



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Lainey Westbrooks
Complainant,

v.

Board of Trustees, East Cleveland Public Library
Respondent.

Complaint No. 13-EMP-CLE-41464

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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May 11, 2015

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Re: Lainey Westbrooks v. Board of Trustees, East Cleveland Public Library
Complaint No.: 13-EMP-CLE-41464

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 **June 3, 2015**. *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.



Ohio Civil Rights Commission

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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 /jmd

Desmon Martin
Director of Enforcement and Compliance

Enclosure

cc: Lori A. Anthony, Section Chief – Civil Rights Section/Kari Stilwell, Administrative Secretary /
G. Michael Payton, Executive Director / Keith McNeil, Director of Operations and Regional Counsel /
Stephanie Bostos-Demers, Chief Legal Counsel



INTRODUCTION AND PROCEDURAL HISTORY

Lainey Westbrooks filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on March 28, 2012 and May 11, 2012.

The Commission investigated the charges and found probable cause that East Cleveland Public Library Board of Trustees (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).¹

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued two Complaints on January 31, 2013.

¹The Commission initially filed the complaints against East Cleveland Public Library. At the public hearing, the Administrative Law Judge granted the Commission's motion to correct the name of the Respondent to specify the Board of Trustees.

The first Complaint alleged that the Respondent terminated the Complainant's employment in retaliation for having engaged in activity protected by R.C. 4112.02(I).

The second Complaint alleged that the Respondent withheld 16 hours of unused vacation pay from Complainant in retaliation for having engaged in activity protected by R.C. 4112.02(I).

Respondent filed an Answer to the Complaints on March 14, 2013. Respondent admitted certain procedural allegations, but denied it engaged in any unlawful discriminatory practices. The ALJ granted a motion to consolidate the complaints on January 14, 2014.

A public hearing was held on February 24, 2014 at the Ohio Civil Rights Commission, 615 West Superior Avenue, Ste. 200, Cleveland, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 203 pages, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on April 7, 2014 and by the Respondent on May 15, 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 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 March 28, 2012 and May 11, 2012.
2. The Commission determined on December 13, 2012 that it was probable 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 the board of trustees of a public library in Cleveland, Ohio.
5. In 1997, Respondent consisted of a main library building and two branch libraries called North and Caledonia. (Tr. 133)
6. Respondent hired Complainant as a computer technician in January of 1997. (Tr. 28)
7. In 2000, Respondent promoted Complainant to technology operations manager, creating a computer technology department. (Tr. 28-29)
8. In 2009, the Complainant was the manager of information technology and worked out of Respondent's main building. (Tr. 135)
9. Complainant supervised 10 employees spread across Respondent's three buildings. (Tr. 136)
10. Complainant reported directly to the deputy director of Respondent. (Tr. 29)

11. In December 2009, Respondent closed both of the branches for budgetary reasons. (Tr. 133-134)
12. Respondent staff was reduced from around 60 employees to approximately 23 employees. (Tr. 164-165)
13. The manager of the North branch was demoted, transferred to the main building, and given a reduction in pay and the Caledonia branch manager was laid off completely. (Tr. 134-135)
14. All of Respondent's employees were to report directly to the director or deputy director. (Tr. 135)
15. In 2011, Respondent's board voted to reinstate a 3% cost of living increase in 2012 that had been stayed the previous two years. (Tr. 42)
16. Rose Ford (Ford) took over as interim director for Respondent. (Tr. 30)
17. Complainant reported directly to Ford. (Tr. 30)
18. On September 22, 2011, Ford formally noted via letter that Complainant had performance issues and had two instances of unexcused absences. (Tr. 158-159)

19. On November 21, 2011, Complainant sent Ford an email expressing twelve concerns she had with how Ford was treating her. (Tr. 90)
20. In the email, Complainant complained about not having wages returned to her, being discriminatorily asked to do small tasks in a small amount of time, rescheduling Complainant's subordinates, equipment not being ordered, and computers not being fixed. (Tr. 91-95)
21. Complainant stated in the email that she was being treated this way due to her age. (Tr. 35)
22. Ford responded back to this email informing Complainant that they needed to meet to discuss Complainant's work performance. (Tr. 36)
23. The meeting never occurred. (Tr. 36)
24. In November, 2011, Respondent accused Complainant of theft. (Tr. 37)
25. On November 30, 2011, Complainant sent Ford a notice that she felt her character was being attacked through this accusation. (Tr. 37)

