Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Karen S. Sanders

Complainant,

Complaint No. 10-EMP-DAY-20442

v.

Central State University

Respondent.

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

OHIO CIVIL RIGHTS COMMISSION

G. Michael Payton
Executive Director

Commissioners
Leonard Hubert, Chairman
Stephanie Mercado, Esq.
Lori Barreras
William W. Patmon, III
Tom Roberts

MIKE DeWine
ATTORNEY GENERAL

Megan Hudson, Esq.
Assistant Attorney General
Civil Rights Section
30 East Broad Street – 15th Flr.
Columbus, OH 43215
Counsel for the Commission

Michael C. McPhillips, &
Mia Yaniko, Esqs.
Assistant Attorney Generals
Education Section
30 East Broad Street – 16th Flr.
Counsel for the Respondent

Jason Matthews, Esq.
Jeffrey M. Silverstein & Assoc.
627 Edwin C. Moses Blvd. #2C
Dayton, OH 45417

Karen S. Sanders
6054 Hemingway Road
Huber heights, OH 45424-3525
Complainant

ALJ'S REPORT
Denise M. Johnson
Ohio Civil Rights – Hearing Division
State Office Tower, 5th Flr.
30 East Broad Street
Columbus, OH 43215
614-466-6684
Chief Administrative Law Judge

Central Office
30 East Broad Street
5th Floor
Columbus, Ohio 43215
(614) 466-2785 Phone
(888) 278-7101 Toll Free
(614) 644-8776 Fax
www.crc.ohio.gov

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Stephanie M. Mercado, Esq.
William W. Patmon, III
Tom Roberts
Lori Barreras

G. Michael Payton, Executive Director

February 21, 2014

Karen S. Sanders
6054 Hemingway Road
Huber Heights, OH 45424-3525

Megan Hudson, Esq.
Assistant Attorney General
Civil Rights Section – 15th Floor
C30 East Broad Street
Columbus, OH 43215

Michael C. McPhillips & Mia Yaniko, Esq.
Assistant Attorney Generals
Education Section – 16th Floor
30 East Broad Street
Columbus, OH 43215

Jason Matthews, Esq.
Jeffrey M. Silverstein & Assoc.
627 Edwin C. Moses Blvd. #2
Dayton, OH 45417

Re: Karen S. Sanders v. Central State University
10-EMP-DAY-20442

Attached 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 17, 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

Attachment

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

INTRODUCTION AND PROCEDURAL HISTORY

Karen S. Sanders (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on November 5, 2009.

The Commission investigated the charge and found probable cause that Central State University (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 April 22, 2010. The Complaint alleged that Complainant was subjected to different terms and conditions of employment due to her age in violation of R.C. 4112.02 (A).

Respondent filed an Answer to the Complaint on May 9, 2010. 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 April 26, 2011 at the Greene County Court, 45 North Detroit Street, Xenia, Ohio 45385.

The record consists of the previously described pleadings, a transcript of the hearing (137 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on July 15, 2011 and by Respondent on August 5, 2011.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the Administrative Law Judge's assessment of the credibility of the witnesses who testified before her in this matter. The Administrative Law Judge (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 November 5, 2009.

2. The Commission determined on March 11, 2010 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 public historically black university located in Wilberforce, Ohio.

5. Complainant's date of birth is September 27, 1951.

6. Complainant graduated with a business associate degree from Sinclair College in 1987. (Tr. 40)

7. Complainant began her employment with Respondent in February 2005. Her position was Clerk in the Office of Financial Aid (OFA).

8. At the time that complainant was hired Veronica Leach (Leach) was the Director of the OFA.

9. Complainant's duties as front desk clerk included the following tasks: answering the telephone, monitoring a sign-in sheet, making copies for students, and handling basic inquiries. (Tr. 40-41)

10. Complainant's direct supervisor was Betty Jean Hurst (Hurst), Assistant Director of Financial Aid.

11. In 2006 Complainant was promoted to the Student Employment Coordinator position.

12. In this new position Complainant addressed questions from both students and their parents about work study issues, and interacted with supervisors at work sites on and off campus where work study students had jobs. (Tr. 59-60)

13. In January 2008 Phyllis Jeffers-Coly (Jeffers-Coly) was appointed as the Interim Dean of Enrollment Services.

14. In April of 2008 Jeffers-Coly was appointed the Dean of Enrollment Services for the College. (Tr. 12)

15. Jeffers-Coly's date of birth is July 18, 1971. (Tr. 12)

16. As Dean of Enrollment services, Jeffers-Coly's responsibilities included the oversight of the OFA.

17. Jeffers-Coly wanted to improve the delivery of services in the departments that were under her management. (Tr. 115)

18. Jeffers-Coly had been inspired by the work of Tally Hart (Hart) of Ohio State University's Financial Aid Department. Jeffers-Coly met Hart during the summer of 2008. (Tr. 14)

