



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN MATTER OF:

Melanie A. Lane

Complainant,

Complaint No. 12-EMP-DAY-22671

v.

Little York Tavern

Respondent.

**OHIO
CIVIL RIGHTS
COMMISSION**

G. Michael Payton
Executive Director

Commissioners

Leonard Hubert, Chairman
Lori Barreras
William W. Patmon, III
Tom Roberts

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

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ALJ'S REPORT

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Governor John Kasich

December 5, 2014

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**Re: *Melanie A. Lane v. Little York Tavern*
Complaint No. 12-EMP-DAY-22671**

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 December 29, 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 / rb

Desmon Martin
Director of Enforcement and Compliance

Enclosure

cc: Lori A. Anthony, Section Chief – Civil Rights Section/Sharon Tassie,
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INTRODUCTION AND PROCEDURAL HISTORY

Melanie Lane (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 13, 2011.

The Commission investigated the charge and found probable cause that Little York Town Management, Inc. d.b.a. Little York Tavern (Respondent) engaged in an unlawful employment practice in violation of Ohio Revised Code (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 November 15, 2012.

The Complainant alleged Respondent terminated Complainant's employment in retaliation for engaging in a protected activity.

Respondent filed an Answer to the Complaint on December 14, 2012. 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, October 24, 2013 at the Ohio Civil Rights Commission located at 40 W. Fourth St., Suite 1900, Dayton, Ohio, 45402.

The record contains previously described pleadings, a hearing transcript consisting of 258 pages, exhibits admitted into evidence at the hearing, a post-hearing brief filed by the Commission on January 23, 2014, Respondent's reply brief filed on February 13, 2014, and the Commission's reply brief filed on February 21, 2014.

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 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 December 13, 2011.

2. The Commission determined on September 27, 2012, probable cause existed and that Respondent engaged in unlawful discrimination in violation of R.C. § 4112.02(I).

3. The Commission attempted but failed to resolve this matter by informal methods of conciliation.

4. Respondent is a bar and restaurant located in Vandalia, Ohio.

5. Respondent is owned by Tom Hentrick (Hentrick). (Tr. 14)

6. Complainant began working part-time for the Respondent as a server on the evening and weekend shifts in July of 2010. (Tr. 28-29)

7. Complainant's duties included customer service, taking food and drink orders, ringing customer orders into the computer system, delivering food and drinks, and cashing customers' bills out at the end of their meal. (Tr. 28)

8. Mark Rothwell (Rothwell) is the General Manager and Kelly Severs (Severs) is the Assistant General Manager for Respondent.

9. Rothwell and Severs manage and supervise staff, hire employees, and run the day-to-day operations. (Tr. 14-15)

10. After working her shift on Sunday, January 16, 2011, Complainant sat at the bar with a co-worker who was having a drink with Rothwell. (Tr. 30-31)

11. Rothwell, who had not been on duty that day, was at the bar watching football.

12. Rothwell had approximately 8-10 beers throughout the evening. (Tr. 216)

13. During this time Complainant became uncomfortable with the actions of Rothwell. (Tr. 31)

14. The next day Complainant discussed the incident with Hentrick. (Tr. 33)

15. Hentrick proposed Complainant work day shifts so she would not have to work with Rothwell. (Tr. 33-34)

16. Complainant could not work day shifts as she did not have daytime childcare and feared she would make less money as a result of slower daytime business. (Tr. 33-34)

17. Hentrick then met alone with Rothwell to discuss Complainant's allegations against him. (Tr. 240)

18. Complainant was unsatisfied with Hentrick's handling of the situation and later that evening filed a police report with the Vandalia police after discussing the incident with Hentrick. (Tr. 34-35)

19. Rothwell was later arrested by the Vandalia Police Department while he was at work. (Tr. 217)

20. Complainant also filed a charge of sexual harassment with the Commission as a result of the January 16, 2011 incident with Rothwell. (Comm. Ex. 2)¹

21. Complainant later discussed the January 16, 2011 incident with Severs after running into her at another local restaurant. (Tr. 34)

22. During the months following Complainant's complaint of alleged sexual harassment, Complainant complained to management that her co-workers were acting in an uncooperative and antagonistic manner toward her. (Tr. 74)

23. Management also started giving Complainant write ups for disciplinary infractions.

¹A determination of "no probable cause" was found by the Commission in relation to Complainant's sexual harassment claim leaving only Complainant's retaliation claim.

