for me is Connie Johnson and she was there the day I started this in '84. So there is a whole procedure so that there is no emotional firings. We only fire on facts." (Tr., pgs. 15-16).

Prior to making the decision to terminate Mr. Weatherspoon, Pat Walsh talked to Diane Alsdorf about what happened. (Tr., p. 15). Clearly, Mr. Walsh was relying on a more senior manager, Diane Alsdorf. (Tr., p. 190 and tr., pgs. 15-16).

Judy Negrete did not speak to Mr. Walsh regarding Frank Weatherspoon. Quoting from Judy Negrete's testimony,

"Mr. Gibson: Okay. So you talked to Diane but you didn't talk to Pat?

Ms. Negrete: I don't remember talking to him." (Tr., p. 169).

To find liability under the "rubber stamp" or "cat's paw" theory of liability, a plaintiff must show that the decision maker followed the biased recommendation of a subordinate without independently investigating the complaint against the employee. Stimpson v. City of Tuscaloosa 186 F.3d 1332 (11th Cir. 1999). The issue is whether or not the biased subordinate's discriminatory reports, recommendation or other actions caused the adverse employment action. EEOC v. BCI Coca-Cola 450 F.3d 476 (10th Cir. 2006).

The recommendations of Connie Johnson and Diane Alsdorf were based primarily upon the photos taken of the cab of Mr. Weatherspoon's truck. Connie Johnson saw the photos the day they were taken (Tr., p. 184). In particular the suspicion that Mr. Weatherspoon planned to steal the items was based on the photographs. Quoting from the transcript:

"Mr. Gibson: When you saw the photographs did they give you any suspicion that these items were going to be stolen?

Ms. Johnson: Yes.

Mr. Gibson: What made you suspicious?

Ms. Johnson: The main question I had as soon as I saw or as soon as I talked to Diane, I said was the back of the truck full? And she said no. And I said why would they even be there and that's what led us to believe that they were being or were planning to be stolen.

Mr. Gibson: Okay.

Ms. Johnson: There's, I can't really tell here, but there is another one where it is behind – there was an Old Navy - yeah there, that's the Old Navy jacket that was behind the – that's the photo we were talking about. That is the one that was behind the umseat." (Tr., p. 185).

Diane Alsdorf agreed with Pat Walsh's decision to terminate Mr. Weatherspoon. Respondent's Exhibit D is her handwritten statement regarding the incident. Quoting from the transcript,

"Mr. Gibson: Okay. And you agreed that it made no sense whatsoever that the items that were found in his cab were in the places where they were found?

Ms. Alsdorf: Right." (Tr., pgs. 114-115).

It was Ms. Alsdorf's testimony that regardless of race, if things were found in the cab that management believed should not be there, an employee would be fired for stealing. (Tr., p. 116). Before the telephone meeting with Pat and Connie Johnson, Ms. Alsdorf had seen the photographs (Tr., p. 121) and she had seen the photographs before she wrote up her written statements regarding the incident. See Respondent's Exhibits D and E.

The photographs relied upon by Ms. Johnson and Ms. Alsdorf in recommending termination were taken by Alayna Grayall. (Tr., p. 166). There is no dispute that the photographs accurately depict where the items were put in Mr. Weatherspoon's truck cab. According to Complainant's crucial testimony:

"Mr. Gibson: We will mark this Respondent's B photographs. Mr. Weatherspoon I am handing you what has been marked as Respondent's B and I will represent to you that those are photographs of the items found in the cab of your truck on May 11th. Is that what they appear to be to you?

Mr. Weatherspoon: Yes.

Mr. Gibson: And looking at the first two photos on the first page, would you agree with me that those appear to be a pair of jeans and a pair of red shiny pants?

Mr. Weatherspoon: Yes.

Mr. Gibson: And those items were found on the floor of our cab were they not?

Mr. Weatherspoon: Right.

Mr. Gibson: Was there room in the back of your truck to put those items?

Mr. Weatherspoon: Yes.

Mr. Gibson: And why didn't you put them there?

Mr. Weatherspoon: Because I jumped out of my truck. I didn't want to go to the back of my truck. I just threw them in the cab of my truck.

Mr. Gibson: Okay. And looking at the um next two pages, um I will represent to you that that is a photograph of the Old Navy jacket that was behind the seat of your truck in the cab, isn't that what it is?

Mr. Weatherspoon: Yup.

Mr. Gibson: And isn't that where you put it?

Mr. Weatherspoon: Yes I did." (Tr., pgs. 65-66).

The decision maker in this case, Pat Walsh, relied upon the word of Connie Johnson and Diane Alsdorf to make this decision to terminate. He did not have a recommendation from Judy Negrete to rubber stamp. Instead, he accepted the recommendations of the two senior managers who relied upon photographic evidence that even Mr. Weatherspoon admits accurately depicts where the items were in the cab of his truck.

