

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**PETER HORWITZ**

Complainant

v.

**KENT STATE UNIVERSITY**

Respondent

Complaint No. 9890  
(AKR) 73050704 (28930) 07192004  
22A-2004-03057C

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

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## **INTRODUCTION AND PROCEDURAL HISTORY**

Peter Horwitz (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on July 19, 2004.

The Commission investigated the charge and found probable cause that Kent State University (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on June 23, 2005.

The Complaint alleged Respondent terminated Complainant's employment in retaliation for having engaged in protected activity.

Respondent filed an Answer to the Complaint on July 27, 2005. Respondent admitted certain procedural allegations, but

denied that it engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on April 24-26, 2007 at the Kent State University, University Counsel, Executive Offices, Library, 2<sup>nd</sup> Floor, Kent, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 533 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on August 21, 2008; by Respondent on September 25, 2008; and a reply brief filed by the Commission on October 7, 2008.

## **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 July 19, 2004.

2. The Commission determined on January 13, 2005 it was probable that Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

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

4. Complainant began his employment with Respondent in August 1989 in Respondent's Department of Academic Services which was later reorganized to be the Academic Computing Services and Technology Department.

5. In 1997 Complainant was appointed to Financial Affairs as a Systems Coordinator.

6. In 2000 Complainant was appointed to Business Operations and Management Services as a Manager of Business Information Support Systems.

7. In 2002 Complainant applied for and was promoted to Residence Services as the Senior LAN Administrator.

8. On July 16, 2003, Complainant received an evaluation from Terry Webb (Webb), Director of Residence Services. It was the first formal written evaluation Complainant received since his employment with Respondent began in 1989. (Tr. 45)

9. In late July 2003 Webb resigned. (Tr. 41)

10. On September 1, 2003, Azfar Mian (Mian) began his appointment as Interim Director of the Department of Residence Services. (Tr. 274)

11. After Mian became the Interim Director, he had weekly meetings with Complainant for the purpose of receiving updates and information about on-going projects Complainant was responsible for. (Tr. 67-68)

12. In September 2003, Dr. Harold (Pete) Goldsmith (Goldsmith) was hired by Respondent in the position of Vice President for Enrollment Management and Student Affairs with ultimate authority over thirteen (13) areas, including Residence Services. (Tr. 153)

13. After evaluating the areas he had authority over Goldsmith determined some of the areas needed to be streamlined for better efficiency. (Tr. 195)

14. He specifically noted Residence Services was “top heavy” with administrative structure. (Tr. 207)

15. He began to meet with various administrators and employees within the divisions under his authority, including Residence Services.

16. Goldsmith set up meetings with Residence Services employees in late September 2003. (Tr. 153)

17. Mian received a written complaint from one of Complainant's direct reports, Ron McDaniel (McDaniel). In the complaint McDaniel indicated Complainant had been interfering with Mian's authority, stating Complainant ordered McDaniel to report on his communications with Mian and instructed him not to do anything that Mian requested without first checking with Complainant. (Comm. Ex. 37)

18. When Goldsmith met with Mian, Mian presented Goldsmith with a document dated September 22, 2003 entitled "Documentation In Regard To The Behavior of Peter Horwitz" which was documentation of performance problems Mian had observed since his appointment as Interim Director. (Comm. Ex. 48)

19. In late September or early October 2003 Mian informed Complainant that McDaniel would no longer report to him but would report directly to Mian. The change was recommended by Mian and supported by Goldsmith. (Tr. 288-289)

20. In early October 2003, Goldsmith suggested that Mian undertake progressive discipline with Complainant as a response to his concerns raised at the September 22, 2003 meeting.

21. On November 3, 2003, Goldsmith met with Complainant as a part of his regular course of meetings with Residence Services employees. (Tr. 42)

22. At that meeting Complainant provided Goldsmith with a copy of an e-mail from sender "Azfar Mian" that stated:

I am sure that you have taken some time to evaluate your new role within Residence Services over the past several days. Adjusting your attitude to become an obedient little jew may prolong your stay with Residence Services and Kent State University.

