

INTRODUCTION AND PROCEDURAL HISTORY

Delores M. Karnofel (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 18, 2000.

The Commission investigated the charge and found probable cause that DWYCO (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on April 27, 2001.

The Complaint alleged that Complainant was subjected to different terms and conditions of employment and was discharged because of her age and gender.

Respondent filed an Answer to the Complaint on October 29, 2001. 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 August 27, 2004 at the Columbiana County Educational Services Center in Lisbon, Ohio.¹

The record consists of the previously described pleadings, a transcript of the hearing (164 pages), exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on May 13, 2005 and by Respondent on August 3, 2005. The Commission did not file a reply brief.

¹ On April 12, 2004, Counsel for the Commission filed a Motion to Reinstate to Active Docket because settlement negotiations had failed. By Order dated June 25, 2004, the Administrative Law Judge (ALJ) reinstated this matter to hearing.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the ALJ's 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 October 18, 2000.

2. The Commission determined on June 21, 2001 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Complainant was hired by Respondent on May 15, 2001 as a salesperson.

5. Respondent sells office equipment and is an authorized Xerox distributor.

6. Complainant's job responsibilities included making cold calls from the Master Prospect List (MPL).

7. The MPL was a list of potential customers in the geographic area that salespeople were assigned to call in an effort to sell Respondent's business products.

8. Complainant was also required to make follow-up proposals to customers who were interested in purchasing office equipment from Respondent.

9. Prior to attending formal training, Complainant met weekly with her supervisor, the manager, and the owner, and was given new hire training tools to work with. (Tr. 78-113)

10. Complainant went to formal training at the Xerox Training Center for one week in July and one week in August 2001.

11. On August 22, 2001, the Xerox representative who trained Complainant sent a letter to Respondent's owner, Dale Wynn, outlining various areas for improvement, but concluding Complainant had the ability to become an excellent sales representative.

12. On August 27, 2001, Respondent discharged Complainant because of the feedback given to him by the Xerox Training Center.

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 accordance with the findings therein, it is not credited.²

1. The Commission alleged in the Complaint that Complainant was subjected to different terms and conditions of employment and was discharged because of her age and gender.

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.

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the ... sex, age, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

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. Therefore, 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. 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. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The proof required to establish a

prima facie case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, n.13. 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).

6. 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.³ *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

... “clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

³ Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

The defendant’s burden is merely to articulate through some proof a facially nondiscriminatory reason for the 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 (10th Cir. 1992) (citations and footnote omitted).

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.

7. 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.

8. Respondent met its burden of production with the introduction of evidence that Complainant was terminated before her probationary period ended due to feedback from the Xerox training manager.

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex and age. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for Complainant's discharge 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.

10. 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 ... [sex] is correct. That remains a question for the factfinder to answer (...).

Id., at 524, 62 FEP Cases at 106.

Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of sex discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for discharging Complainant. 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 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

The factfinder'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.⁴

Hicks, supra at 2749, 62 FEP Cases at 100 (emphasis added).

⁴ 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* 2749, 62 FEP Cases at 100, n.4.

12. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason was a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reason 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.*

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged that younger male employees were treated differently.

14. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects":

Thus to be deemed "similarly situated", the individuals with whom ... [Complainant] seeks to compare ... her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hospital, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

15. To be deemed similarly situated, “a precise equivalence in culpability” is not required; misconduct of “comparable seriousness” may suffice. *Harrison v. Metro. Gov’t. of Nashville and Davidson Cty.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted). Likewise, similarly situated employees “need not hold the exact same jobs; however, the duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.” *Hollins v. Atlantic Co., Inc.*, 76 FEP Cases 553, 557 (N.D. Ohio 1997), quoting *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

16. Respondent argues that the Commission failed to prove that Complainant was treated differently than similarly situated younger male employees. This argument is well-taken. Complainant’s opinion’s about her performance were self-serving and were not supported by credible evidence.

17. Dale Wynn had just purchased the company prior to hiring Complainant and Joe Cox, a male employee. Wynn testified that Complainant was given materials to study regarding the sales process and equipment, and met weekly with him and her supervisor. Wynn testified that based on Complainant's experience and background, he was disappointed that she was doing so poorly with the MPL, the Master Prospect List of customers.

18. Additionally, Complainant admitted on cross-examination that she received reimbursement for travel expenses and for any other travel expenses in question, even though she did not properly submit her requests.

19. The Commission cannot prove pretext through disparate treatment without evidence that a similarly situated comparative was treated more favorably than Complainant.

20. The Commission's case of pretext relies primarily on a letter that was sent by Xerox regarding Complainant's training that stated Complainant had the potential to be a good sales person.

21. I do not find that Xerox's evaluation regarding Complainant's potential overcomes Respondent's articulated reason for Complainant's termination as a salesperson.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9160.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 20, 2006