Courts have stated that in a discrimination context cat's paw refers to a situation in which a biased subordinate who lacks decision making power uses a formal decision maker as a dupe in a deliberate scam to trigger a discriminatory employment action. Arendale v. City of

Memphis 519 F.3d 587 (6th Cir. 2008). Here, the allegedly biased subordinate did not even speak to the decision maker.

The adverse employment decision in this case was made by Pat Walsh, the President of the Company. The person he relied upon to make this decision was Diane Alsdorf. Ms. Alsdorf not only did not have impermissible bias, Mr. Weatherspoon himself described her as being a good manager. There being no proof that Ms. Negrete manipulated Mr. Walsh's decision in any regard, the decision must be reversed.

II. The Administrative Law Judge Erred By Misapplying The Honest Belief or Business Judgment Analysis As It Relates To Pretext.

For more than 20 years the United States Court of Appeals for the Sixth Circuit has developed the honest belief rule. Smith v. Chrysler Corp. 155 F.3d 799 (6th Cir. 1998). The Sixth Circuit followed a series of decisions by the Seventh Circuit and held that so long as the employer honestly believed in proper reason for its employment action, the employee cannot establish pretext even if the employer is ultimately found to be mistaken, foolish, trivial or baseless. Smith v. Chrysler, supra. In order to determine whether an employer has an honest belief in the proper basis for an adverse employment action, courts look to whether the employer can establish its reasonable reliance on the particularized facts that were before it at the time the decision was made. Wylie v. Arnold Transportation 494 F.Supp.2d 717 (S.D. Ohio, Western Division 2006). In deciding whether or not an employer relied on the particularized facts then before it, it is not necessary to require that the decisional process used by the employer be optimal or that it left no stone unturned. Rather, the key inquiry is whether or not the employer made a reasonably informed considered decision before taking an adverse employment action. Smith v. Chrysler, supra.

In this case, all three of the managers acted on the honest belief that based on the position of the old navy jacket next to Mr. Weatherspoon's behind his seat meant he was planning on stealing the items. These items were found in the wrong place at the absolute wrong time. A meeting had been held the day before after jewelry had been found in the glove box of a truck cab that Mr. Weatherspoon had been driving and the decision was made to check all of the cabs the next day. This was the absolute wrong time to show up after a route with items stuck behind the back of your truck seat. That is exactly what Mr. Weatherspoon did.

Focusing on Diane Alsdorf who is the principle person that Mr. Walsh spoke to regarding the decision to terminate Mr. Weatherspoon's employment, she agreed with the decision to terminate. (Tr., p. 116). Quoting the relevant testimony:

Mr. Gibson: Would I be correct to say that you agreed with Pat's decision to terminate based on theft?

Ms. Alsdorf: Yes.

Mr. Gibson: Okay. And is it your understanding that at Cherryhill Management, Inc., regardless of race, if things are found in your cab that management believes should not be there you are going to get fired for stealing?

Ms. Alsdorf: Yes.

Mr. Gibson: And that is regardless of what your race is?

Ms. Alsdorf: Yes.

Mr. Gibson: And in fact you liked Frank Weatherspoon didn't you?

Ms. Alsdorf: Yes.

Mr. Gibson: You thought he was a good guy?

Ms. Alsdorf: I never had any problems with him. (Tr., p. 116).

Mr. Weatherspoon testified that he liked Diane Alsdorf a lot. (Tr., p. 68). There can be no question but that the Complainant's witness, Ms. Alsdorf, had no discriminatory animus towards Mr. Weatherspoon and yet she, based on the photographs, agreed with the decision to terminate Mr. Weatherspoon's employment.

In order to challenge the credibility of an employer's explanation the plaintiff must show by a preponderance of the evidence that (1) the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the adverse employment action or (3) that the proffered reasons were insufficient to motivate the adverse employment action. Manzer v. Diamond Shamrock Chemicals Co. 29 F.3d 1078 (6th Cir. 1994). It cannot be said that the proffered reasons had no basis in fact since everyone that saw the photographs of where Mr. Weatherspoon had put the Old Navy jacket behind the seat believed he was planning to steal it included Ms. Alsdorf.

The law does not require employers to make perfect decision nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire or promote for impermissible discriminatory reasons. Hartsell v. Keys 87 F.3d 795 (6th Cir. 1996) and see EEOC v. Yenkin-Majestic Paint Corp. 112 F.3d 831 (6th Cir. 1997). While the Commission may not agree that Mr. Weatherspoon was planning to steal the old navy jacket he had placed behind his seat in the cab but it must admit the item being there does provide a basis in fact for management's decision. A plaintiff has a burden to put forth evidence which demonstrates that an employer did not honestly believe in the proffered non-discriminatory reason for the adverse employment action. Smith v. Chrysler, *supra*. Not only did Mr. Weatherspoon not put forth such evidence, the Commission's witness, Ms. Alsdorf, had the

same honest belief in the proffered basis for the adverse employment action that the other managers did.

