



Governor John Kasich

## OHIO CIVIL RIGHTS COMMISSION

### IN THE MATTER OF:

*Willie E. Parker*

**Complainant,**

**Complaint No. 09-EMP-AKR-34019**

v.

*Polymeric, Inc.*

**Respondent.**

**OHIO  
CIVIL RIGHTS  
COMMISSION**

G. Michael Payton  
*Executive Director*

#### Commissioners

Leonard Hubert, Chairman  
Stephanie Mercado, Esq.  
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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## INTRODUCTION AND PROCEDURAL HISTORY

On March 25, 2014, The Administrative Law Judge issued Findings of Fact, Conclusion of Law and Recommendations in the matter of Parker v. Polymerics, Inc., Case No. 09-EMP-AKR-34019. That Report and Recommendation concluded that Polymerics, Inc. (Respondent) engaged in unlawful discriminatory conduct when it terminated Mr. Parker (Complainant).

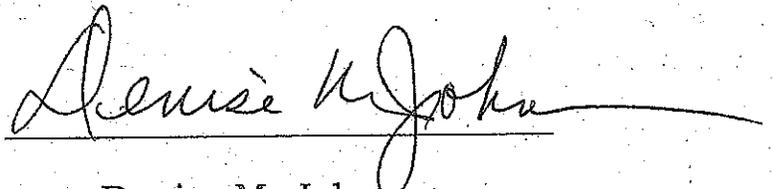
The Report and Recommendation further recommended that Polymerics submit a certified check to the Commission payable to Complainant in the amount Complainant would have earned had Respondent not terminated his employment.

At the time the hearing was held, there was no cut-off date for Complainant's lost earnings, as there was no evidence that Complainant had located equivalent employment or that any other event had taken place that would have ended the running of his back-pay.

Following the issuing of the Report and Recommendations in this matter, the parties agreed on a cut-off date for back-pay, and an amount owed to Complainant.

## SUPPLEMENTAL FINDINGS OF FACT AND RECOMMENDATIONS

1. Based on the agreement of the parties, Complainant's back-pay accrual ended as of July 13, 2012. Respondent has made an unconditional offer of return, which offer Complainant did not accept.
2. Based on the above, Respondent owed Complainant \$77,362.54.
3. The Commission's Final Order should reflect that Respondent owed Complainant \$77,362.54 as compensation for pay lost due to Respondent's unlawful discriminatory conduct.
4. Respondent has tendered a check to Complainant in the amount of \$77, 362.54. The Final Order should reflect this fact as well.



Denise M. Johnson  
CHIEF ADMINISTRATIVE LAW JUDGE

December 19, 2015



# Ohio Civil Rights Commission

Governor  
John Kasich

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## Re: Willie E. Parker v. Polymerics, Inc. 09-EMP-AKR-34019

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 **April 16, 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, 5<sup>th</sup> 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

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

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## **INTRODUCTION AND PROCEDURAL HISTORY**

Willie E. Parker (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on December 29, 2008.

The Commission investigated the charge and found probable cause that Polymerics, Inc. (Respondent) engaged in unlawful employment practices in violation of R.C. 4112.02(A).

The Commission attempted, but failed to resolve the matter by informal methods of conciliation. The Commission subsequently issued a Complaint on November 12, 2009.

The Complaint alleged that Complainant was terminated in part because of his race (African American), and in part because of his disability.

Respondent filed an Answer to the Complaint on December 30, 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 November 30<sup>th</sup> and December 1, 2010 at the Ohio Civil Rights Commission, One Government Center, Toledo, Ohio 43604.

The record consists of the previously described pleadings, a transcript of the hearing (372 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on October 30, 2012; by Respondent on November 29, 2012; and a reply brief filed by the Commission on December 6, 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 Commission on December 29, 2008.
2. The Commission determined on August 13, 2009 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. (Tr. 8-9)
4. The Commission issued the Complaint and the Notice of Hearing on July 15, 2010, after conciliation failed.
5. Respondent is an employer as defined by R.C. 4112.01(A)(2).
6. Troy Smith (Smith) is Respondent's Plant Manager.
7. Respondent manufactures rubber from raw materials and produces rubber strips and slabs which are purchased by industries in the production of goods such as windshield wiper blades. (Tr. 25-26)
8. The raw materials are weighed, mixed, and milled to produce the rubber.
9. The process of producing the rubber involves the operation of various machines. The employees who operate the machines hold the positions of rubber man, compounder, banbury operator, mixer, and mill operator.

