



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Diane Labiche

Complainant,

Complaint No. 09-EMP-DAY-32433

v.

Greater Toledo Urban League, Inc.

**OHIO
CIVIL RIGHTS
COMMISSION**

Respondent.

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

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Executive Director

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Complainant

ALJ'S REPORT

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Governor
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Ohio Civil Rights Commission

Board of Commissioners

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February 11, 2014

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Re: Diana Labiche v. Greater Toledo Urban League, Inc.
Complaint No. 09-EMP-DAY-/TOL-32433

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **March 5, 2014**. *No extension 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, OH 43215-3414.** All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

Desmon Martin / rlb

Desmon Martin
Director of Enforcement and Compliance

Enclosure

cc: Lori A. Anthony, Section Chief – Civil Rights Section / Sharon Tassie, Principal Assistant Attorney General / G. Michael Payton, Executive Director / Keith McNeil, Director of Operations and Regional Counsel / Stephanie Bostos-Demers, Chief Legal Counsel

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INTRODUCTION AND PROCEDURAL HISTORY

Diana Labiche (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 11, 2008, and filed an amended charge on June 4, 2009.

The Commission investigated the charge and found probable cause that Greater Toledo Urban League, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve the matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 16, 2009.

The Complaint alleged that Complainant was denied employment and was retaliated against because of her sex.

Respondent filed an Answer to the Complaint on September 2, 2009. 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 18, 2011 at One Government Center, 12th Floor, in Toledo, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (194 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on January 4, 2012; by Respondent on February 1, 2012; and a reply brief filed by the Commission on February 7, 2012.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) credibility assessment 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 August 11, 2008, and filed an amended charge on June 4, 2009.

2. The Commission determined on June 25, 2009 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint and the Notice of Hearing on July 16, 2009, after conciliation failed.

4. Respondent is an employer as defined by R.C. 4112.01(A)(2).

5. Complainant was initially hired by Respondent in April 2002.
(Tr. 13, 19)

6. Complainant worked in various capacities and positions for Respondent throughout her employment.

7. In 2002, Johnny Mickler (Mickler), Respondent's former CEO and president, hired Complainant as the Director of Job Placement Services (JPS). (Tr. 13)

8. Complainant held this position for her entire employment tenure. Complainant's JPS duties included supervising staff, reporting and writing grants, obtaining job opportunities and referrals for constituents, and community education programs. (Tr. 13-14, 17)

9. In March of 2007¹ Commission investigators interviewed Complainant relating to charges of discrimination (sexual harassment and wrongful discharge) against Mickler filed by two former employees. (Tr. 36-37, 78-79)

10. Following the investigation, Mickler left the Toledo location and John Jones (Jones) became the new CEO/President on May 1, 2008. (Tr. 99, 103-104)

¹ Complainant could not recall the exact year that she participated in the Commission's investigation of a sexual harassment charge filed by two former employees of Respondent. On cross-examination Respondent's counsel asked Complainant when she gave statements to the Commission and the Complainant could not recall. Respondent's counsel offered the following in order to refresh Complainant's recollection: "Q: And if I told you that both Ms. Perili and Ms. Glover filed their complaints in 2006, would you have any reason to dispute that? A. I don't know when they filed."

11. The Lucas County Job and Family Services (LCJFS) suspended funding of the JPS, FOTI and Academic Success Program on June 19, 2008 pending the outcome of a fraud investigation of Respondent's contract management. (Tr. 109-110, 136-137)
(Ex Exhibit D)

12. Respondent also conducted an internal investigation to uncover any fraud related to the three suspended programs. (Tr. 141-142)

13. At the time of the fraud investigation, Barbara Kyles (Kyles), Liz Watson (Watson) and Complainant were program directors. Kyles was the Director of Senior Programs, Watson was the Director of FOTI, and Complainant was the Director of JPS, as well as a consultant for FOTI. (Tr. 110-111, 115)

14. Due to the suspended funds, Respondent was unable to pay salaries and laid-off/terminated thirteen individuals working in programs funded by LCJFS, including Complainant and Watson on July 15, 2008. Kyles was not laid-off/terminated because her J. Frank Troy Senior Center was not involved in the fraud investigation. (Tr. 147-148, 170)

15. In late-July 2008, LCJFS restored funding to Respondent's programs after Jones submitted strict process/procedural changes to resolve the fraudulent activities committed by staff members in both the JPS and FOTI programs. (Tr. 141-142, 145, 150)

16. Respondent sent out certified letters recalling previously terminated employees. (Tr. 150-151)

17. Eight of the thirteen terminated employees were permitted to return to work in their same positions without requiring another interview or job application. All of the recalled employees were lower level staff members and not program directors. (Tr. 150,176)

18. Complainant and Watson did not receive recall letters although they were found not guilty of any personal fraud. (Tr. 156-157, 176)

19. In August 2008, Jones informed Complainant that JPS was merging with FOTI and that her previous position no longer existed. The restructured position was entitled Workforce Development Director, and Complainant had to apply and interview to be considered for the job. (Tr. 29, 152-153)

20. Respondent posted an advertisement for the new director position setting forth the qualifications for the job. (Tr. 153)

21. Complainant submitted an application, but was not interviewed for the position. (Tr. 153-154)

22. In November 2008, Respondent hired Brandon Tucker (Tucker) for the position of Workforce Development Director. (Tr. 159)

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.²

² 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 Complainant was subject to different terms, conditions and privileges of employment, including lower pay, lay off, failure to rehire, and failure to hire, based on her sex and in retaliation for engaging in protected activity in violation of R.C. 4112.02(A) and (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,... 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 other matter directly or indirectly related to employment."