III. The ALJ Inferred A Discriminatory Animus On Very Weak Evidence Or An Incorrect Recollection Of The Facts.

In her decision issued almost three years after the hearing, the Administrative Law Judge stated at paragraph 26:

“Byanski was in an accident with one of Respondent’s trucks which caused major damage. Negrete did not require Byanski to be drug tested pursuant to Respondent’s policy.”

Respondent’s drug policy was entered into evidence as Complainant’s Exhibit 6 pursuant to paragraph 1d, the policy went into effect on December 1, 2004. Mr. Byanski’s testimony makes it clear that at the time of his accident, there was no drug policy that required him to be tested.

The relevant testimony is as follows:

“Ms. Terrell: And uh what was – were you ever drug tested when you worked there?”

Mr. Byanski: No.

Ms. Terrell: Did you ever get in any accidents?

Mr. Byanski: I did **prior** to the drug testing policy.” (Tr., p. 130).

Clearly, Administrative Law Judge Johnson has inferred discriminatory animus when there is none based on factual error. This is fundamentally unfair to Respondent.

Review of the Judge’s decision will establish that much was made of the fact that Mr. Weatherspoon was drug tested three times despite the fact that by his own admission the tests were all required by the Company drug testing policy. The relevant testimony is that regard is:

“Mr. Gibson: Okay. But wouldn’t you agree with me that all of the drug testing that was done, all three occasions were right in your company drug testing policy. Isn’t that true?”

Mr. Weatherspoon: Yes.

Mr. Gibson: The first test was on May 12, 2005, wasn't it?

Mr. Weatherspoon: Yes.

Mr. Gibson: And that was because you backed your car –

Mr. Weatherspoon: That wasn't the first one.

Mr. Gibson: Okay. But there was a test on May 12, 2005 and that was because you backed into a car?

Mr. Weatherspoon: Yes.

Mr. Gibson: And you would agree with me that in the Company's drug testing policy everybody that gets in an accident gets drug tested.

Mr. Weatherspoon: Yes.

Mr. Gibson: Okay. And then you had an accident on May 2nd, 2006 where the hole went into the company's truck?

Mr. Weatherspoon: Right.

Mr. Gibson: Okay and you would agree with me that the written drug testing policy of the company requires a drug test?

Mr. Weatherspoon: Yes.

Mr. Gibson: And then your last drug test was January 31st, 2006, was it not?

Mr. Weatherspoon: Yes.

Mr. Gibson: And that one was also prescribed by the company's policy

-

Mr. Weatherspoon: I guess you are talking about my shoulder?

Mr. Gibson: Yes.

Mr. Weatherspoon: Okay." (Tr., pgs. 56-57)

Diane Alsdorf, a manager according to Mr. Weatherspoon was always fair to him. She testified that with one exception every employee was always tested if they met the criteria in the policy. (Tr., p. 113).

At paragraph 27 of her decision, Judge Johnson infers discriminatory intent for a drug test that was required by the policy since management did not exercise its right to waive the requirement. This despite the fact that the evidence is that management never waived drug testing for any employees with one exception that was accidental. Manager Judy Negrete testified that after the owner Pat Walsh discovered an employee had not been tested pursuant to the drug policy, she was told to never let it happen again. The relevant testimony is as follows:

“Mr. Gibson: Okay. Now um was there ever an occasion where someone either got into an accident or was injured where they were not tested?”

Mr. Negrete: There was one with Jason Yahma.” (Tr., p. 162).

She later described her conversation with owner Pat Walsh regarding the failure to drug test in this one incident.

“Mr. Gibson: Okay. Did um, Pat ever find out that he was not drug tested?”

Ms. Negrete: After – yeah after the incident, yeah.

Mr. Gibson: And did he discuss with you the fact that an employee who should have been tested, wasn’t?

Ms. Negrete: Yes he did.

Mr. Gibson: What did he say to you about that?

Ms. Negrete: He told me to you know, be careful ... not let that happen again.

Mr. Gibson: Did you understand there would be consequences for you if when someone who was supposed to be drug tested and didn't get tested?

Ms. Negrete: Yes." (Tr., pgs. 163-164).

When Pat Walsh was asked about his discussion with Judy Negrete about not having Jason tested, he stated "**I was furious**". (Tr., p. 193).

