

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

CLAUDIA MARTINEZ

Complainant

v.

BIG DADDY'S DRIVE THRU
AND ERIC M. OLEJNIK AND
CHRISTINE A. OLEJNIK

Respondent

Complaint No. 07-EMP-AKR-31447
(AKR) E3 (31447) 07242006 Amended
22A-2006-20679F

CHIEF ADMINISTRATIVE LAW JUDGE'S

AMENDED FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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INTRODUCTION AND PROCEDURAL HISTORY

Claudia Martinez (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on July 24, 2006.

The Commission investigated the charge and found probable cause that Big Daddy's Drive Through, LLC, Christine A. Olejnik, and Eric M. Olejnik (Respondents) engaged in unlawful employment practices in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on June 22, 2007.

The Complaint alleged Respondents subjected Complainant to different terms, conditions, and privileges of employment based on her sex and national origin in violation of R.C. 4112.02(A) and constructively discharged her in violation of R.C. 4112.02(I).

Respondent filed an Answer to the Complaint on August 13, 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 October 28, 2008 at the Trumbull County Common Pleas Court, 161 High Street N.W., Warren, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 48 pages; exhibits admitted into evidence during the hearing; and a post-hearing brief filed by the Commission on September 8, 2009. Respondents did not file a post hearing brief.¹

¹ On January 8, 2008 the Commission filed a Motion to Compel Discovery which was granted. Respondents failed to comply with the Order and the Commission filed a Motion for Default, pursuant to Ohio R. Civ. P. 37(D). The Commission's Motion was granted, pursuant to an Order issued October 24, 2008.

DEFAULT JUDGMENT

Pursuant to Ohio Administrative Code (O.A.C.) 4112-3-12(B), the Civil Rules govern discovery. Accordingly, the Commission's Motion for Default was granted and sanctions were imposed, pursuant to Ohio R. Civ. P. 37((B)(2)(a) and (b) as follows:

- (2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
 - (a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
 - (b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

Since a default judgment has been entered in this matter, the only remaining issue is to determine the appropriate amount of damages.

**FINDINGS OF FACT by
DEFAULT FROM THE COMMISSION'S COMPLAINT ²**

1. Complainant's sex is female. (6A)

2. Complainant's national origin is Hispanic.³ (6B)

3. Respondent hired Complainant in March 2006. (6C)

4. Respondents permitted an environment that was hostile with the use of offensive and derogatory language based on Complainant's national origin and sex. (6D)

5. In March 2006, Complainant complained to Respondents about the offensive language and derogatory comments toward women by Eric Olejnik. (6E)

6. On July 16, 2006 Complainant was forced to resign after Respondent accused her of stealing and called her a racially

² Numbers correspond to allegations set forth in the Commission's Complaint and Notice of Hearing.

³ Pursuant to O.A.C. 4112-3-05 (D) the Administrative Law Judge *sua sponte* amend the Commission's Complaint , paragraph 6(B) to change the basis from "race" to "national origin". Paragraphs 6D, 6E and 6F reflect the changes and are thereby amended consistent with the amended basis.

offensive name based on her national origin and sex in retaliation for engaging in a protected activity. (6F)

FINDINGS OF FACT FROM HEARING

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.

7. Complainant filed a sworn charge affidavit with the Commission on July 24, 2006.

8. The Commission determined on March 1, 2007 it was probable Respondents engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

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

10. Respondent is a limited liability corporation doing business in Ohio and an employer.

11. Respondent Christine A. Olejnik (Respondent C. Olejnik) is a person doing business in Ohio and an employer.

12. Respondent Eric M. Olejnik (Respondent E. Olejnik) is a person doing business in Ohio and an employer.

13. Complainant is a female, and her national origin is Hispanic.

14. Respondents operate a beer and wine drive through and pizza delivery.

15. Respondents hired Complainant in March 2006 as a cook.

16. During the time Complainant worked for Respondents, Respondent E. Olejnik made derogatory statements based on Complainant's national origin and sex.

17. Complainant complained to Respondent C. Olejnik about the offensive comments being made to her by Respondent E. Olejnik.

18. On July 16, 2006, Respondent E. Olejnik accused Complainant of stealing and called her a derogatory term based on her national origin and sex.

19. Complainant left and did not return to work.

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.⁴

⁴ 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 Respondents subjected Complainant to different terms, conditions, and privileges of employment based on her sex and national origin in violation of R.C. 4112.02(A), and constructively discharged her in violation of R.C. 4112.02(I).

2. These allegations, 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, national origin, ... of any person, to discharge without just cause..., or otherwise to discriminate against that person with respect ... tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.
- (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 (A) and (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 discrimination/retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Title VII's analogous anti-discrimination provision, 42 U.S.C. § 2000e-2(a)(1), makes it:

an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's (...) , sex, or national origin.

