



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Sherese D. Smith

Complainant,

Complaint No. 12-EMP-TOL-34770

v.

*Toledo Edison Power Company, an
Operating Company of FirstEnergy*

**OHIO
CIVIL RIGHTS
COMMISSION**

Respondent.

G. Michael Payton
Executive Director

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

Commissioners

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

**MIKE DeWine
ATTORNEY GENERAL**

Susan Sharkey, Esq.
Associate Assistant Attorney General
Civil Rights Section
615 W. Superior Avenue -11th Flr.
Cleveland, OH 44113
Counsel for the Commission

Denise M. Hasbrook, Esq.
Emily Ciecka Wilcheck, Esq.
Roetzel & Andress
One SeaGate – Suite 1700
Toledo, OH 43604
Counsel for Respondent

Sherese D. Smith
2138 N. 14th Street
Toledo, OH 43620
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



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Ohio Civil Rights Commission

Board of Commissioners

Leonard J. Hubert, Chairman
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G. Michael Payton, Executive Director

October 7, 2014

Susan Sharkey, Esq. Associate Assistant Attorney General

Civil Rights Section
One Government Center
Toledo, OH 43604

Denise M. Hasbrook, Esq.

Emily Ciecka Wilcheck
Roetzel & Andress
One SeaGate – Suite 1700
Toledo, OH 43604
Counsel for Respondent

Sherese D. Smith

2138 N. 14th Street
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Complainant

Re: Sherese D. Smith v. Toledo Edison Power Company an Operating company of FirstEnergy Comp No. 12-EMP-TOL-34770

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 **October 30, 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

Attachments

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

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614-466-2785 • TOLL FREE: 1-888-278-7101 • TTY: 614-466-9353 • FAX: 614-644-8776

REGIONAL OFFICES

AKRON • CINCINNATI • CLEVELAND • COLUMBUS • DAYTON • TOLEDO www.crc.ohio.gov



INTRODUCTION AND PROCEDURAL HISTORY

Sherese Smith (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on August 26, 2011.

The Commission investigated the charge and found probable cause that the Toledo Edison Power Company (Respondent) engaged in unlawful employment practices in violation of Ohio Revised Code R.C. 4112.02(A) and 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on August 17, 2012.

The complaint alleged that Respondent denied Complainant a promotion she was qualified for and took adverse employment action against her based on Complainant's race and in retaliation for engaging in a protected activity.

Respondent filed an Answer to the Complaint on September 28, 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 July 18, 2013 at the Ohio Civil Rights Commission located at One Government Center, Toledo, Ohio.

The record contains previously described pleadings, transcripts consisting of 234 pages, trial deposition transcripts, exhibits admitted into evidence at the hearing, post-hearing briefs filed by the Commission on September 4, 2013, Respondent on September 23, 2013, and the Commissions reply brief filed on October 2, 2013.

FINDINGS OF FACT

1. Complainant filed a sworn charge affidavit with the Commission on August 26, 2011.

2. The Commission determined on June 7, 2012 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and 4112.02(I).

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

4. Respondent is owned and operated by FirstEnergy Corp. (FEC).

5. FEC is a utility provider that conducts business in the Midwest region of the country. (Tr. 18-23)

6. Complainant began working for Respondent as a Customer Service Representative in 1999 at Respondent's Toledo, Ohio facility. (Tr. 18-19)

7. In the Spring of 2005, Complainant was promoted to Assistant Human Resources Representative (Asst. HRR) at the Akron, Ohio facility and worked in the position for approximately eight months. (Tr. 19-20)

8. Complainant's husband was unable to secure employment commensurable with his experience in Akron. Complainant and her husband moved back to Toledo to improve his job prospects. (Tr. 20-21)

9. In December 2005, Complainant applied for an administrative position as a Senior Administrative Assistant in Respondent's Human Resources Department (HRD) in Toledo, Ohio. (Tr. 21)