In sum, Judge Johnson found at paragraph 27 is that management's failure to treat Mr. Weatherspoon better than it treated its other employees is evidence of discrimination. In order to support an inference of discrimination, the employee must show disparate treatment in relation to a specific adverse employment action. Brewer v. Cleveland Bd. Of Edn. (1997) 122 Ohio App.3d 378. The company treatment pursuant to its drug policy does not constitute disparate treatment. The plaintiff in a disparate treatment case must show that he was treated differently from similarly situated individuals. Mitchell v. Toledo Hospital 964 F.2d 577 (6th Cir. 1992). Here, the Administrative Law Judge found disparate treatment based on the failure of Respondent to waive the taking of a drug test when there is no evidence that Negrete or any other manager intentionally waived the drug test for any other employee. (All employees were drug tested with the sole exception being management negligence on one occasion). Mr. Weatherspoon here is clearly ask that the company's drug policy not be applied to him. It is completely illogical to accept the lack of preferential treatment as being discriminatory. Mr. Weatherspoon was simply treated as all employees have been under the company's written drug testing policy. The Administrative Law Judge's finding that the company's failure to waive its policy with respect to Weatherspoon is err and calls for a finding in favor of Cherryhill Management that no discrimination took place.

IV. The Administrative Law Judge Should Not Have Awarded Back Pay Since Complainant Failed To Mitigate His Damages.

The Administrative Law Judge awarded back pay as though Mr. Weatherspoon was not employed in any capacity since his termination from employment with the Respondent. Complainant has the duty to mitigate his damages. See, for example, Miciotto v. The US 270 F.Appx.301 (5th Cir. 2008). This duty has ancient origins and operates to prevent claimants from recovering for damages that they could have avoided through reasonable diligence. Ford Motor Co. v. EEOC 458 U.S. 219 (1992).

Mr. Weatherspoon worked in 2006 and 2007 doing odd jobs for others. He does not know how much he earned and did not pay taxes on the amounts earned. (Tr., pgs. 70-71). His failure to maintain records of his earnings is a failure of his duty to mitigate his damages. Here the Administrative Law Judge ordered the payment of back wages as though Mr. Weatherspoon had never worked since he was working and does not know how much he earned he has failed to mitigate his damages and hence, back pay should not have been ordered.

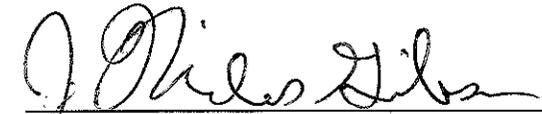
CONCLUSION

It was improper for the Administrative Law Judge to impute discriminatory intent of Judy Negrete to the decision made by Pat Walsh when there is no evidence that she made any form of recommendation that represents a "rubber stamp" or "cat's paw" theory of liability. Unquestionably, the individuals who viewed the photographs of the Old Navy jacket next to Mr. Weatherspoon's jacket behind his seat had an honest belief and/or business judgment that Mr. Weatherspoon planned to steal it. Regardless of the Commission's belief from review of the pictures, it cannot be said that there was no factual basis for the conclusion that Mr. Weatherspoon was planning to steal the items. The inference of discrimination drawn by the

Administrative Law Judge on her mistaken belief that Judy Negrete exempted Mr. Byanski from drug testing after his accident when his accident occurred prior to the implementation of the drug testing policy shows that the Judge's conclusions regarding discriminatory animus must be rejected. Back pay should not have been awarded since Mr. Weatherspoon failed to mitigate his damages by keeping track of his self-employed earnings.

Respectfully submitted,

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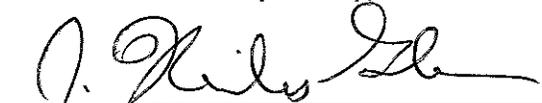
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document has been served by regular U. S. Mail, postage prepaid, upon Duffy Jamieson, Assistant Chief, Attorney for the Commission, Civil Rights Section, State Office Tower, 15th Floor, 30 East Broad Street, Columbus, Ohio 43215-3428 and upon Michael B. Murphy, Attorney for Complainant, at Wright & Vonnoy, 130 West 2nd Street, Suite 1600, Dayton, Ohio 45402-1505 on this 17th day of May, 2011.



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Attorney for Respondent,

Cherryhill Management, Inc.

445473v1

Attorney General's
Response
To
Objections

**STATE OF OHIO
CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:)	COMPLAINT NO. 07-EMP-CIN-17791
)	
FRANK WEATHERSPOON,)	ADMINISTRATIVE LAW JUDGE:
)	DENISE M. JOHNSON
Complainant,)	
)	
vs.)	
)	
CHERRYHILL MANAGEMENT, INC.)	
)	
Respondent.)	

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OHIO CIVIL RIGHTS COMMISSION
COMPLIANCE DEPARTMENT

THE OHIO ATTORNEY GENERAL'S RESPONSE TO RESPONDENT'S OBJECTIONS

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Facts

This is a race discrimination case where the Commission alleged that Respondent terminated Frank Weatherspoon because he is African-American. As a truck driver for Respondent, Cherryhill, Mr. Weatherspoon picked up donations for Respondent's thrift store. Respondent alleges Mr. Weatherspoon stole some donated items. However, at the hearing, the Commission proved that Respondent used the "stealing incident" as a pretext to fire its only African-American driver.