(I) "For any person to discriminate in any manner against any other person 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. Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination and retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII, the evidentiary framework established in *McDonnell Douglas v. Greene*, 411 U.S. 792 (1973) for disparate treatment applies to unlawful discrimination and retaliation cases.

6. This framework normally requires the Commission to establish a *prima facie* case of unlawful discrimination and retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802.

7. 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.³ *McDonnell Douglas, supra* at 802.

8. 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 (1993), quoting *Burdine, supra* at 254-55.

9. The presumption of discrimination created by the establishment of the *prima facie* case “drops out of the picture” when the employer

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.

“The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the failure to hire. 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 reason was applied in a nondiscriminatory fashion.”

EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations and footnote omitted).

articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511.

10. In this case, it is not necessary to determine whether the Commission established a *prima facie* case of disparate treatment. Respondent's articulation of legitimate, nondiscriminatory reasons for its decision to not 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, 715 (1983) quoting *Burdine, supra* at 255.

"Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant." *Aikens, supra* at 715.

11. Respondent stated that its decision not to hire or interview Complainant was based on her inability to meet required qualifications for the restructured position. Specifically, Complainant's failure to effectively communicate with CEO/President Jones and her inadequate leadership of subordinates. (Tr. 154-156)

12. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex. *Hicks, supra* at 511. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for failure to hire/interview Complainant were not the true reasons, but were "a pretext for discrimination." *Id.*, at 515, quoting *Burdine, supra* at 253.

"[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.

13. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing 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..." *Id., supra*, at 524.

14. The Commission must ultimately provide sufficient evidence to allow the fact finder to infer that Complainant was, more likely than not, the victim of sex discrimination. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d. 578, 586-587.

15. To show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's reasons for failing to hire/interview Complainant. The Commission can directly challenge the credibility of the articulated reasons by showing that the reasons 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) (emphasis added).

"The fact finders 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.

⁴ Even though rejection of the [Respondent's] proffered reasons is enough at law to *sustain* a finding of discrimination, *there [still] must be a finding of discrimination. Hicks, supra* at 512.

16. The Commission can indirectly challenge the credibility of Respondent's reasons by proving that the sheer weight of circumstantial evidence makes it "more likely than not" that the reasons articulated are a pretext for unlawful discrimination. *Manzer, supra* at 1084 (emphasis added). Indirect attacks tend to prove that the reasons did not *actually* motivate the employment decision. The Commission is required to produce evidence in addition to a *prima facie* case to show unlawful discrimination occurred. *Id.*

17. The Commission attempted to show that Respondent's reasons for not hiring Complainant were pretextual because its explanations were "unworthy of credence." *Burdine, supra* at 450.

18. The Commission alleged that Respondent's failure to meet job qualification argument was meritless because the Complainant was overly qualified for the restructured position. (Tr. 33-34)

19. CEO/President Jones articulated that due to past experiences with Complainant, namely her failure to submit a funding proposal to him for review before she contacted potential donors,

demonstrated Complainant's lack of effective communication skills.
(Tr. 112-117, 154-155)

20. Moreover, Jones believed Complainant lacked adequate leadership skills for the new position because she failed to supervise and take responsibility for subordinate JPS staff found liable for fraud in the investigation. (Tr. 156-158)

"The perception of a decision maker regarding the performance of a Complainant is the *relevant consideration*, not a Complainant's self assessment." *Dejarnette v. Corning, Inc.*, 75 FEP Cases 1088, 1092 (4th Cir.1998) (footnote, citations, and quotations omitted).

21. Pretext can also be shown by proof of disparate treatment. The Commission alleged that the successful candidate was given preferential treatment over Complainant by CEO/President Jones. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

22. Tucker was well qualified for the Director of Work Force Development position based on his work experience and not simply his gender. Prior to employment with the Respondent, Tucker worked for Lucas County Workforce Development as the Director of

the Summer Youth Programs, for two to three years, and possessed the necessary skills for the restructured job. (Tr. 159-160,180-181)

23. The Commission is not in a position to second guess Respondent's business judgment regarding the impact of Complainant's past performance in regard to her application for the position of Director of Work Force Development.

“[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.” *Combs v. Meadowcraft, Inc.*, 73 FEP Cases 232, 249 (11th Cir. 1997).