24. Respondent has ten computers throughout the restaurant and bar area for employees to enter in food and beverage orders. (Tr. 121)

25. Servers maintain a cash "bank" to make customers change and turn in cash collected from customers at the end of their shifts to a manager or periodically throughout the night if they choose to. (Tr. 200)

26. Servers turned in cash based upon their sales entered into the computer system and as specified on their nightly server revenue report. (Tr. 200)

27. On October 8, 2011 at approximately 6:23 P.M. Complainant was preparing to cash out a customer's check and noticed a pizza was missing from the customer's computer check.

28. Complainant rang in the missing pizza to correct the customer's check before presenting it to the customer for payment. (Comm. Ex. 7) (Tr. 46-47)

29. Only management can delete orders added to a customer's computer check once the server has entered the order into the computer system.

30. Complainant went into the kitchen to tell the staff not to make the pizza since the pizza had already been served to the customer.

31. Rothwell and Severs approached Complainant and asked Complainant about the order.

32. After the discussion with Severs and Complainant, Rothwell left the kitchen and went into the office. (Tr. 126)

33. While Complainant was in the kitchen with Severs, Complainant and Severs corrected the customer's check, turned in cash for the order, and the pizza was paid for at that time. (Tr. 47, 101)

34. Complainant went back to work.

35. Rothwell came out of the office and instructed Severs to prepare a termination form for Complainant before Severs left for the evening at 8:00 P.M. (Comm. Ex. 3.) (Tr. 126-127)

36. At the end of Complainant's shift sometime around 11:00 P.M., Rothwell told Complainant that he and Hentrick wanted to meet with her.

37. After Complainant entered the office Hentrick told her that she was being terminated for theft regarding the deletions shown to him by Rothwell. (Tr. 47, 246-247) (Comm. Ex. 1, 3, 7, 8)

38. Complainant refused to sign the termination form admitting to theft. (Tr. 46-48) (Comm. Ex. 3)

39. Hentrick threatened to have Complainant arrested if she did not sign a Notice of Termination form regarding the reason for her termination. (Tr. 46-48) (Comm. Exh. 1, 3)

40. At 11:19 P.M. Vandalia Police was called and an officer arrived at the restaurant at 11:22 P.M. (Comm. Exh. 1)

41. Complainant signed the Notice of Termination form in the presence of the Vandalia police officer and Hentrick. (Comm. Ex. 3)

42. Complainant's employment was terminated on October 8, 2011. (Comm. Ex. 1, 3) (Tr. 46-48)

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

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

2. This allegation, if proven, would constitute a violation of R.C. § 4112.02, which provides in pertinent part, that:

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

- (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 § 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 by a preponderance of reliable, probative, and substantial evidence.

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. v. Ohio Civil Rights Com.*, 61 Ohio St. 3d 607, 609-10, 575 N.E.2d 1164, 1167 (1991).

5. 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).

6. Under Title VII case law, the evidentiary framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973).

7. To establish a *prima facie* case of unlawful retaliation under Title VII, the Commission must demonstrate by a preponderance of the evidence that:

- 1) Complainant engaged in activity that Title VII protects;
- 2) Respondent knew that Complainant engaged in this protected activity;
- 3) Respondent subsequently took an employment action adverse to the Complainant; and
- 4) A causal connection between the protected activity and the adverse employment action exists.

Greer-Burger v. Temesi, 116, 116 Ohio St.3d 324 at para. 13 citing *Canitia v. Yellow Freight Sys., Inc.* (C.A. 6, 1990), 903 F.2d 1064, 1066³

³ R.C. 4112.08 mandates that "this chapter [4112] shall be construed liberally for the accomplishment of its purposes which is to eliminate discrimination in the state of Ohio. *Genaro v. Cent. Transp.*, 84 Ohio St. 3d 293 *Helmick v. Cincinnati Word Processing, Inc.* (1989), 45 Ohio St. 3d 131, 133, 543 N.E.2d 1212, 1215, *Kerans v. Porter Paint Co.* (1991), 61 Ohio St. 3d 486, 575 N.E.2d 428, *Collins v. Rizkana* (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653. Based on the liberal construction of Ohio's anti-discrimination statute enunciated in *Genaro* the Court's recent decision in *University of Texas Southwestern Medical Center v. Nassar*, 133 S.Ct. 2517(2013) is inapplicable to alleged violations of R.C. 4112.02(I).