The crux of the matter began on May 11, 2006. Mr. Weatherspoon was on his route picking up donations. He had two stops on one street. After the first stop, he put the donation bags into the back of the truck. Tr. 32. As is allowed by Respondent's policies, he kept the back door open and drove down the street to his second stop. Tr. 32, Exhibit 1. He put three donation boxes into the back of the truck and closed the truck. Tr. 32. When he turned around and went back down the street to leave, he saw some items in the middle of the street. Tr. 32. Realizing that they must have fallen out of his truck, he picked them up. Tr. 32. Since he had already done his last stop and closed down the back of the truck, he tossed them in the cab, and headed back to the store to unload. Tr. 32.

When Mr. Weatherspoon returned to the store, he got out of the cab and started unloading the back of his truck. Tr. 32, 80. While he was unloading his truck, he saw Judy Negrete, his supervisor, talking on her cell phone in the cab of his truck. Tr. 32. He thought she was checking the mileage. Tr. 32-33. After Mr. Weatherspoon unloaded the back of his truck, he went around to the front to clean out the cab. Tr. 33, 81. However, when he went to remove the donations from the cab, Ms. Negrete instructed her assistant to take the items from him. Tr. 33,

81. Because there were items in the cab (and not the back of the truck), Ms. Negrete accused Mr. Weatherspoon of stealing. Tr. 81-83.

The investigation Ms. Negrete conducted of Mr. Weatherspoon's cab was a sham. Ms. Negrete was the only manager present when Mr. Weatherspoon pulled into the store to unload his truck. Tr. 85. She started taking pictures of Mr. Weatherspoon's truck as soon as he arrived and before he finished unloading. Tr. 80-81. Rather than documenting where the items were in the cab, Ms. Negrete and her assistant actually rearranged the items before taking pictures. Tr. 93. They also went through Mr. Weatherspoon's personal belongings. Ms. Negrete and her assistant (who was under Ms. Negrete's direct supervision) opened Mr. Weatherspoon's personal lunch bag, pulled out a condom, rested it on the zipper of the bag, and took a picture of it. Tr. 89-92, Exhibit 5. She did not tell Mr. Weatherspoon to unload his cab before unloading the back of his truck. Tr. 84-85. And before she sent him home, she never asked Mr. Weatherspoon to explain. Tr. 33. Instead, she just called Ms. Alsdorf, another supervisor, to formally make her accusations against Mr. Weatherspoon. Tr. 85-86.

After Ms. Negrete's rendition of the incident was communicated to Pat Walsh (the owner) he instructed Ms. Alsdorf to terminate Mr. Weatherspoon. Tr. 108-109. On May 12, 2006—the day after Ms. Negrete's sham investigation—Ms. Alsdorf told Mr. Weatherspoon he was fired. Tr. 38-39. Ms. Alsdorf did what Mr. Walsh told her to do because she wanted to keep her \$110,000-a-year job. Tr. 110, 120. However, before instructing Ms. Alsdorf to terminate Mr. Weatherspoon, Mr. Walsh did not conduct an independent investigation of the incident that only Ms. Negrete witnessed. Tr. 15-16, 85. Rather, he merely rubber-stamped Ms. Negrete's discriminatory decision and never asked Mr. Weatherspoon, or any other witnesses, to present their sides of the story.

The ALJ's Report and Recommendation

The Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Recommendations in which she found that Respondent, Cherryhill Management, fired Frank Weatherspoon because of his race. More specifically, the ALJ found that Judy Negrete, Mr. Weatherspoon's direct supervisor, treated him differently based on his race by being rude to him, assigning him less favorable routes, and making him take a drug test for a minor accident. The ALJ also found that Ms. Negrete told another employee that if it were up to her, she would not have any African-Americans working for her. Ms. Negrete was even observed spraying disinfectant on a telephone used by an African-American employee. When she investigated Mr. Weatherspoon for allegedly stealing clothing, she opened his personal belongings and photographed a condom to portray him in a bad light. The owner, Pat Walsh, accepted Ms. Negrete's representation that Mr. Weatherspoon was allegedly stealing.

Respondent's Objections

Respondent asserted four objections to the Administrative Law Judge's Report and Recommendation. First, it argues that the ALJ improperly imputed Judy Negrete's discriminatory intent onto the owner, Pat Walsh. Second, it argues that its decision to fire Frank Weatherspoon was based on an honest belief that he was stealing. Third, it argues that there is insufficient evidence of discriminatory animus. Fourth, it argues that Mr. Weatherspoon is not entitled to back pay. As discussed below, the Commission should reject each of these objections.