10. Each step of the process requires one person to run each station. (Tr. 26-27, 29-33, 150, 168, 186-187, 288-289, 317)
11. After the raw materials are turned into strips and slabs of rubber, those strips and slabs are taken by the lay down men at the end of the line, boxed up and shipped out.
12. This process often takes two men working together, so that the lay down position has two people rather than one.
13. The lay down men also generate labels that they put on the boxes, after which the rubber is sent to shipping, where it is loaded onto outgoing trucks. (Tr. 26-27, 22-36, 49, 150, 169-170, 180, 196-197, 288)
14. Complainant started working for Respondent in May 2005 as a temporary employee.
15. Complainant worked as a lay down man on the Number 9 Mill. Complainant's supervisor was Willis Paul (Paul) who is Caucasian.

16. The Number 9 Mill produced black carbon residue as a byproduct of the process. ( Tr. 29)
17. The process of producing the rubber also required the use of hazardous materials on the Number 3 Mill.
18. Complainant was hired as a full time employee in September 2005 working in the same position under the supervision of Paul.
19. Complainant cross-trained on a couple of other positions, and occasionally filled in for other employees, but he primarily worked as a lay down man.
20. Respondent's Employee Handbook contains a progressive discipline policy which includes discipline for poor performance and attendance. (Comm. Exh. 11)
21. The attendance policy is based on an 8-point yearly system. Points are calculated per year starting with the date of the first occurrence. Each point drops off on its own after a one-year anniversary. (Comm. Exh. 11, p. 21)

22. When an employee is not at his/her place of employment during his/her scheduled work day for one hour or more, they are considered absent and given one attendance point.

(Comm. Exh. 11, p. 21)

23. If an employee does not report off for his/her shift then the absence is unexcused and the employee is given a 1½ in absence points. (Comm. Exh. 11, p. 21)

24. If an employee is tardy or leaves less than one hour early, the employee is given a ½ attendance point. (Comm. Exh. 11, p. 21)

25. Employees clock into work on a time-clock.

(Tr. 211-213, 219-220, 298)

26. When Complainant arrived to work for his 6:00 AM shift, he clocked in and proceeded to the locker room to put on his boots and store any personal items.

27. Complainant passed Paul's office on his way to his work station. (Tr. 27-28)

28. Kim Cousino (Cousino) worked in Human Resources and was responsible for reviewing the read-outs from the time clock to

determine if an employee should be disciplined for attendance.  
(Tr. 211-213, 219-220, 298)

29. Under the Respondent's attendance policy, supervisors can give attendance points to employees who arrive to their work station late after clocking in.

30. The discipline given by supervisors for employees arriving to their work station late is based on the observation of the supervisor. (Tr. 217, 237)

31. Under Respondent's attendance policy it is the employee's responsibility to keep track of absences. (Comm. Exh. 11, p. 21)

32. During 2006 and 2007 Complainant received attendance points that he acknowledged and signed off on. (Tr. 56-59, 264-265, 267-268)

33. In August of 2007 Complainant received discipline for again reaching 4 attendance points, and he signed off on the discipline. (Tr. 56-59, 264-265, 267-268; Comm. Exh. 6,7,8)

34. The exception was in October of 2007 when Complainant was disciplined for having six attendance points.

35. Complainant refused to sign the disciplinary action because he only had five attendance points.
36. Cousino made a mistake in calculating the amount of attendance points for Complainant. (Tr. 62-65, 225-227; Comm. Exh. 10)
37. In January 2008 Complainant and all of the employees working on the line received discipline points for an error related to inaccurately weighing a batch of raw material.
38. Complainant refused to sign the disciplinary action because he had not been trained to perform the function that he was being disciplined for. (Tr. 126-128, 268-269; Resp. Exh. E)
39. Shortly after the beginning of 2008 Complainant began experiencing problems due to his health.
40. Complainant's doctor sent him to the hospital.
41. Complainant stayed in the hospital overnight and called Paul and told him that the doctor said he was having heart problems. (Tr. 69-69)

42. Complainant was eventually diagnosed with heart and kidney disease and sleep apnea. (Tr. 66-71; Comm. Exh. 13-15, 24-32)
43. In February 2008 Complainant started taking time off from work because of his medical conditions.
44. On March 13, 2008 Complainant was disciplined for his second offense under Work Rule 4 for failure to be at his work station at the scheduled starting time.
45. Complainant refused to sign the Work Rule 4 violation notice. (Comm. Exh. 16)
46. In April 2008 Complainant applied for and was granted periodic leave under the Family and Medical Leave Act (FMLA). (Tr. 66-72, 75-79, 227-231, 231-235; Comm. Exh. 13-15, 24-32)
47. On October 14, 2008, Paul gave Complainant an annual Employee Performance Review. (Comm. Exh. 17)
48. Paul rated Complainant fair for attendance/punctuality commenting that Complainant "still pushes starting time". *Id.*