The Court's rationale in *Nassar* is premised on the amendments to the Civil Rights Act of 1991(1991 Act), 105 Stat. 1071 which overruled, in part, *Price Waterhouse v. Hopkins*, 490 U.S. 228 at 259 (1989). The amendments changed the causation standard for status-based discrimination but did not change the causation language of the anti-retaliation provision. The Court reasoned that since the legislature only amended Title VII's status provision, there was no intent to eliminate the "but for causation" standard for the retaliation provision. To apply the *Nassar* rationale to Ohio law would require a presumption that Ohio law has undergone similar changes, which it has not. The application of *Nassar's* holding to R.C. 4112.02 (I) would therefore require a construction of Ohio law inconsistent with the law's statutory mandate.

8. The temporal relationship between a Complainant's participation in protected activities and a Respondent's alleged retaliatory conduct is an important factor in establishing a causal connection. *Gonzales v. State of Ohio, Dept. of Taxation*, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

9. However, the temporal relationship is not the only relevant evidence that courts consider depending on other circumstances that occur between the protected activity and the adverse action. *Devera v. Adams*, 67 FEP Cases 102 (D.C. Cir. 1995).

10. There is no dispute that Complainant opposed what she believed to be discriminatory conduct and that Rothwell and Hentrick were aware of her opposition.

11. There is also no dispute that Complainant was terminated from employment by Hentrick based on information provided to him by Rothwell.

12. The Commission introduced evidence that from the time that Complainant started working in July 2010 up until January 16, 2011, Complainant had a cordial and cooperative working relationship with Rothwell and her co-workers and had no documented disciplinary issues. (Comm. Ex. 9) (Tr. 30)

13. Additionally, the Commission introduced evidence that after January 16, 2011, Complainant complained to management about harsh treatment and lack of cooperation from co-workers, including threats of physical violence.

14. After January 16, 2011 Complainant also received a large amount of written disciplinary infractions. (Tr. 37-44)

15. The Commission established a causal connection with the introduction of evidence of other circumstances that occurred after Complainant's opposition to alleged sexual harassment.

16. The Commission has therefore established a *prima facie* case of retaliation.

17. Once the Commission establishes a *prima facie* case, the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its adverse employment action against Complainant. *McDonnell Douglas*, 411 U.S. at 802.

18. The presumption of unlawful retaliation created by the establishment of a *prima facie* case “drops out of the picture” when the Respondent articulates a legitimate, nondiscriminatory reason for its employment action. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502 at 511 (1993).

19. Respondent met its burden of production with the introduction of evidence that Complainant engaged in attempted theft by deleting food items from a customer’s ticket in an attempt to pocket the customer’s money on October 8, 2011.

20. 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 ... [unlawful retaliation].” *Id.* at 515 quoting *Burdine*, 450 U.S. at 253.

[A] reason cannot be proved to be a “pretext for ... [unlawful discrimination and retaliation]” unless it is shown *both* that the reason was false, *and* that ... [discrimination and unlawful retaliation] was the real reason. *Hicks*, 509 U.S. at 515.

21. Therefore the Commission must demonstrate by a preponderance of the evidence that Respondent’s proffered legitimate reason: (1) has no basis in fact; (2) did not actually motivate the defendant’s challenged conduct; or (3) was insufficient to warrant the challenged conduct. *Wexler v. White’s Fine Furniture*, 317 F.3d 564, 576 (6th Cir. 2003).

22. The Commission presented evidence that Respondent's actions did not actually motivate Respondent but were merely a pretext for retaliation.