19. Hart wrote and worked extensively in the area of making college accessible to unlikely college candidates. (Tr. 116)

20. Jeffers-Coly educated herself about OSU's peer access program through which students work with other students to learn the college financial aid process, with the aim of avoiding defaults on student loans. (Tr. 14-15)

21. Jeffers-Coly wanted to institute a similar program in the departments that she managed. (Tr. 15)

22. The Hart model was based on financial aid services being delivered by employees who were knowledgeable about funding sources and who would be able to proactively teach parents and students how to acquire available resources for college funding. (Tr. 116-117)

23. Respondent hired a recruitment and marketing consultant who advised Jeffers-Coly to bring in a financial aid consultant to discuss how the office might be re-organized. (Tr. 116)

24. In the summer of 2008 Respondent hired Dr. Reggie Brazzle (Brazzle), a financial aid consultant.

25. Brazzle recommended that Respondent adopt a counselor centered approach toward financial aid. (Tr. 15-16)

26. Based on Brazzles's recommendation, Jeffers-Coly wrote a memorandum to Respondent's President, John Garland (Garland) dated November 8, 2008. In that memo Jeffers-Coly recommended that Student Services and OFA have reassigned roles and responsibilities for the counseling staff so that service levels could be more efficient. (Tr. 118,119, Exh. 8)

27. Jeffers-Coly recommended that two financial aid positions be eliminated and replaced with the creation of an Access Investment Educator position and the adoption of a counselor centered approach. (Tr. 16-17)

28. The two positions to be eliminated were the Default Manager, held by Joyce Spencer (Spencer), and the Student Employment Coordinator position held by Complainant. (Tr. 16-17)

29. At the time Jeffers-Coly recommended the changes, she forecasted that the savings from the proposed job eliminations

would be action steps toward bringing consistency to the student services department.

30. The elimination of the two positions would help fund the Access Investment Educator/Investment Educator position. This would give the departments that she managed more leverage to provide a competitive salary to the future director of the OFA along with the two new Counselor positions, thus providing money for training and development. (Exh. 11)

31. Jeffers-Coly was 37 years old at the time she made the recommendations to Garland.

32. Garland had the ultimate authority to make hiring and firing decisions for Respondent. (Tr. 94)

33. Garland accepted Jeffers-Coly's recommendation.

34. Complainant was notified by Garland pursuant to a letter dated December 2, 2008 that she was being terminated, effective early January 2009. (Tr. 21-22, 72, Exh. 1)

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.

1. The Commission alleged in the Complaint that Complainant was subjected to different terms and conditions of employment due to her age 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 . . . age . . . 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."
>
> R.C. 4112.01(A)(14) defines age as "at least forty years old."

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) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Absent direct evidence of discrimination, the Commission is generally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence applying evidentiary standards arising under federal case law. *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St. 2d 192, 197 citing *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.

5. The establishment of a *prima facie* case creates a rebuttable presumption of discrimination. *Burdine* at 254.

6. 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, n.13. In this case, the Commission may establish a *prima facie* case of age discrimination by proving that:

(1) Complainant was a member of a statutorily protected class;

(2) Complainant was discharged;

(3) Complainant was qualified for the position; and

(4) Complainant was replaced by, or the discharge permitted the retention of, a person of substantially younger age.

Coryell v. Bank One Trust Co., 101 Ohio St. 3d 175, (2004) Ohio-723 P.8

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.[1] *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.

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.

9. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a

---

[1]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 reorganization and position elimination ; 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).

legitimate, non-discriminatory reason for Complainant's discharge 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 (1983), quoting *Burdine, supra* at 255.

> 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.

10. Respondent met its burden of production with the introduction of evidence that Complainant's position was eliminated as a part of the reorganization of positions in student services and OFA.

11. Respondent having met its burden of production, the inquiry moves to the ultimate issue of the case (i.e., whether Respondent eliminated Complainant's position because of her age). The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not its true reasons, but were "a pretext for discrimination."

Hicks, supra 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.

Thus, even if 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 . . . [age] is correct. That remains a question for the fact finder to answer . . ." *Id.* at 524.

12. Ultimately, the Commission must provide sufficient evidence for the fact finder to infer that Complainant was, more likely than not, the victim of age discrimination.

13. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for discharging Complainant.

14. The Commission may directly challenge the credibility of Respondent's 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).