24. Respondent also articulated that it did not retaliate against Complainant for her participation in the investigation of former CEO/President Mickler. Respondent's decision not to hire/interview Complainant was solely based on the availability of more qualified applicants. (Tr. 154)

25. To establish unlawful retaliation, the Commission must show by a preponderance of the evidence that:

- (1) Complainant engaged in a protected activity,
- (2) Respondent was aware that the Complainant had engaged in that activity,
- (3) Respondent took an adverse employment action against the Complainant, and
- (4) There is a causal connection between the protected activity and adverse action.

Greer-Burger v. Temesi, 116, 116 Ohio State.3d 324 at para. 13 citing *Canitia v. Yellow Freight Sys., Inc.* (C.A. 6, 1990), 903 F.2d 1064, 1066

26. The Commission failed to satisfy the second prong of a *prima facie* case of retaliation because although CEO/President Jones made the decision not to interview Complainant, Jones lacked knowledge of Complainant's interview with investigators. (Tr. 103-104, 154)

27. Although Jones and board members were made aware of the charges against Mickler, the board was not provided with details, nor was it discussed in his presence as to who provided information to the investigators. (Tr. 168-169,187)

28. Moreover, the Commission failed to satisfy the fourth prong of a casual connection for retaliation. Respondent presented credible evidence that the lapse of time between Complainant's investigation interview and the "adverse action" is too long to support a charge of retaliation.

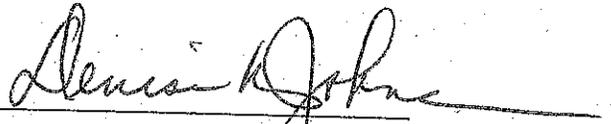
"[A]s a matter of law, three months is too long to support an inference of retaliation." *Reeves v. Digital Equipment Corp.*, (N.D. Ohio, 1989), 710 F. Supp. 675, 677; See *Reedy v. Good Samaritan Hosp. & Health Ctr.*, (S.D. Ohio, 2000), 137 F. Supp. 2d 948, 974.

29. Complainant was interviewed approximately in March 2007, yet the "adverse" decision not to hire her was made *more than one year later* sometime between August and November 2008. (Tr. 29, 78-79, 159)

30. The Commission failed to show that the Complainant was not hired for the position of Director of Workforce Development because of her sex, or in retaliation for participating in a protected activity under R.C. 4112.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 09-EMP-DAY/ TOL.-32433



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed: February 11, 2014

DMJ/rb



Governor
John Kasich

Ohio Civil Rights Commission

Board of Commissioners

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Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

May 15, 2014

Diana Labiche
1607½ S. Cove Blvd.
Toledo, Ohio 43606

RE: Labiche, Diana v. Greater Toledo Urban League
DAY72(32433)08112008
22A-2008-04552-C
Complaint No. 09-EMP-DAY/TOL-32433

The enclosed Order dismissing Complaint No. 09-EMP-DAY/TOL-32433 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting May 15, 2014.

This case is closed.

FOR THE COMMISSION

Desmon Martin/pjw

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section

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May 15, 2014

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420 Madison Avenue, Suite 1250
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FOR THE COMMISSION

Desmon Martin/pju

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief - Civil Rights Section

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John Kasich, Governor

IN THE MATTER OF:)
)
DIANA LABICHE,) Complaint No. 09-EMP-DAY/TOL-32433
)
Complainant,)
)
vs.)
)
GREATER TOLEDO URBAN)
LEAGUE,)
)
Respondent.)

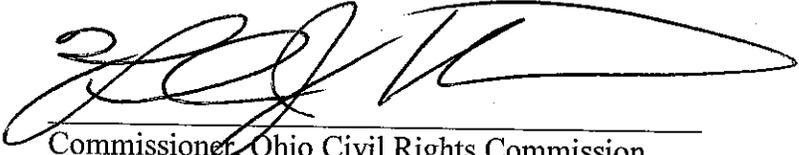
FINAL ORDER

This matter comes before the Commission upon the Complaint and Notice of Hearing No. 09-EMP-DAY/TOL-32433; the official record of the public hearing held on October 18, 2011 before Denise M. Johnson, a duly appointed administrative law judge; the post-hearing briefs filed by the Commission and Respondent; and the Administrative Law Judge's Report and Recommendation dated February 11, 2013. No objections to the report and recommendation were filed.

The complaint alleges that Complainant was discriminated against because of her race and sex. After a public hearing, the Administrative Law Judge recommended that the Commission dismiss Complaint No. 09-EMP-DAY/TOL-32433. After careful consideration of

the entire record, the Commission adopted the Administrative Law Judge's report at its public meeting on April 24, 2014. Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations contained in the Administrative Law Judge's report, as if fully rewritten herein, and dismisses the complaint against Respondent.

This ORDER issued by the Ohio Civil Rights Commission this 15th day of May, 2014.



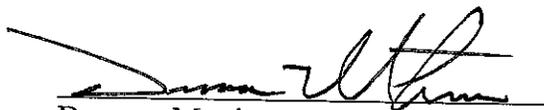
Commissioner, Ohio Civil Rights Commission

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 Final 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