Pat Walsh was influenced by Judy Negrete's sham investigation

Respondent claims that Mr. Walsh made the final decision to terminate Mr. Weatherspoon, not Ms. Negrete. Courts have held that the discriminatory animus of those who

may have *influenced* the personnel decision can be indicative of discrimination. “When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, this Court has held that the employer may be held liable under a ‘rubber-stamp’ or ‘cat’s paw’ theory of liability.” *Arendale v. City of Memphis* (6th Cir 2008), 519 F.3d 587, 604 n.13.

Here, Mr. Walsh merely rubber-stamped the discriminatory decision Ms. Negrete recommended. After her sham investigation, Ms. Negrete—the only manager who witnessed what happened—called Ms. Alsdorf to make her accusations. Tr. 85-87. Ms. Negrete testified that she knew that Mr. Walsh would not investigate the situation before approving her recommendation. Tr. 87. Ms. Negrete also testified that she knew that if she accused Mr. Weatherspoon of stealing, Mr. Walsh would agree with her that he should be fired. Tr. 86-87. Ms. Negrete did more than influence the decision to terminate Mr. Weatherspoon—she made the decision.

Respondent claims that he had an independent basis for approving the termination because he talked with the other managers, Connie Johnson and Diane Alsdorf. Tr. 191. However, neither Ms. Johnson nor Ms. Alsdorf were present when the events took place, and neither personally investigated the situation. Tr. 85-87. The only knowledge they had of what happened was what Ms. Negrete told them. Even though Mr. Weatherspoon had told her ~~numerous times that Ms. Negrete did not like him because he is African-American,~~ Ms. Alsdorf did not personally and independently investigate what happened. Tr. 107, 109, 118-119. Ms. Alsdorf merely did what Mr. Walsh told her to do so she would continue to earn her \$110,000-a-year salary. Tr. 111. Mr. Walsh admitted that he never personally investigated what happened or allowed Mr. Weatherspoon to present his side of the story. Tr. 15.

In fact, Mr. Walsh rubber-stamped Ms. Negrete's termination quickly. The very same day that Ms. Negrete conducted her sham investigation, Mr. Walsh gave Ms. Alsdorf the instruction to fire Mr. Weatherspoon. Tr. 109. Mr. Walsh rarely, if ever, even interacts with the non-manager employees. Tr. 15, 87. And when Mr. Weatherspoon called Mr. Walsh to find out what was going on, Mr. Walsh hung up on him. Tr. 33.

Mr. Walsh and Ms. Alsdorf did not reach an independent conclusion that Mr. Weatherspoon's termination was lawful; rather, they rubber-stamped Ms. Negrete's race-based accusations. The law does not permit Mr. Walsh to create a management structure that isolates a discriminatory actor to try to protect his company from liability.

Respondent's reason for terminating was not based on an "honest reason" or a "business judgment," but instead was a pretext for discrimination.

Ms. Negrete did not have a reasonable belief that Mr. Weatherspoon stole anything. Ms. Negrete accused Mr. Weatherspoon of stealing as soon as he arrived at the store and before he even had a chance to finish unloading his truck. Tr. 81. The company policies and practices allowed Mr. Weatherspoon to do exactly what he was trying to do—clean out his cab *after* he unloaded the back of his truck. But, Ms. Negrete interrupted Mr. Weatherspoon, accused him of stealing, and prevented him from doing his job. Tr. 81-84. Respondent claims that merely having items in the cab was grounds for termination, but Mr. Byanski testified that he regularly had items in the cab of his truck, and he was never terminated for it. Tr. 131-132. In a bizarre attempt to bolster her accusations against Mr. Weatherspoon, Ms. Negrete actually went through Mr. Weatherspoon's personal belongings and took pictures of condoms he had in his bag. Tr. 89-92, Exhibit 5. However, the only thing those pictures prove is that Ms. Negrete wanted to humiliate Mr. Weatherspoon.

Whether Ms. Alsdorf believed Mr. Weatherspoon is irrelevant because Ms. Alsdorf did not make the decision to terminate him, and her opinions were formed after the decision to terminate him was already made. Tr. 33-34. Ms. Negrete accused Mr. Weatherspoon of stealing, and then Ms. Alsdorf was instructed to fire Mr. Weatherspoon before anyone—including Ms. Alsdorf—ever talked to him. Tr. 108-109, 119-120. The first time Ms. Alsdorf talked to Mr. Weatherspoon after Ms. Negrete lodged her accusations was during his termination meeting. Tr. 33-34, 119-120. During that meeting, Mr. Weatherspoon tried to explain what happened, but Ms. Alsdorf told him that the decision had already been made and it did not matter what he said. Tr. 33-34, 119-120. Therefore, Ms. Alsdorf's after-the-fact opinions, which were based on information fed to her by Ms. Negrete, are merely commentary, not corroboration.