10. Sue Spiess (Spiess), the HRD Manager, conducted Complainant's interview. (Spiess Dep. 4)

11. The positions within HRD are classified as professional or administrative. (Tr. 21-22)

12. The professional positions involve the performance of tasks that provide human resource services for Respondent.

13. The administrative positions involve the performance of clerical and administrative support tasks to the professional positions within the HRD. (Spiess Dep. 8)

14. During the interview process Spiess spoke with Complainant's supervisor at the Akron facility who stated Complainant's duties were mainly administrative. (Spiess Dep. 8)

15. Complainant accepted an offer of employment with Respondent as a Senior Administrative Assistant in December 2005 at Respondent's Toledo facility reporting directly to Spiess. (Spiess Dep. 8-9)

16. Complainant's duties include acting as a receptionist when people come into the office, maintaining office records, paying invoices, setting up meetings, administering the drug and alcohol testing, maintaining CDL records, and other special projects as assigned. (Spiess Dep. 6)

17. Spiess hired Complainant into the administrative assistant position at the high end of the standard rate because of her experience. (Spiess Dep. 9)

18. The standard rate is a pay scale for positions within the company and employees can be given raises based on their current amount of compensation in relation to the standard rate for their position. (Spiess Dep. 12)

19. Spiess put in two separate requests in 2008 and 2010 to the Respondent's division of Corporate Compensation to have Complainant promoted to her previous entry-level professional position as an Asst HRR.

20. Corporate Compensation denied both requests. (Spiess Dep. 14-17) (Comm. Ex. 19)

21. On June 2, 2011, Complainant became angry after Spiess informed Complainant she would not be given a merit increase.

22. After speaking with another employee, Complainant returned to her desk and angrily threw papers from her desk and bulletin board onto the floor in the walkway in front of her cubicle.

23. Complainant also threw a large cup of soda on the floor before leaving the office. (Spiess Dep. 26-27) (Tr. 35-36) (Resp. Ex. G)

24. Spiess was informed of the incident shortly after Complainant left the office.

25. Complainant did not return to work for approximately a week due to a health issue. (Spiess Dep. 26-27) (Tr. 36)

26. On June 10, 2011, a job posting was placed on the Respondent's internal job recruiting website for an Advanced Human Resources Representative (AHRR) to replace Brooke Sefton (Sefton) who had accepted another position with Respondent. (Resp. Ex. I)

27. Per Respondent's policy the open position was listed at the AHRR level and one level below at the Human Resources Representative (HRR) level. (Spiess Dep. 38)

28. Spiess had a discussion with Complainant regarding the June 2, 2011 incident on June 14, 2011 upon Complainant's return to work after her health issue had been resolved. (Tr. 30)

29. During the June 14, 2011 meeting, Complainant informed Spiess of her intention to apply for the open AHRR position vacated by Sefton. (Spiess Dep. 36)

30. Spiess informed Complainant that management was seeking "another Brooke" and that Complainant could apply but Spiess did not anticipate Complainant being interviewed, as Complainant did not meet the minimum qualifications. (Spiess Dep. 36) (Tr. 51)

31. After the June 14, 2011 meeting Complainant applied for the AHRR position. (Tr. 51)

32. A formal letter dated June 24, 2011 was later sent to Complainant regarding her violation of the Respondent's policy against workplace violence. (Resp. Ex. H)

33. Complainant and two other candidates initially applied for the AHRR position. No interviews were held, as none of the applicants met the minimum qualifications. (Spiess Dep. 40-41)

34. On July 11, 2011, Complainant filed an internal complaint with Respondent on the basis that Spiess had denied Complainant a promotion alleging discrimination on the basis of her race and disability. (Comm. Ex. 5)

35. An internal investigation was conducted in response to Complainant's internal complaint by Shannon Gilfillan (Gilfillan), the HRR 3 for Respondent. (Resp. Ex. R) (Tr. 111)

36. The AHRR position was later reposted on July 25, 2011 after no qualified applicants applied for the position when it was initially posted on June 10, 2011. (Resp. Ex. J)

37. Complainant did not have to reapply for the position because she previously submitted an application that was considered a part of the application pool for the position.