49. Paul rated Complainant fair for dependability commenting that Complainant "has had numerous health problems". *Id.*
50. After seeing Complainant's performance review, Cousino told Paul that he could not downgrade Complainant's evaluation because Complainant missed work due to illness. (Tr. 239-240) (Comm. Exh. 17)
51. On November 21, 2008 Complainant and Hodges were late to work due to bad weather conditions. (Tr. 88-90, 156-157, 163, 310, 312-313)
52. Complainant and Hodges were both late getting to their work station.
53. Based on Complainant being late to his work station Paul made a recommendation to Smith that Complainant be disciplined.
54. Smith checked with Cousino to find out where the discipline placed Complainant under the progressive discipline policy.

55. Cousino informed Smith that the discipline warranted termination.

56. Complainant was terminated on the afternoon of November 21, 2008.

## **CONCLUSIONS OF LAW AND DISCUSSION<sup>1</sup>**

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 subject to different terms, conditions and privileges of employment and termination, based on his race and perceived disability in violation of R.C. 4112.02(A).

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<sup>1</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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 race, (...) disability (...) 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."

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. 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 under Title VII of the Civil Rights Act of 1964 (Title VII).

5. The Commission may establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence.

*McDonnell Douglas v. Greene*, 411 U.S. 792 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.* at 802.

6. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981).

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.<sup>2</sup> *McDonnell Douglas, supra* at 802.

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<sup>2</sup> 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 racially nondiscriminatory reason for the termination, 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 (10<sup>th</sup> Cir. 1992) (citations and footnote omitted).

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, 62 FEP Cases 96, 103 (1993), quoting *Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

9. The presumption created by the establishment of a *prima facie* case "drops out of the picture" when the employer articulates a legitimate, nondiscriminatory reason for the employment action.

*Hicks, supra* at 511, 62 FEP Cases at 100.

10. 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 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, 31 FEP Cases 609, 611 (1983), quoting *Burdine, supra* at 255, 25 FEP Cases at 116.

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, 31 FEP Cases at 611.

11. Respondent met its burden of production with the introduction of evidence that Complainant incurred his third offense under Respondent's progressive discipline policy which warranted dismissal. (Comm. Exh. 18)

12. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant. *Hicks, supra* at 511, 62 FEP Cases at 100.

13. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for discharging Complainant was not the true reason, but was "a pretext for discrimination." *Id.* at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

[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, 62 FEP Cases at 102.

14. Thus, even if the Commission proves that Respondent's articulated reason is 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, 62 FEP Cases at 106.

15. Ultimately, the Commission must provide sufficient evidence to allow the fact finder to infer that Complainant was, more likely than not, the victim of race and disability discrimination.

*Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d. 578, 586-587.

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.<sup>3</sup>

*Hicks, supra* at 511 (emphasis added).

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<sup>3</sup> 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* at 512.

16. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for Complainant's termination.

17. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6<sup>th</sup> Cir. 1994).

18. 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.<sup>4</sup>

*Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

19. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the

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<sup>4</sup> 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, 62 FEP Cases at 100, n.4.

circumstantial evidence makes it “more likely than not” that the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084.

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

## **Race Discrimination**

21. The Commission's alleges that Paul's use of racially derogatory epithets and symbols in the work place show that Paul harbors a discriminatory animus toward African Americans that motivated Paul's recommendation to terminate Complainant.

Alleged discriminatory remarks made by a person involved in the decision-making process may become relevant in determining whether there is direct evidence establishing discrimination.

*Carter v. Univ. of Toledo*, 349 F.3d 269, 273 (6<sup>th</sup> Cir. 2003)

22. Direct evidence of discrimination is proof that the discriminatory motive of the alleged discriminator motivated the adverse action.

Direct evidence is evidence that proves the existence of a fact without requiring any inferences. *Id.*

*Rowan v. Lockheed Martin Energy Systems Inc.*  
(6<sup>th</sup> Cir. 2004), 360 F.3d 544.