This provision "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult," *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), and thus prohibits conduct which is "sufficiently severe and pervasive [as] to alter the conditions of the victim's employment and create an abusive working environment." *Id.* at 67 (internal quotation marks omitted); accord *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).

6. In order to establish a claim of hostile-environment harassment, the Commission must show:

- (1) that the harassment was unwelcome;
- (2) that the harassment was based on sex and national origin;
- (3) that the harassing conduct was sufficiently severe or pervasive to affect the "terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment"; and

- (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Hampel v. Food Ingredients Specialties, Inc. (2000), 89 Ohio St. 3d 169, 176-77, 729 N.E.2d 726.

7. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas, supra* 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.⁵ *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

⁵ 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; [constructive discharge, retaliation] 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).

... “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.

10. The proof required to establish a *prima facie* case of retaliation 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 that:

- (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 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

11. In March 2006 Complainant opposed what she believed to be discriminatory practices talking to Respondents about the offensive comments based on sex and national orgigin that Respondent E. Olejnik directed toward Complainant.

12. Respondent however did not stop making derogatory statements to Complainant based on her sex and national origin throughout the duration of her employment.

13. On July 16, 2006 Respondent E. Olejnik made offensive and derogatory statements to Complainant based on her national origin and sex and accused her of stealing.

14. Normally, employees who are subjected to unlawful discrimination must remain on the job while they seek legal redress. *Brooms v. Regal Tube Co.*, 50 FEP Cases 1499 (7th Cir. 1989).

15. However, an employee may be compelled to resign when confronted with an “aggravated situation beyond ordinary discrimination.” *Id.*, at 1506 (citation omitted); *See also Yates v. AVCO Corp.*, 43 FEP Cases 1595, 1600 (6th Cir. 1987) (“proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors”) (citation omitted).

16. When there is an allegation of constructive discharge, the fact-finder must examine “the objective feelings of [the] employee and the intent of the employer.” *Wheeler v. Southland Corp.*, 50 FEP Cases 86, 88 (6th Cir. 1989), *quoting Yates, supra* at 1600. To meet the objective standard, the Commission must show the “working conditions ... [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt

compelled to resign.” *Yates, supra* at 1600, *quoting Held v. Gulf Oil Co.*, 29 FEP Cases 837, 841 (6th Cir. 1982).

17. To meet the intent requirement, the Commission must show that a “reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged.” *Wheeler, supra* at 89. In other words, an employer “must necessarily be held to intend the reasonably foreseeable consequences of its actions.” *Hukkanen v. International Union of Operating Engineers*, 62 FEP Cases 1125 (8th Cir. 1993).

18. Through the failure by Respondents to dispute the allegations in the Commission’s Complaint, the allegations in the Complaint are deemed true.

19. Accordingly, the Commission has established a *prima facie* case of hostile work environment based on national origin and sex, and constructive discharge based on Complainant’s good faith

belief that she was opposing Respondents' discriminatory practices.

20. The Complainant related the following verbal exchange between herself and Respondent E. Olejnick:

Mr. Oppenheimer: Wait, wait, I'm sorry, let me just break up your testimony a little bit here. Starting cussing you out. What did he say to you? It's important that we have it on the record.

Ms. Martinez: Are you serious? He's like, do I have to say the bad words?

Mr. Oppenheimer: You can maybe do the first letter.

Ms. Martinez: He's like you dumb B Mexican, you can't get nothing right. And I was like whatever Eric I just need you to get down here and help me with the order and he's like I don't need to because I F'n told you how to do it and I go well I'm confused Eric. And so he's like I will be down there and all hell's going to break loose and I was like whatever you know, it was nothing new with Eric. So he showed up and he started throwing pans all over and he's like you are so stupid and you can't get nothing right. I told you to get it done. He's like

you're just like every other woman, they can't get nothing right.(...)

Tr. 25

21. Respondents should have been able to foresee the consequences of Respondent E. Olejnik's behavior on Complainant's work environment.

22. The Commission proved that Respondent retaliated against Complainant for opposing what she believed to be a protected activity. Respondents subjected Complainant to an illegal hostile work environment so severe and pervasive that it was foreseeable that Complainant felt forced to leave her job.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 07-EMP-AKR-31447 that:

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

2. Complainant shall be paid the same wage she would have been paid had she been employed as a cook on July 16, 2006 and continued to be so employed up to the date April 27, 2007⁶;

3. Respondents shall submit to the Commission within 10 days of the Commission's Final Order a certified check payable to Complainant for the amount she would have earned had she been employed as a cook on July 16, 2006 and continued to be so until

⁶ Respondents sold the Big Daddy's Location and the Complainant was hired by the new owner in April of 2007. Tr. 28-31, 33, Commission Exhibit 3.

April 27, 2007 including any raises and benefits she would have received, less any interim earnings, plus interest at the maximum rate allowed by law.⁷

Denise M. Johnson

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 24, 2012

⁷ 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.