38. In total, seven internal applicants applied for the AHRR position and two were granted interviews, Buffy Maier (Maier) and Loren McDonald (McDonald). (Resp. Exh. L)

39. Maier, a Caucasian female, who lacked the minimum experience requirements, was interviewed at the request of Randall Frame, (Frame) Speiss's supervisor. (Resp. Exh. K)

40. McDonald, a Caucasian male, was offered the AHRR position. (Resp. Exh. L)

41. Gilfillan sent Complainant a letter dated August 10, 2011 to inform Complainant the results of her internal investigation and that she had concluded no discriminatory actions occurred. (Resp. Ex. R)

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.¹

1. The Commission alleged in the Complaint that Respondent failed and refused to promote Complainant for reasons not applied equally to all persons without regard to their race and in retaliation for engaging in a protected activity.

2. These allegations, if proven, would constitute violations of R.C. 4112.02(A) and 4112.02(I) which provide, in pertinent part, that it shall be an unlawful discriminatory practice:

¹ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

- (A) For any employer, because of the race, ..., 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.

- (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 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, 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. To establish a *prima facie* case for failure to promote based on racial discrimination the Complainant must show that:

- 1) She belonged to a racial minority;
- 2) She applied and was qualified for a job the employer was trying to fill;
- 3) Though qualified for the position, she was rejected and;
- 4) The employer continued to seek applicants with Complainant's qualifications. *McDonnell Douglas Co. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 1820, 36 L. Ed. 2d 668 (1973).

7. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *Id.*

8. The burden of establishing a *prima facie* case is not onerous, but one easily met. *Abbott v. Crown Motor Co.*, 348 F.3d 537, 542 (6th Cir. 2003).

9. It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *McDonnell Douglas Co.*, 450 U.S. at 254.

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

- 1) She engaged in activity that Title VII protects;
- 2) Defendant knew that she engaged in this protected activity;
- 3) The defendant subsequently took an employment action adverse to the plaintiff 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, 1066

11. An employee's activity is "protected" under the applicable federal and state law if the employee has "opposed any unlawful discriminatory practice" (the "opposition clause") or "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" (the "participation clause"). *Mengelkamp v. Lake Metro. Hous. Auth.*, 549 F. App'x 323, 330 (6th Cir. 2013).

12. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason for its failure to promote 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, 715 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1982), quoting *Burdine*, 450 U.S. 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*, 460 U.S. at 713.

13. Respondent met its burden of production with the introduction of evidence that Complainant was not hired when the AHRR position was first posted because she lacked the minimum qualifications, and after the second posting of the AHRR position it was awarded to the candidate who met the minimum qualifications and had previous employment experience with Respondent in the same position.

14. Respondent having met its burden of production, the burden shifts to the Commission to prove that Respondent unlawfully discriminated against Complainant. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

15. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for its failure to promote Complainant were not the true reasons, but were "a pretext for discrimination [and retaliation]." *Id.*, 509 U.S. 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.

16. 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 race is correct. That remains a question for the fact-finder to answer ...*Id.* at 524.

17. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer that Complainant was, more likely than not, the victim of race discrimination and retaliation.

18. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for its failure to promote Complainant.

19. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that they had no basis in fact or they were insufficient to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1079, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reason 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... [n]o additional proof is required.²

20. 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 [and retaliation]. *Manzer*, 29 F.3d at 1084.

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*, 509 U.S. at 511.

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

22. The Commission introduced evidence that Complainant's experience and education qualified her for a professional position.

23. The Commission's assertion lacks credibility.

24. Respondent placed a job posting for an AHRR or an HRR on June 10, 2011 and July 25, 2011.

25. The HRR position required a Bachelor's Degree in Human Resources or related discipline and 4-7 years of relevant work experience.

26. The AHRR position required a Bachelor's degree in Human Resources or related discipline and 7-10 years of relevant work experience.