There is sufficient evidence of discriminatory animus.

Respondent assumes that the only evidence of discriminatory animus was the way it treated Mr. Weatherspoon in comparison to other white workers with respect to its drug testing policy. In actuality, there was ample evidence of Respondent's discriminatory animus. This evidence consisted of the following:

- Ms. Negrete never hired any African-American employees. Tr. 192.
- Ms. Negrete said that if it were up to her she would not have African-Americans working for her, and she thinks African-American men are mean. Tr. 149.
- Ms. Negrete sprayed disinfectant on a phone after an African employee used it, and she treated the African-American employees "rougher" than the other employees. Tr. 154-155.
- Ms. Negrete swore at Mr. Weatherspoon, belittled him, turned her back to him, and treated him like a child. Tr. 40-43, 62, 126-127, 174.
- Ms. Negrete gave Mr. Weatherspoon routes with fewer stops than the other drivers and refused to accommodate his local route requests even though she accommodated the other drivers' requests. Tr. 45-47, 106, 117, 129.

- When applying the drug-testing policy, Ms. Negrete was lenient with a Caucasian driver, but never with Mr. Weatherspoon. Tr. 48-49, 96-98.
- Company practice and policy allows drivers to transport items in their cabs and clean their cabs out *after* unloading the back of the truck, but Ms. Negrete fired Mr. Weatherspoon for following this practice. Tr.82-84, Comm. Ex. 1.
- A Caucasian driver regularly transported items in the cab of his truck, but he was not fired. Tr. 131-132.
- On the day before Ms. Negrete terminated Mr. Weatherspoon, Ms. Negrete accused him of stealing as soon as he pulled his truck into the store. Tr. 32, 80.
- Before Mr. Weatherspoon even had a chance to finish unloading his truck, Ms. Negrete accused him of stealing. Tr. 32, 80, 81.
- Ms. Negrete humiliated Mr. Weatherspoon by pulling a condom out of his bag, resting it on the zipper, and taking a picture of it. Then, she disingenuously testified that she did so because she wanted proof of what he had in the truck. Tr. 89-92, Comm Ex. 5.
- Ms. Negrete knew that Mr. Walsh does not interact with his non-management employees and he would not look into Mr. Weatherspoon's situation. Tr. 15, 86-87.
- Ms. Negrete knew that if she accused Mr. Weatherspoon of stealing, he would be fired. Tr. 86-87.

Therefore, there was ample evidence to support the ALJ's recommendation that Respondent discriminated against Mr. Weatherspoon based on his race.

Mr. Weatherspoon is entitled to back pay.

Ironically, Respondent argues that because it failed to meet its burden of proving mitigation and interim earnings, it should not have pay any lost wages. Such an argument goes against the spirit and purpose of R.C. 4112 because it would allow an employer to benefit from its own failure to meet its evidentiary burden. Respondent bears the burden to prove mitigation and interim earnings. *State ex rel. Martin v. Bexley City Dist. Bd. of Edu.* (1988), 39 Ohio St. 3d 36. While the wrongfully discharged employee must establish the amount of lost wages, the amount the employee could have earned in mitigation must be proven by the employer. *Id.*

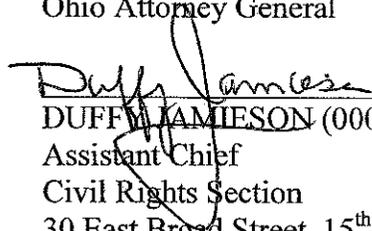
The Ohio Supreme Court has held that “[s]ince the amount of interim earnings is to be deducted from an award of back pay (thus reducing the employer’s obligation to pay), the burden of showing what an employee *earned* during the period of wrongful discharge rests on the employer.” *State ex rel. Martin v. Bexley City Dist. Bd. of Ed.* (1988), 39 Ohio St. 3d 36, 38. In short, deducting interim earnings is in the nature of an affirmative defense. *Id.* at 37. Therefore, “[i]t is the generally accepted rule that the employer bears the burden of showing that the employee either *found or could have found* other similar employment.” (Emphasis added.) *Id.* In *State ex rel. Martin*, because the employer failed to ascertain the amount that the employee could have earned after she was wrongfully discharged, it could not subtract any amount from the back pay it owed. *Id.* at 39.

Conclusion

The Ohio Attorney General’s Office respectfully requests the Commission to reject Respondent’s objections and adopt the ALJ’s Report and Recommendation.