(Comm. Ex. 5)

23. After consulting with Ann Penn (Penn), Director of Affirmative Action, Goldsmith immediately advised Complainant to file an internal complaint with Respondent's Office of Affirmative Action (OAA). (Tr. 155-156)

24. Three (3) separate investigations were undertaken as a result of Complainant's complaint, including one by Respondent's Police Department. (Tr. 89-90)

25. Mian was asked by Goldsmith to delay initiating progressive discipline pending the outcome of the investigations. (Tr. 291)

26. On November 13, 2003, Mian sent Complainant an e-mail to ask that Complainant contact him. Mian wrote he had been trying to get a hold of Complainant since November 10, 2003 and had left multiple messages on Complainant's work, cell phone, office line, and left multiple IM messages. Complainant had also missed his one-on-one meeting with Mian on November 12, 2003.

27. Complainant did not respond to Mian's e-mail. Instead he forwarded the e-mail to Goldsmith and Penn asking to meet with them for the purpose of having his line of supervision changed. His request was denied. (Tr. 43-44, Comm. Ex. 28)

28. Respondent notified Complainant of the disposition of his internal complaint on December 19, 2003. (Tr. 46, Comm. Ex. 33)

29. Complainant met with Goldsmith the same day to express his dissatisfaction with the outcome of the investigation of his complaint.

30. Goldsmith informed Complainant he could pursue a further complaint with the OAA. (Tr. 48)

31. Complainant pursued his complaint with the OAA.

32. After further investigation the OAA informed the Complainant that the original disposition regarding his complaint would not be changed.

33. Complainant continued to ignore Mian's request to meet or respond to his e-mails. (Tr. 281)

34. Goldsmith devised a reorganizational plan for the areas under his authority.

35. The plan was set forth in a confidential document entitled “Re-Organization Plan: Phase I-Residence Life-February/March 2004 and Reorganization Plan: Phase 2-Facilities and Operations-Spring 2004”. (Resp. Ex. I)

36. Goldsmith made the determination to restructure the Senior LAN Administrator position to include both Student Services and IT in a shared services context. (Tr. 162)

37. Complainant was terminated pursuant to University Policy 3342-6-09, which gives Respondent the right to terminate a contract employee with or without cause with ninety (90) days’ notice. Complainant received the notice by letter dated May 7, 2004. (Comm. Ex. 4)

## **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.<sup>1</sup>

1. The Commission alleged in the Complaint Respondent terminated Complainant's employment in retaliation for having engaged in protected activity.

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<sup>1</sup> 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:

- (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone*, (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law the proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) The alleged retaliator knew about the protected activity;
- (3) Thereafter, Respondent subjected Complainant to an adverse employment action; and
- (4) There was a causal connection between the protected activity and the adverse employment action.

*Hollins v. Atlantic Co., Inc.*, 80 FEP Cases 835 (6<sup>th</sup> Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997).

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.<sup>2</sup>

*McDonnell Douglas, supra.* 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.

*Hicks, supra.*

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.

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<sup>2</sup> 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 failure to recall; 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 (10<sup>th</sup> Cir. 1992) (citations and footnote omitted).

7. Generally, mere temporal proximity between a protected activity and a materially adverse action without other indicia of retaliatory conduct is not sufficient to establish the causal connection element of a retaliation claim. See *Michael v. Caterpillar Fin. Services Corp.*, 496 F.3d 584 , 596; *Tuttle v. Metro. Gov't. of Nashville*, (C.A. 6, 2007), 474 F.3d 307, 321; *Little v. BP Exploration & Oil Co.*, (C.A. 6, 2001), 265 F.3d 357, 363-64; *Nguyen v. City of Cleveland*, 229 F.3d 562, 553; *Johnson v. University of Cincinnati*, (C.A. 6, 2000), 215 F.3d 561, 582-83.

8. 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 termination 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.

9. Respondent met its burden of production with the introduction of evidence that Complainant's contract was terminated due to the reorganization of Student Services along with the determination that Complainant's services were no longer needed due to performance issues.

10. Respondent having met its burden of production, the Commission must prove Respondent retaliated against Complainant because he engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence Respondent's articulated reason for Complainant's termination was not the true reason, but was "a pretext for ... [unlawful retaliation]." *Id.* at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

[A] reason cannot be proved to be a “pretext for [unlawful retaliation]” unless it is shown both that the reason is false, and that ... [unlawful retaliation] is the real reason.

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

11. Thus, even if the Commission proves 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 ... [unlawful retaliation] is correct. That remains a question for the factfinder to answer ....