26. Ford responded back to this email notifying Complainant that Complainant was suspended from being part of Respondent's planning commission, a group of managers that met monthly to discuss plans for Respondent. (Tr. 38)
27. Respondent held a staff meeting on December 1, 2011, where part of the agenda was eliminating the title of "manager" throughout the library. Complainant was the last remaining employee with the title.² (Tr. 42-43)
28. After that meeting, Complainant's duties remained unchanged, but the three employees that used to report to her began reporting directly to Ford. (Tr. 46)
29. On January 13, 2012, Complainant filed a charge with the Commission in response to being removed from the planning committee in November, 2011. (Tr. 84)
30. On March 26, 2012, Complainant was called into Ford's office and was terminated from her position due to the elimination of her position. (Tr. 46)

²There had previously been four other manager positions. One manager was absorbed into the department she had previously supervised, another was moved to another position, and the last two left for other reasons. None of the positions were refilled. (Tr. 44-45)

31. The decision to eliminate Complainant's position was decided by a majority vote of the board of trustees. (Tr. 74)

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.³

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

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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

(l) 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, 609-10, 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. The burden of establishing a *prima facie* case is not an onerous one. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).
8. The Commission alleges that Respondent terminated Complainant and withheld 16 hours of unused vacation pay in retaliation for opposing what she believed to be a discriminatory practice.

9. 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, 1066.

10. An employee's activity is protected if the employee has opposed any unlawful discriminatory practice or 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. *Gembus v. MetroHealth Sys.*, 290 F. App'x 842, 846 (6th Cir. 2008).

11. 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. *Nguyen v. City of Cleveland*, 229 F. 3d 559, 563 (6th Cir. 2000).
12. 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.
13. 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).

14. The burden then shifts back to the Commission to 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.

15. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case.

16. Respondent's articulation of a legitimate, nondiscriminatory reason for terminating Complainant from her position 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 *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255.

17. Respondent met its burden of production with the introduction of evidence that (1) Respondent fired their four highest paid employees, including Complainant, (2) Respondent's two branch buildings were closed in recent years, and (3) their staff was greatly reduced, lowering the need for Complainant's position. (Tr. 133-134, 164-165, 167)
18. Respondent having met its burden of production, the burden shifts to the Commission to prove that Respondent retaliated against Complainant because she engaged in protected activity. *Hicks*, 509 U.S. 502, 511.
19. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for its termination of Complainant's employment.
20. 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.

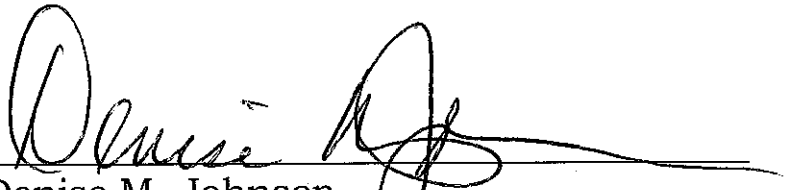
21. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination [and retaliation]. *Manzer*, 29 F.3d at 1084.
22. This type of 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.*
23. Thus, 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).
24. The Commission must prove that the adverse action would not have occurred "but for" Respondent having engaged in unlawful retaliation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d 503 (2013).

25. The Commission introduced evidence that Respondent had no lay-offs in 2010 and 2011 to show that Respondent was not having financial trouble and therefore the Respondent's reasons for terminating Complainant were not the true reason for her termination. (Tr. 48)
26. However, the credible evidence in the record does not support the Commission's assertion.
27. Respondent froze a 3% cost of living increase in 2010 and 2011, and laid-off half of their staff in December of 2009. (Tr. 42, 164)
28. A pay-freeze and maintaining a reduced staff each indicate budgetary constraints.
29. Three of Respondent's highest paid employees were terminated after Complainant's termination. (Tr. 167)
30. Ford was not a board member and did not vote to terminate Complainant. (Tr. 74)
31. Nor was there any evidence introduced regarding the board members deliberations prior to the vote to terminate Complainant. (Tr. 74)

32. Although the Complainant e-mailed complaints of discrimination to Ford four months before the board meeting, there is no credible evidence in the record that the board members knew of the e-mail prior to the vote.
33. There is no evidence in the record that Respondent had knowledge of the Commission filing before she was terminated on March 26, 2012.
34. The Commission failed to prove that Respondent retaliated against Complainant.

RECOMMENDATION

For all the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 13-EMP-CLE-41464.


Denise M. Johnson
Chief Administrative Law Judge

May 11, 2015