23. Complainant testified about how her co-workers treated her differently after she complained of sexual harassment on January 11, 2011. (Tr. 38-44)

24. One of her co-workers, Monica, threatened to smack her in the face because she was lying about the allegation of sexual harassment by Rothwell (Tr. 43)

25. Another co-worker, Krista Stewart, who threatened to punch Complainant in the face, told Complainant that she was lying about Rothwell and was trying to close Respondent down. (Tr. 74)

26. When Complainant complained to Hentrick about her co-workers, he suggested that she was the one with the problem. Hentrick even asked Complainant if she was taking medication. (Tr. 74)

27. Respondent wrote Complainant up for three disciplinary infractions that occurred during the months of February and March of 2011. (Tr. 95)

28. In March of 2011 Respondent revised the attendance policy so that employees that had three or more attendance fractions within a month would be terminated. (Comm. Ex. 9)

29. In May of 2011, Complainant had accumulated three written disciplinary actions in the employee book but was not terminated because one of the infractions, not showing up for work on March 8, 2011, was incorrectly documented by Rothwell. (Comm. Ex. 9) (Tr. 91-92)

30. Complainant's purpose for coming into the kitchen on October 8, 2011 was to correct the mistake on the customer's check.

31. At no time prior to her termination at 11:00 P.M. was Complainant presented with any evidence of theft or given the opportunity to explain herself regarding any deleted items on October 8, 2011. (Tr. 46-48)

32. Rothwell knew theft was the one offense Hentrick would not tolerate and would result in an employee's immediate termination. (Tr. 247)

33. Although Rothwell was aware that Complainant had paid for the pizza he neglected to make that disclosure to Hentrick. (Tr. 20, 249)

34. A reasonable inference can be drawn that Rothwell patiently laid the groundwork for an opportunity to manufacture a reason to terminate the Complainant without looking like it was being done because Complainant complained about sexual harassment.

35. Although Complainant signed the termination form admitting to theft, she qualified her admission by writing "I admit I stole from Little York Tavern because that is better than being arrested." (Comm. Exh. 3)

36. Hentrick terminated Complainant based on information provided to him by Rothwell. (Tr. 20, 249-250)

37. The "cat's paw" theory of liability, in the employment discrimination context, "refers to a situation in which a biased subordinate, who lacks decision making power, uses the formal decision maker as a dupe in a deliberate scheme to trigger a discriminatory employment action." *Thrash v. Miami University*, 549 F. App'x 511 (6th Cir. 2014) citing *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 450 F.3d 476, 484 (10th Cir. 2006).

38. Under the “cat’s paw” theory, the motive of the biased subordinate is imputed to the decision maker. *Id.* at 486.

39. Although Hentrick made the decision to terminate Complainant, the termination was based solely on information provided to him by Rothwell.

40. The credible evidence supports the determination that Rothwell retaliated against Complainant because she engaged in a protected activity.

41. The Respondent’s conduct is a violation of R.C. § 4112.02(I) and the Complainant is therefore entitled to relief as a matter of law.

RECOMMENDATION

For all of the foregoing reasons, it is recommended in Complaint No. 12-EMP-DAY-22671 that:

1. The Commission orders Respondent to cease and desist from all discriminatory practice in violation of R.C. Chapter 4112; and
2. The Commission orders Respondent to offer to reinstate Complainant at the hourly wage and benefits prior to her termination; and
3. The Commission orders Respondent within 10 days of the Commission's Final Order to pay Complainant back pay, including raises, benefits, and overtime pay based on the wages Complainant would have received had she not been terminated from employment from October 8, 2011 up until an offer of re-employment is made or the date of its rejection by Complainant.⁴

⁴ Complainant worked 30-35 hours a week and paid at an average rate of \$3.70 hr. She made tips in the amount of about \$800-\$900 a week at Respondent, then found another job at Cracker Barrel and BJ's Brewhouse making about \$400-\$500 a week. (Tr. 53).

4. The Commission orders Respondent to receive training on the anti-discrimination laws in Ohio within six (6) months of the date of the Commission's Final Order. As proof of participation in anti-discrimination training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the training. The letter of certification shall be submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order; and

5. The Commission orders Respondent within nine (9) months of the date of the Commission's Final Order to submit to the Compliance Department a draft for an Employee Handbook outlining Respondent's policies and procedures regarding Ohio's anti-discrimination laws, *including but not limited to* sections regarding:

- Zero tolerance for any form of discrimination based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry.
- Sexual harassment
- Racial harassment
- Pregnancy
- Disabilities
- Progressive discipline and disciplinary grid
- Reporting and investigation of complaints


DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date Mailed: December 5, 2014

DMJ/rb