15. Such direct attacks, if successful, permits the fact finder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

> "The fact finder'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. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of discrimination is *required*."[2]
> *Hicks, supra* at 511, (bracket removed); Also see *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108 (2000).

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.

17. This type of showing, which tends to prove that the reasons did not *actually* motivate the employment decisions, requires the Commission to produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

18. In the instant case the Commission indirectly challenged the credibility of the Respondent's reasons with the introduction of evidence that there was no reorganization, that Respondent's actions

[2]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* 511, n.4.

were designed to fire two employees in their fifties and to hire two individuals in their twenties.

19. The Commission's argument is without merit.

20. A person is considered replaced when another employee is hired or reassigned to perform the Complainant's duties.
Barnes v. GenCorp Inc., 896 F.2d 1457, 1465, (1990).

21. The ultimate inquiry is whether Respondent took adverse action because of age. *Gross v. FBL Financial Svcs. Inc.* 129 S. Ct. 2343, 2350 (2009).

22. Respondent's reason for the reorganization was credible.

23. Pursuant to Respondent's reorganization plan, Complainant's job was eliminated in addition to another the position of Default Manager held by Spencer. Both Complainant and Spencer were notified that their positions were being eliminated in early December 2008.

24. Some of the duties that were previously performed by the Student Coordinator position were given to other employees.

25. There was no credible evidence in the record that the position of Student Employment Coordinator remained after its elimination or that another employee was hired to perform the duties of that position.

26. Because Complainant and Spencer's terminations were non-disciplinary they were eligible to apply for job vacancies with Respondent.

27. On January 6, 2009 Respondent posted two Financial Aid Officer vacancies in the OFA.

28. On January 9, 2009 Respondent posted a vacancy for a Clerk 1 position in OFA.

29. The Clerk 1 job duties were similar to those Complainant performed when she was first hired by Respondent in 2005.
(Tr. 10)

30. On January 30, 2009 Respondent posted the vacancy for the newly created position of Access Investment Educator.

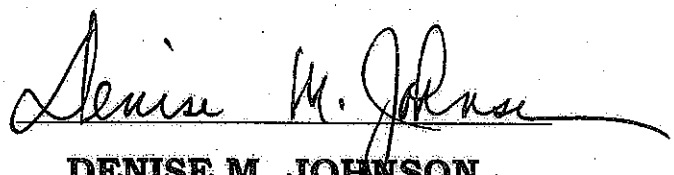
31. Complainant did not apply for any of the vacant positions.

32. The Commission also failed to introduce any credible evidence that Jeffers-Coly made ageist remarks that would create an inference that she harbored a discriminatory animus toward employees over the age of 40.

33. The Commission has failed to prove that Respondent terminated Complainant's employment because of her age.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 10-EMP-DAY-20442.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date: February 21, 2014

DMJ/rb

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Lori Barreras
William Patmon, III
Tom Roberts

G. Michael Payton, Executive Director

November 21, 2014

Karen Sanders
6054 Hemingway Road
Huber Heights, OH 45424

RE: Karen S. Sanders v. Central State University
Complaint No. 10-EMP-DAY-20442

The enclosed Order dismissing Complaint No. 10-EMP-DAY-20442 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting November 20, 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

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Lori Barreras
William Patmon, III
Tom Roberts

G. Michael Payton, Executive Director

November 21, 2014

Michael McPhillips, Esq.
Ohio Attorney General's Office
Education Section
30 E. Broad Street, 16th Floor
Columbus, Ohio 43215

RE: Karen S. Sanders v. Central State University
Complaint No. 10-EMP-DAY-20442

The enclosed Order dismissing Complaint No. 10-EMP-DAY-20442 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting November 20, 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

John Kasich, Governor

IN THE MATTER OF:	)	
	)	
KAREN S. SANDERS,	)	
	)	COMPLAINT NO. 10-EMP-DAY-20442
Complainant,	)	
	)	
vs.	)	
	)	
CENTRAL STATE UNIVERSITY,	)	
	)	
Respondent.	)	

DISMISSAL ORDER

This matter comes before the Commission upon the Complaint and Notice of Hearing No. 10-EMP-DAY-20442; the official record of the public hearing held on April 26, 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 21, 2014.

The complaint alleges that the Complainant was subject to different terms, conditions and privileges of employment and termination based on her age in violation of R.C. 4112.02(A). After a public hearing, the Administrative Law Judge recommended that the Commission dismiss Complaint No. 10-EMP-DAY-20442. After careful consideration of the entire record, the Commission adopted the Administrative Law Judge's report at its public meeting on

September 25, 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 20th day of November, 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

DATE: 11/21/2014