



Governor John Kasich

April 2, 2012

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**OHIO
CIVIL RIGHTS
COMMISSION**

G. Michael Payton
Executive Director

Re: Case Name: Ana M. Hambuechen v. 221 Market N., Inc.
dba Napoli's Italian Eatery
Complaint No. 07-EMP-CLE-32238

Dear Counsel:

Enclosed, is a copy of the ALJ's Report and Recommendation. Please be advised that you may submit a Statement of Objections to the enclosed.

Commissioners

Leonard Hubert., *Chairman*
Eddie Harrell, Jr.
Stephanie Mercado
Tom Roberts
Rashmi Yajnik

Pursuant to Ohio Admin. Code §4112-1-02, your Statement of Objections must be received by the Commission no later than **(23 days after the date mailed)**. **No extensions of time will be granted.**

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

Please send the original Statement of Objections to:

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

All parties and the Administrative Law judge should received copies of your Statement of Objections.

FOR THE COMMISSION

Desmon Martin

Desmon Martin
Director of Enforcement and Compliance

DM/glm

cc: Denise M. Johnson, Chief Administrative Law Judge

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INTRODUCTION AND PROCEDURAL HISTORY

Ana Hambuechen (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 15, 2007.

The Commission investigated the charge and found probable cause that 221 Market N. Inc. *dba* Napoli's Italian Eatery (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 September 13, 2007.

The Complaint alleged that Respondent subjected Complainant to different terms, condition, and privileges of employment, including termination, based on her sex in violation of R.C. 4112.02(A).

Respondent filed an Answer to the Complaint on November 2, 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 19, 2008, at the Ray Denczak Council Chambers and Office, Council Chambers, 218 Cleveland Avenue, S.W., Canton, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 212 pages, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on January 11, 2010, by Complainant on February 4, 2010 and by Respondent on January 28, 2010.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the ALJ's 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 March 15, 2007.

2. In a letter dated July 19, 2007, the Commission notified the Respondent 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 Napoli's Italian Eatery is owned by restaurateur Phillip John DeChellis (Mr. DeChellis).

5. Complainant interviewed for a server position with Patricia DeChellis, (DeChellis) general manager and Louie Karoue (Karoue), the dining room manager and was hired in August of 2006. (Tr. 6, Tr. 25).

6. DeChellis oversaw the restaurant's daily operations including, but not limited to, ordering, scheduling, hiring, and firing of employees. (Tr. 121-22).

7. Complainant's responsibilities as a server included greeting customers, presenting herself at customer's tables, taking orders and serving food.

8. Complainant and co-worker Angie Price (Price), who worked in the kitchen, would "hang out" with DeChellis and have a few drinks with her after work on Wednesdays. (Tr. 28-29, 150).

9. In mid-September of 2006, Complainant and Price went out with DeChellis and her son, Michael Skiba (Skiba), to celebrate his birthday, (Tr. 29, 150, 162).

10. Skiba, who resides in Florida, arrived in town on September 16th to install computers for Respondent.

11. While Skiba was in town, he and Complainant engaged in a sexual relationship. (Tr. 164).

12. Around October or November 2006 Complainant became aware she was pregnant. (Tr. 33).

13. Complainant informed Skiba, who had returned to Florida, of her pregnancy.

14. Complainant also informed Price of her pregnancy and then Kelly Mitcheltree, a co-worker. (Tr. 34-35, 101, 111).¹

15. On or around November 25, 2006, Complainant informed DeChellis that she was pregnant. (Defendant's Exhibit G)²

16. On or around November 30, 2006, DeChellis discharged Complainant. (Tr. 105, 143).

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.

¹ DeChellis testified that there were rumors regarding Complainant's pregnancy going back as far as the very beginning of October. Tr. 135.

² Both Complainant and DeChellis recollection regarding the specific date is not clear. (Tr. 35, 137).

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 Respondent subjected Complainant to different terms, condition, and privileges of employment, including termination, based on her sex in violation of R.C. 4112.02(A).

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 medical 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. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196, 20 O.O.3d 200, 421 N.E.2d 128.