Stray remarks unrelated to the decisional process itself cannot suffice to satisfy the plaintiff's burden. *Id.*

23. Paul's racist statements and the display of a noose were said and done in front of an audience of Caucasian employees but were done when African Americans were in a zone of observation to be able to see or hear his conduct:

Mr. Oppenheimer: Did you ever see or hear anything um with regards to Mr. Paul to indicate that there was any kind of racial issue going on?

Mr. Parker: Let's see, Willis Paul, Willis Paul he do this a lot. He'll say racial things when he's with the Caucasians, he try not to let us overhear him saying it but I know he do it.

Mr. Oppenheimer: Did you ever hear him?

Mr. Parker: Yeah I heard him saying when he acted like he didn't say it...if I say why you say that he'll act just like he didn't even say it and I'll leave it alone because first of all why sit there and argue over something and he cited with mine, he gonna tell me and then everything he do everybody is gonna believe exactly what he say. (...) Tr. 49-50

24. The Complainant did not complain to HR or upper management because he was fearful that he would lose his job.

(Tr. 51)

25. The testimony of Michael Brazil, Caucasian, who was employed by Respondent from 2006 through December 2009, is particularly elucidating regarding the random and stray nature of Paul's use of racist epithets in the workplace: (...)

Mr. Oppenheimer: Did you ever hear Mr. Paul say anything that you felt to be of a racial nature?

Mr. Brazil: He said a few things, I've heard him use the "N" word before, not indirectly, but I've heard him use it in a crowd or I've seen him do a lot of racial things, not just slurs but racial things that you just don't do in public--you know in a business.

Mr. Oppenheimer: Okay well let's focus on that for a few minutes.

Mr. Brazil: Uh hum.

Mr. Oppenheimer: You said the "N" word and I'm sorry it is an offensive word but for the clarity of the record.

Mr. Brazil: Nigger.

Mr. Oppenheimer: Okay and about how many times would you hear (sic) Mr. Paul use the "N" word?

Mr. Brazil: I mean a couple, three times. You know it wasn't something that came off of his tongue all of the time but he did use it.

Mr. Oppenheimer: And what were the racial things that you saw Mr. Paul do?

Mr. Brazil: I seen-I was on a-me and Mr. Parker here were on the three side, we were uh I think we were doing snaps at the time and I seen this man make a noose.

Mr. Oppenheimer: Uh hum.

Mr. Brazil: A noose? Sit there and make a noose and then Troy had come through the door and then he hurried up and took it to the side. It didn't make no sense, you know, it just puzzled me that people you know would do some things like that. (...) Tr. 172-173

26. The Commission's evidence regarding Paul's use of racial epitaphs and displaying racist symbols did not establish when and where the statements and the conduct occurred or that it was close in time to the decisional process to terminate Complainant.

27. The evidence of Paul's use of racist epitaphs and symbols in the workplace is not direct evidence that Paul's recommendation to terminate Complainant was based on Complainant's race.

Examples of direct evidence include telling a woman unequivocally that she was fired because of her gender, telling a female plaintiff that she was denied employment because the employer would not hire a woman, or telling a handicapped person that he was fired because he was disabled. *Murphy v. University of Cincinnati* (6<sup>th</sup> Cir. 2003), 72 Fed. Appx. 288; *Smith v. Chrysler Corp.* (6<sup>th</sup> Cir. 1998), 155 F.3d 799

28. Paul stated that Complainant was a good worker. Paul also stated that Dathan Holly (Holly), African American, was a good worker. Upon Holly's urging that Complainant was a good worker, Paul decided to hire him as a permanent employee from his position as a temporary. (Tr. 314)

Whereas here it is the same actor that both hires and terminates an employee, there is a strong inference that [race] discrimination was likely not the reason for this discharge. *Burmkmaster v. Overnite Transp. Co.*, 61 F.3d 461,463 (6<sup>th</sup> Cir. 1995)

29. Nor has the Commission shown that Complainant was treated differently than other employees who are not members of the protected class. *Mitchell v. Toledo Hospital, Id.*

30. Although the Commission presented evidence that Steve Snowberger (Snowberger), Caucasian, was late to his work station and was not disciplined or terminated by Paul, Paul did not discipline or terminate African American employees who were late to their work station.

31. Holly was often late to his work station; however he was not disciplined or terminated for being late to his station. (Tr. 99-100, 154-155, 260)

32. Angelo Hodges (Hodges), African American, was late to his work station on the same date that Complainant was disciplined and terminated. Unlike Complainant, Hodges did not receive any discipline for being late to his work station on November 21, 2008.