*Id.* at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of unlawful retaliation.

12. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent’s articulated reason for terminating Complainant’s contract. The Commission may directly challenge the credibility of 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 (6<sup>th</sup> 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.<sup>3</sup>

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

13. The Commission may indirectly challenge the credibility of Respondent's reason by showing the sheer weight of the circumstantial evidence makes it "more likely than not" that 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

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<sup>3</sup> 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.

Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

14. The Commission attempted to challenge the credibility of Respondent's articulated reason based on the lack of written performance evaluations regarding Complainant's performance.

15. A reasonable inference can be drawn from the credible evidence in the record that instead of creating documentation regarding unsatisfactory work performance, Respondent exercised its right to non-renew an unclassified employee's contract when it was dissatisfied with the employee's performance:

Ms. Tobocman: You didn't work with Mr. Horwitz?

Dr. Goldsmith: I did not, no.

Ms. Tobocman: And you left that to Mr. Mian?

Dr. Goldsmith: I did.

Ms. Tobocman: Without any specific instructions.

Dr. Goldsmith: Other than investigating with HR what the possibilities were.

Ms. Tobocman: And that dealt with progressive discipline?

Dr. Goldsmith: *Right, which was in their mind not used very often with unclassified people.* (Emphasis added.)

(Tr. 219)

Ms. Stoll: *And I don't wish to um ... when you have a for cause termination that carries a very different stigma than the fact that an institution and an employee have decided to part ways and discontinue a contract.* (Emphasis added.)

(Tr. 377)

16. During September 2003 when Dr. Goldsmith was conducting interviews with employees in an effort to evaluate his area of responsibility, he heard complaints about Complainant's performance from Mian, Sherideen Stoll, John LaPlante (LaPlante), and Millie Freeman (Freeman).

17. Stoll was the Director of Business Operations and Management Services from October 1995 to April 2004. She had direct supervision of Complainant from 2001 to 2002.

18. LaPlante was the Director for Enrollment Management and Student Affairs from March through September of 2004.

19. Freeman worked as the Administrative Clerk for Residence Services for 27 years.

20. Lt. Christopher Jenkins (Jenkins) with Respondent's police services spent approximately forty (40) hours investigating Complainant's complaint.

21. During the course of the investigation four (4) LAN Administrators were interviewed. All of these individuals were identified because they coordinated or assisted in the computer networking for Residence Services and would have had the opportunity to send the offensive e-mail. (Tr. 415)

22. All four (4) persons were asked if they were willing to take a polygraph examination.

23. Mian said that he would take the polygraph examination; however, Lt. Jenkins' report stated that Complainant "didn't say whether he would or would not take it but he did say it wouldn't benefit him anyway." (Tr. 417)

24. Even after the results of the investigation of his complaint were completed and the offensive e-mail could not be conclusively tied to Mian, Complainant still refused to talk to or meet with Mian or respond to his e-mails.

25. Complainant admitted that Mian had never made any harsh or derogatory statements to him, saying only that Mian had accused him of questioning Mian's decision at one point. (Tr. 82)

26. Complainant also admitted that the e-mail in question was out of character for Mian, given Complainant's dealings with him:

Mr. Jackson: Now based upon your dealings prior to October 30<sup>th</sup>, is it a fair statement that receiving this email that purported to be from Mr. Mian came as quite a surprise to you.

Mr. Horwitz: Yes, receiving this email was a great shock to me.

Mr. Jackson: And it was a great shock because you did not expect Mr. Mian to send anything like that to you correct?

Mr. Horwitz: I didn't expect anybody to send something like this to me.

Mr. Jackson: Is it a fair statement to say that it is completely out of character for Mr. Mian to send that email to you given your dealings that you had had with him over the past few months in residence services.

Mr. Horwitz: I suppose yes. I didn't know him that well.

Mr. Jackson: But he certainly never said anything derogatory to you as you –

Mr. Horwitz: No he had not.

(Tr. 85-86)

27. Complainant was not the only employee whose contract was not renewed due to the reorganization. Three (3) other employees in Goldsmith's division also lost their jobs and the ninety (90) day termination policy was used to effectuate their terminations. (Tr. 213-214, Resp. Ex. M)

28. The Commission failed to persuade the ALJ that Respondent's articulated reason was a pretext for illegal retaliation.

## **RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9890.

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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

December 15, 2010