

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

TAMMY DUTY

Complainant

Complaint No. 07-EMP-COL 34123

v.

CHAD WALTERS

Respondent

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

**MIKE DeWINE
ATTORNEY GENERAL**

Darlene Fawkes Pettit, Esq.
Assistant Attorney General
Civil Rights Section – 15th Floor
30 East Broad Street
Columbus, Ohio 43212-3428
614-995-5897
Counsel for the Commission

C. Walters Enterprises, LLC
dba Citgo Express/Subway
c/o Chad Walters
5540 Three Locks Road
Chillicothe, Ohio 45601
Respondent

Ms. Tammy Duty
4654 Blain Highway
Chillicothe, Ohio 45601-8406
Complainant

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

Tammy Duty (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 25, 2007.

The Commission investigated the charge and found probable cause that Chad Walters (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 November 15, 2007.

The Complaint alleged Complainant was denied employment due to her sex (pregnancy).

Respondent filed an answer to the Complaint on December 31, 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 on November 7, 2008 at the Carver Community Center in Chillicothe, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 151 pages, exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on September 16, 2009; by Respondent on October 13, 2009; and a reply brief filed by the Commission on October 19, 2009.

FINDINGS OF FACTS

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 January 25, 2007.

2. The Commission determined on October 27, 2007 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

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

4. Respondent is a business owner who purchased the Circleville Oil gas station/subway restaurant in Chillicothe, Ohio in January of 2007. Respondent purchased the business in order to convert the establishment to a Valero gas station.

5. Complainant had been previously employed at the Circleville Oil for seventeen (17) years. She had difficulty getting pregnant during that time but learned she was pregnant in October of 2006 before Respondent purchased the business.

6. All previous employees of Circleville Oil were terminated when Respondent assumed control.

7. The employees then had to complete new applications and be hired as new employees under Respondent's management.

8. None of the employees from the prior business were guaranteed employment with Respondent.

9. On January 25, 2007, Complainant was informed by the Circleville Oil management that Respondent did not wish to hire her.

10. Complainant and one other Circleville Oil employee were denied employment under Respondent's new management.

11. All of the remaining Circleville Oil employees were hired as employees at the new business.

CONCLUSIONS OF LAW AND DISCUSSION¹

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. The Commission alleged in the Complaint that Complainant was denied employment because she was pregnant at the time Respondent purchased the business.

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

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

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the ... sex, ... 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 term “because of sex” for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related conditions. R.C.4112.01(B). This division further provides that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ...

4. 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).

5. 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. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads “almost verbatim to the Pregnancy Discrimination Act” of 1978 (PDA). *Priest v. TFH-EB, Inc. dba Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; See 42 U.S.C. § 2000e(k). Thus, 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), as amended by the PDA.

6. 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 v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973).

7. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases 969, n.13.

8. 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).

9. 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.

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).

10. To meet this burden of production, Respondent must:

... “clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action.

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

11. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of legitimate, nondiscriminatory reasons for its failure to hire Complainant removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 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 is no longer relevant.

Aikens, supra at 713, 31 FEP Cases at 611.

12. Respondent gave three reasons for its decision: 1) Respondent witnessed an altercation between Complainant and another employee in the presence of customers; 2) Respondent spoke with a Circleville Oil manager and was told that the company had numerous discipline problems with Complainant; and 3) Respondent spoke with a second manager that again described the job performance issues and discipline problems. (Tr. 98-101)

13. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex (pregnancy). *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for **failure to hire** Complainant were not the true reasons,

but were “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.

14. Thus, even in the Commission proves that Respondent’s articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer’s proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission’s] proffered reason of ... [sex] 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 sex discrimination.

15. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent’s articulated

reasons for failing to hire Complainant. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that they had no basis *in fact* or were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the prima facie case, suffice to show intentional discrimination ... [n]o additional proof is required.³

Hicks, supra at 511, 62 FEP Cases at 100 (emphasis added).

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

³ Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination*. *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

did not actually motivate the employment decision, requires the Commission to produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case.

Id

17. In this case, the Commission introduced evidence in an attempt to show that Respondent's reasons for failing to hire Complainant were pretextual because the proffered explanations were "unworthy of credence." *Burdine*, 450 U.S. 248 (1981).

18. The Commission failed in its attempt to show that the Respondent's reason for not hiring Complainant was not credible.

19. Additionally, pretext can be shown by disparate treatment. Proof of disparate treatment requires similarly situated comparatives. In order to prove disparate treatment 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 circum-stances 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).

20. 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).

21. 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).

22. In the instant case a strikingly similarly situated employee was present. This individual was the only other employee who was not hired by Respondent and was the other person involved in the alleged altercation with Complainant.

23. Respondent presented testimony which showed that along with Complainant this employee had numerous incidents of disruption.

24. Respondent witnessed what he thought was an altercation between Complainant and the employee and was subsequently told this behavior was common with the two. The other employee that was denied employment was not pregnant at the time.

25. The Commission failed to present any credible evidence which would tend to show that Respondent's decision was motivated by an illegal discriminatory animus.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 07-EMP-COL-34123.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 30, 2011