33. The Commission failed to meet its burden of proof to show that Paul recommended that Complainant be terminated based on Complainant's race.

## Perceived Disability

34. In the instant case the Commission does not argue that Complainant had an actual disability during the relevant period. Instead, the Commission argues that Complainant is “protected under the statute and its rules because Respondent perceived him to be disabled.”

35. The order of proof in a disability discrimination case requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

- (1) Complainant was disabled under R.C. 4112.01(A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant’s disability.

*McGlone, supra* at 571 (citation omitted).

36. R.C. 4112.01 (A)(13) sets forth a three prong definition of disability:

- [1] "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;
- [2] a record of a physical or mental impairment; or
- [3] being regarded as having a physical or mental impairment.

Many impairments are not in fact disabling but are believed to be so, and the people having them may be denied employment or otherwise shunned as a consequence. Such people, objectively capable of performing as well as the unimpaired, are analogous to capable workers discriminated against because of their skin color or some other vocationally irrelevant characteristic.

*Vande Zande v. State of Wisconsin*

Dept of Administration, 3 AD Cases 1636  
(7<sup>th</sup> Cir. 1995)

An employee falls into the definition of one regarded as having a disability if an employer ascribes to that employee an inability to perform the functions of a job because of a medical condition when in fact he is perfectly able to meet that job's duties.

*Ross v. Campbell's Soup Co.*, 237 F. 3d 701, 706 (6<sup>th</sup> Cir. 2001)

37. Under Ohio law individuals are protected who are regarded as having an impairment that might become burdensome to the employer or limit the employee's major life activities in the future even though the impairment is not currently debilitating:

Not only do two of the three alternatives in R.C. 4112.01(A)(13) fail to qualify the term physical or mental impairment, R.C. 4112.01 (A)(16) defines that term and clarifies as a physical or mental impairment, and even though Johnson concedes that her condition did not limit a major life activity, she concedes that her condition did not limit a major life activity, she correctly asserts that she satisfied one of the other alternative definitions of disability in R.C. 4112.01 (A) (13)

*Johnson v. MetroHealth Med. Ctr.*, 2004 Ohio App. LEXIS 2544 at 2864.

38. The Complainant began having serious health issues in early February 2008 and as a result was diagnosed with heart disease, kidney disease and sleep apnea. (Tr. 66-71; Comm Exh. 13-14)

39. Complainant applied for periodic leave under FMLA in April 2008 which was granted and continued taking periodic leave through October of 2008. (Tr. 66-72, 75-79, 227-231, 232-235; Comm. Exh. 13-15, 24-32)

40. After Complainant went into the hospital in February 2008, Paul became very interested in the reasons for Complainant's hospitalization.

41. Complainant responded to Paul's curiosity by providing him with some information regarding the reasons for his hospitalization, explaining there was a problem with his heart and kidneys.

42. Complainant gave his first medical excuse to Paul who then directed Complainant to provide medical excuses to Cousino.

43. Cousino changed Complainant's time card from "unexcused absences" to "excused for medical reasons". (Tr. 66-72, 227-230, 232-235, 300-304; Comm. Exh. 134-14, 24-32)

44. Paul continued to question Complainant about his medical conditions, unsatisfied with the responses given by Complainant.

45. Complainant then told Paul that he didn't want to talk about his health issues anymore. (Tr. 158-160, 171-172)

46. Paul then began to question complainant's co-workers about Complainant's health. (Tr. 274-275, 299-300, 304-305)

47. Paul tolerated lateness to the work station from other employees that he supervised: Snowberger, Brazil, Hodges, and Holley. (Tr. 97, 100, 119-121, 153-155, 260)

48. However Paul's tolerance did not extend to Complainant.

49. Paul told Hodges on numerous occasions that he was going to fire Complainant. (Tr. 280-282, 311-312, 346-348; Comm. Exh. 17)

50. Brazil testified that "Paul questioned him about Complainant's health." (Tr. 72-74, 171-172, 304-305)

51. I found the testimony of both Hodge and Brazil credible.

52. Paul downgraded Complainant's annual performance evaluation on October 14, 2008 by "reducing his score for dependability on the basis that Complainant has had numerous health problems". (Tr. 81-85, 280-282, 311-312, 348-349; Comm. Exh. 17; Resp, Exh. I).