6. The wording of R.C. 4112.01(B) mirrors “almost verbatim to the Pregnancy Discrimination Act” of 1978 (PDA). *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744.] *Priest v. TFH-EB, Inc. dba Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; See 42 U.S.C. § 2000e(k).

7. 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.

8. 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 burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981).

9. It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at 254, 25 FEP Cases at 116, n.8.

10. 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 at 969, n.13.

12. In this case, the Commission may establish a *prima facie* case of sex/pregnancy discrimination by proving that:

- (1) Complainant was pregnant;
- (2) Complainant was qualified for her position;
- (3) Respondent discharged Complainant under circumstances, which give rise to an inference of discrimination.

Cf. Burdine, supra at 253, 25 FEP Cases at 115;
McDonnell v. Certified Engineering, 68 FEP Cases 1051, 1057 (D.C. Mass. 1995).

13. The Commission established a *prima facie* case of sex/pregnancy discrimination with the introduction of credible evidence that:

- (1) Ms. DeChellis was aware that Complainant was pregnant on or around November 26, 2006.
- (2) Complainant was qualified for her position as a server. (Tr. 25-26).
- (3) Ms. DeChellis became aware that Complainant was pregnant on November 25th and Complainant was discharged on November 30th.

14. The close temporal proximity between the Complainant informing Ms. DeChellis of the pregnancy and her subsequent discharge is sufficient evidence to give rise to an inference of discrimination

Employer discharged employee within two months of learning of her pregnancy. *Asmo v. Keane, Inc.*, 471 F.3d 588 (6th Cir. 2006), see also *DiCarlo v. Potter*, 358 F.3d 408, 421 (6th Cir. 2004)(twenty-one days);

15. The Commission having established a *prima facie* case of sex- pregnancy discrimination, the burden of production shifted to Respondent to “articulate some legitimate, nondiscriminatory

reason” for the employment action.³ *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 254-55, 25 FEP Cases at 116, n.8.

16. 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.

17. Respondent met its burden of production with

³ 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). *Id.*, at 524, 62 FEP Cases at 106.

introduction of evidence that Complainant was discharged due to poor performance.

18. 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.

19. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for Complainant's discharge 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.

20. 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 . . . [sex] is correct. That remains a question for the fact finder to answer

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

22. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for terminating the Complainant. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that 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).

23. Such direct attacks, if successful, permit the factfinder 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.⁴

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

24. 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" that the reason are a pretext for unlawful discrimination. *Manzer, supra* at 1084.

25. 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.*

⁴ 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.

24. The Commission introduced evidence that challenged the credibility of the Respondent's reason for terminating the Complainant.

25. DeChellis socialized with Complainant and Price , spending time with them after work and having drinks. (Tr. 28-29, 150).

26. DeChellis terminated three (3) employees who worked for the Respondent starting in August 2006 for the same types of behavior that DeChellis asserts that Complainant was terminated for: cell phone use and giving food away. (Tr. 151-153).

27. Although DeChellis testified that she started reprimanding complainant for poor work performance in September 2006, she did not terminate Complainant until December 6, 2006, approximately one week after Complainant told her that she was pregnant.

28. I found Price's testimony credible that she overheard DeChellis state that she was going to terminate Complainant because of her pregnancy. (Tr. 104-105, 118).

29. I also found Price's testimony credible that she also heard Mr. DeChellis say "You can't fire her because of her pregnancy". (Tr. 106).

30. After a careful review of the entire record, ALJ disbelieves the underlying reasons that Respondent articulated for Complainant's discharge and concludes that, more likely than not, they were a pretext or a cover-up for pregnancy 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 a prima facie case, suffice to show intentional discrimination.

Id., at 511, 62 FEP Cases at 100.

31. Such action constitutes sex discrimination and entitles Complainant to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #32238 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to make an offer of employment to Complainant within 10 (ten) days of the Commission's Final Order for the position of Server. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a Server on December 6, 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 (ten) days of the offer of employment, a certified check payable to

Complainant for the amount that Complainant would have earned had she been employed as a Server on December 6, 2006 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.⁵

Denise M. Johnson

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Mailed: April 2, 2012

⁵ 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.