27. Both the HRR and the AHRR are professional positions. (Respondent's Ex. I, J.)

28. While Complainant had a degree that satisfied the qualifications, she only had eight months professional experience as an Asst. HRR. (Tr. 19-20)

29. While the position was on the professional track, Complainant's supervisor at the Akron facility stated Complainant's duties were primarily administrative.

30. All of Complainant's experience with Respondent, other than eight months, was in an administrative role, not a professional role. (Tr. 19-20)

31. Although the Complainant believes that her experience qualified her for the available position, it is not her opinion that Respondent was required to consider.

It is well settled, however, that . . . [Complainant's] own opinions about her work performance or qualifications do not sufficiently cast doubt on the legitimacy of her employer's proffered reasons for its employment actions. *Ost v. West Suburban Travelers Limousine*, 71 FEP Cases 304, 309 (7th Cir. 1996) (citations omitted).

32. The Commission also attempted to cast doubt on the motivation of Spiess through her statement to complainant that corporate management was seeking "another Brooke". (Spiess Dep. 36) (Tr. 51)

33. It lacks credibility to assert that Spiess did not want to promote Complainant when Spiess hired Complainant and subsequently twice attempted to have Complainant promoted, which was rejected both times by Corporate Compensation. (Spiess Dep. 14-17) (Complainant's Ex. 19)

34. While Spiess conducted the interviews and screened applicants, she was not the ultimate decision maker when hiring or interviewing for the open position. (Spiess Dep. 45-46)

35. The Commission asserts Respondent and Spiess treated Maier differently by allowing her to interview for the AHRR position, however Maier was only interviewed at Frame's request and Respondent ultimately awarded McDonald the available position, as Maier was unqualified.

36. McDonald has a Masters in Business Administration, previously held the available position for five years, and met all of the minimum qualifications. (Respondent's Ex. K, L)

[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).

37. Here we have an ultimate decision being made by a manager higher in the management hierarchy than Spiess, and there is no evidence in the record by the Commission to cast doubt on the credibility of the ultimate decision maker's reasons or motives.

38. The Commission also alleged that Respondent retaliated against Complainant when she filed an internal charge of discrimination for not being promoted to the open position and being rated as "partially effective" on a mid-year performance evaluation.

39. Complainant's rating of partially effective was done after the she threw a cup of soda and papers in the office area in an angry reaction to finding out that she was not being given a raise.

40. Being rated as partially effective on a mid-year performance evaluation is not an adverse employment action.

To be an adverse employment action the Complainant must show the action taken by the employer materially changed the terms of her employment. A mere inconvenience or an alteration of job responsibilities or a bruised ego is not enough to constitute an adverse employment action. *White v. Burlington N. & Santa Fe Ry.*, 364 F.3d 789, 797 (6th Cir. 2004).

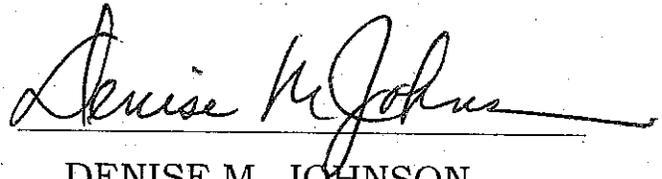
While reassignments without salary or work hour changes are not ordinarily adverse employment actions, such actions as a demotion with a "less distinguished" title, a material loss of benefits, and significantly diminished material responsibilities are adverse employment actions. *Id.*

41. Complainant was only rated as partially effective during her mid-year evaluation as a result of her June 2, 2010 incident then rated "effective" on her subsequent year-end evaluation. (Spiess Dep. 51-52) (Spiess Dep. 55)

42. The Commission has failed to prove that the Respondent engaged in unlawful discrimination and retaliation.

RECOMMENDATION

For all the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 12-EMP-TOL-34770.

A handwritten signature in black ink, reading "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

October 7, 2014

DMJ/rb