53. Although Hodges and Complainant were both late to their work station on November 21, 2008, Paul pounced on the opportunity to discipline Complainant. Paul however, did not discipline Hodges when he was late to his work station on the same date and time:

Mr. Oppenheimer: And directing your attention to Exhibit 18, I believe you talked about this somewhat on your direct, but there were some additional questions I wanted to ask. Um, isn't it true that both Angelo Hodges and Willie Parker were not at their stations by 6:00 A.M. on November 21, 2008?

In fact you saw Mr. Hodges and Mr. Parker walking out of the door leading to the locker room area right next to each other?

Mr. Paul: That is correct.

Mr. Oppenheimer: And ultimately is this the final write up that Mr. Parker received?

Mr. Paul: On November 21, 2008? Yes it is.

Mr. Oppenheimer: Okay. Did you write up Mr. Hodges?

Mr. Paul: No, I did not, and I probably wouldn't have written up Mr. Parker if he hadn't told me to.  
(Tr. 312-313)

54. Paul testified that the weather conditions on November 21, 2008 were not bad. He lives two miles from his work location and walks daily to work. (Tr. 285)

55. I found the testimony of Complainant and Hodges credible regarding the bad weather conditions on November 21, 2008 which Complainant said caused him difficulty in driving to work that morning.

56. Paul told Smith that Complainant needed to be disciplined for being late to his work station.

57. Hodges was not disciplined even though Paul saw Complainant and Hodges walked to their stations at the same time.  
(Tr. 284-285, 331, 335, 345, 350-352)

58. Smith went to Cousino and learned that the discipline for Complainant would result in Complainant's termination. (Tr. 242-244, 350-351)

59. Other than Complainant, Paul never recommended that any other employee that he supervised be terminated for arriving late to their work station. (Tr. 326, 353, 357-358)

60. Although Smith had the ultimate authority regarding Complainant's termination, Smith's decision was based solely upon Paul's recommendation.

61. When a decision maker makes an employment decision based on the recommendation of a subordinate who was acting with discriminatory motives, liability is imputed to the decision maker under the "Cat's Paw" theory. *Chattman v. Toho Tenax Am., Inc.*, 686 F.3d 339, 351 686 F.3d 339 (6<sup>th</sup> Cir. 2012) citing *Staub v. Proctor Hospital*, 131 S. Ct. 1186, 179 L.E. 2d. 144 (2011).

62. The "Cat's Paw" doctrine is a theory of liability that allows an employee to prove discrimination in an employment decision where the decision maker is unbiased.

It refers to a situation in which a biased subordinate, who lacks decision making power, influences the unbiased decision maker to make an adverse employment decision, thereby hiding the subordinate's discriminatory intent. *Id.*

63. Paul's recommendation to discipline Complainant which ended in his termination was because "he regarded Complainant as disabled" in violation of R.C. 4112.02 (A).

64. Complainant is entitled to relief as a matter of law.

## **RECOMMENDATION**

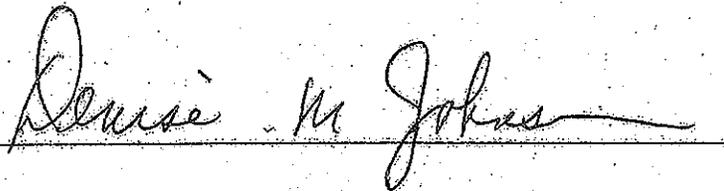
For all the foregoing reasons, it is recommended in Complaint No. 9-EMP-AKR-34019 that:

1. The Commission order Respondent to Cease and Desist from all discriminatory practice in violation of R.C. Chapter 4112; and
  
2. The Commission orders Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of lay down man on the 6:00 AM to 2:00 PM shift. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage<sup>5</sup> he would have been paid had he been employed as lay down man November 21, 2008 on and continued to be so employed up to the date of Respondent's offer of employment; and
  
3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount that Complainant would have earned had he been employed as a lay down man November 21, 2008 and

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<sup>5</sup> Complainant worked five days a week, from 6:00 A.M. to 2:00 P.M. At the time of Complainant's terminated he was earning \$11.25 an hour. In October and November of 2008 Complainant worked 10-20 hours of overtime a week for which he received an hourly rate of \$16.88. (Tr. 39-40, 100-101, 240-241, 307, Comm. Exh. 2, 19, 33)

continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits that he would have received, less his interim earnings, plus interest at the maximum rate allowed by law.<sup>6</sup>



**DENISE M. JOHNSON**  
**CHIEF ADMINISTRATIVE LAW JUDGE**

Date: March 25, 2014

DMJ/rb

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<sup>6</sup> Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.