Respectfully submitted,

MIKE DEWINE
Ohio Attorney General


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Counsel for the Ohio Civil Rights Commission

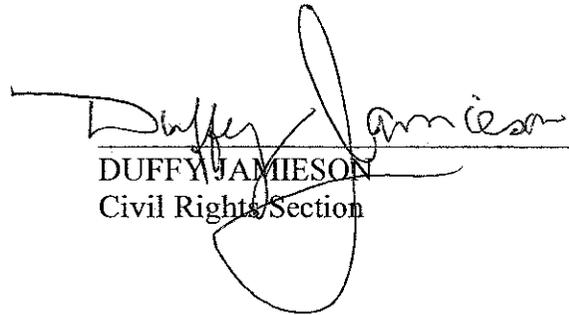
CERTIFICATE OF SERVICE

I hereby certify that a copy of the Ohio Attorney General's Response to Respondent's Objections has been forwarded to the following on May 23, 2011, via U. S. Mail:

J. Miles Gibson, Esq.
Wiles, Boyle, Burkholder & Bringardner Co., LPA
300 Spruce Street, Floor One
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Counsel for Respondent

Frank Weatherspoon
2225 Madel Drive
Dayton, OH 45459
Complainant

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Dayton, Ohio 45426
Counsel for Complainant



DUFFY JAMIESON
Civil Rights Section



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Eddie Harrell, Jr., Chair
Leonard J. Hubert
Stephanie M. Mercado, Esq.
Tom Roberts
Rashmi N. Yajnik
August 16, 2011

G. Michael Payton, Executive Director

Frank Weatherspoon
2225 Madel Drive
Dayton, OH 45459

Re: Frank Weatherspoon v. Cherryhill Management, Inc.
CIN76 (17791) 06072006; 22A 2006 19812C
Complaint No. 07-EMP-CIN-17791

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 / tg

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 [Martin – Kanney – Woods]
Miles Gibson, Esq.
Michael Murphy

Certified No. 7004 1160 0000 5515 6915 [Frank Weatherspoon]
Certified No. 7004 1160 0000 5515 6939 [Miles Gibson, Esq.]
Certified No. 7004 1160 0000 5515 6922 [Michael Murphy]

July 21, 2011 Commission Meeting

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John Kasich, Governor

FRANK WEATHERSPOON,)	COMPLAINT NO: 07-EMP-CIN-17791
)	
Complainant,)	
)	
)	CEASE AND DESIST ORDER
vs.)	
)	
CHERRYHILL MANAGEMENT,)	
)	
Respondent.)	

This matter came before the Commission upon Complaint No. 07-EMP-CIN-17791, issued May 10, 2007; the official record of the public hearing held on May 20, 2008, before Denise M. Johnson, the duly appointed Chief Administrative Law Judge; all exhibits therein; the post-hearing brief submitted by the Commission on June 1, 2009; by Respondent on June 22, 2009; a reply brief submitted by the Commission on July 1, 2009; Judge Johnson's Findings of Fact, Conclusions of Law and Recommendations dated April 22, 2011; Respondent's Statement of Objections to Administrative Law Judge's Decision submitted on May 17, 2011 and the Commission's response submitted on May 23, 2011.

The Complaint alleges that Respondent subjected Complainant to different terms, conditions, and privileges of employment, including termination, based on his race. After the public hearing, the Chief Administrative Law Judge recommended that the

Commission find that Respondent engaged in unlawful conduct and ordered the following relief:

- (1) That Respondent Cease and desist from all discriminatory practices in violation of R.C. Chapter 4112, and;
- (2) That Respondent reinstate Complainant to the position of truck driver with back pay. If Complainant accepts Respondent's offer of employment, he shall be paid the same wage he would have been paid had he been employed as a truck driver on May 12, 2006 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less his interim earnings, plus interest at the maximum rate allowed by law, and;
- (3) That Respondent submit a certified check to the Commission within 10 days of the Commission's issuance of this Cease and Desist Order for back pay totaling \$84,335.32. This amount will continue to accrue from the date of the hearing, plus interest until the date of the offer of employment, and;
- (4) That Respondent receive training regarding the anti-discrimination laws of the State of Ohio and submit certification from the trainer or provider of services that Respondent has successfully completed the anti-discrimination training within seven months of the Commission's date of the final order, and;
- (5) That Respondent post state and federal prohibitions against discrimination in the workplace in a conspicuous location on its premises.

After careful consideration of the entire record, the Commission adopted the Chief Administrative Law Judge's report at its public meeting on June 30, 2011.

With all matters now before it and carefully considered, the Commission hereby adopts and incorporates, as if fully rewritten herein, the findings of fact, conclusions of law, and recommendations contained in the Chief Administrative Law Judge's Report and Recommendation dated April 22, 2011.

This ORDER issued by the Ohio Civil Rights Commission on this 21st day of July, 2011.



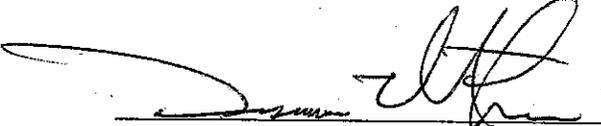
Commissioner, Ohio Civil Rights Commission

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 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: 7/21/11