

INTRODUCTION AND PROCEDURAL HISTORY

Tina Hayner (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 16, 2003.

The Commission investigated the charge and found probable cause that the City of Washington Court House (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on March 11, 2004.

The Complaint alleged that Respondent subjected Complainant to disparate terms and conditions of employment, including but not limited to harassment on the basis of her gender, demoted her, and constructively discharged her, for reasons not applied equally to all persons without regard to their sex, and in retaliation for opposing discriminatory practices.

Respondent filed an Answer to the Complaint on April 24, 2004. 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 October 26, 2004 at the Fayette County Administrative Offices, 133 South Main Street in Washington Court House, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing (148 pages); exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on May 10, 2005 and by Respondent on July 1, 2005.

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 April 16, 2003.

2. The Commission determined on January 29, 2004 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

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

4. Complainant was first employed by Respondent on May 15, 2000 as a seasonal employee in the cemetery, until she began working part-time as a Custodian, cleaning City buildings.

5. In June of 2001, Complainant was promoted to a full-time Custodian position.

6. In June of 2002, Complainant applied for a Street Maintenance Worker position in the Street Maintenance Department (SMD)

7. The SMD keeps the streets and public areas of Washington Court House clean and safe.

8. Complainant was not hired for the position. Rhett Cottrell was the successful candidate.

9. Complainant filed a grievance that she later dropped.

10. In September of 2002, Complainant applied for a Street Maintenance 1 position. The only other applicant was Chase Fast, a seasonal employee. Interviews were scheduled for September 25, 2002.

11. On September 30, 2002, Complainant asked Connie Watson (Watson), Respondent's Personnel Director, who got the job.

12. Watson told Complainant that Chase Fast was the successful candidate.

13. On October 3, 2002, Stephen Sobers, Respondent's City Manager, received a grievance report from Jim McCoy (McCoy), Union Steward, on behalf of Complainant.

14. On November 11, 2002, as a result of the recommendation in the October 3, 2002 grievance report, Complainant was placed in the position of Street Laborer 2/Street Maintenance 1 on a “50/50” trial basis, pursuant to a Letter of Agreement (LOA) between the Union and Respondent.

15. The LOA noted, “the parties recognize that this response was not acceptable to Hayner and the union.”

16. The LOA also extended her “promotional probationary” period from 90 to 120 days.

17. The LOA further stated that “upon execution of this agreement” Chase Fast would be transferred to the position of full-time custodian and Complainant would be promoted to the position of Street Maintenance Worker 1 on a full-time basis.¹

¹ LOA was fully executed on January 28, 2003. Pursuant to the terms of the agreement, Complainant began working full-time in the position of Street Maintenance Worker and Chase Fast began working full-time as a Custodian. At the time of the promotion, Complainant was the only female employee working as a Street Maintenance Worker in the SMD.

18. On January 21, 2003, Complainant received a two-month probationary performance review from the foremen of the Street Maintenance work crew, Jim Heath (Heath) and Mike Clay (Clay).

19. One remark on the evaluation was that Complainant stood back and did not do her part to help clear the brush.

20. Complainant expressed to Heath and Clay that the performance review was full of lies and inaccuracies. She also stated that she believed she was being discriminated against by her coworkers because of her sex.

21. On February 21, 2003, Complainant complained to Joe Burbage (Burbage), the manager of the SMD, that she believed she was being discriminated against by her coworkers because of her sex.

22. Burbage has been the Service Director for approximately eight (8) years.

23. Heath and Clay have worked in the SMD for approximately 15 and 22 years, respectively.

24. The other Street Maintenance Workers and their years of service in the SMD are as follows:

- a. Russell Wood (20-25 years);
- b. Ron Dawson (16 years);
- c. Jerry Grooms (15 years);
- d. Jimmy Miller (11 years);
- e. Gary Dean (5 years);
- f. Pete Harapee (4 years);
- g. Charlie Atkinson (4 years);
- h. Chase Fast (2 years); and
- i. Rhett Cottrell (2 years).

25. On February 21, 2003, Burbage met with Complainant, McCoy, Clay, and Heath.

26. Complainant complained about coworkers who she felt were sabotaging her ability to get her commercial driver's license (CDL)

[Harapee] and comments regarding not wanting to work with a woman [Dean].

27. Burbage told Complainant that he would be happy to discuss the issues that she raised with all of the parties concerned and gather his own opinion of what happened.

28. Complainant's one-month probationary performance review, dated January 21, 2003, was also discussed.

29. Complainant restated her earlier response to the review: that it was inaccurate and full of lies.

30. After Complainant left the meeting, Burbage and the other participants (McCoy, Clay, and Heath) discussed Complainant's performance.

31. Burbage ended the meeting with the remaining participants and separately interviewed Harapee and Dean about the issues raised by Complainant.

32. On February 26, 2003, five days after Complainant met with Burbage, she was notified of her probationary assessment meeting, scheduled for March 4, 2003.

33. On March 4, 2003, Burbage, Watson, and an attorney met with Complainant and provided her with a performance assessment.

34. The assessment stated:

Based upon your performance and progress throughout your promotional probationary period, it is the City's determination to return you to your former position of Custodian effective at the beginning of the day March 5, 2003, due to unsatisfactory performance and progress.

35. After Complainant was informed of her demotion she went on medical leave for two weeks.

36. Complainant did not return to work for Respondent as a Custodian.

37. By letter dated April 7, 2003, Respondent informed Complainant that Respondent was assuming that Complainant had abandoned her job.

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 Respondent subjected Complainant to disparate terms and conditions of employment, including but not limited to harassment on the basis of her gender, demoted her, and constructively discharged her, for reasons not applied equally to all persons without regard to their sex, and in retaliation for opposing discriminatory practices.

² 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 shall be an unlawful discriminatory practice:

- (A) For any employer, because of the ... sex, ... 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(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 its employment action.³ *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

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 demotion; 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).

... “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.

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.

SEX DISCRIMINATION

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case of sexual harassment/sex discrimination. 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 evidence that Respondent investigated Complainant's complaints of sex discrimination and that the investigation revealed that Complainant's job performance and progress were unsatisfactory.

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her sex and demoted her and constructively discharged her in retaliation for opposing what she believed were discriminatory practices. *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 demotion 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.

SEXUAL HARASSMENT

11. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Adm. Code (O.A.C.) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment is sex discrimination under Title VII). There are two forms of sexual harassment:

quid pro quo and hostile work environment. *Id.*, at 65. The latter form of sexual harassment, which the Commission alleges in this case, recognizes that employees have the “right to work in an environment free of discriminatory intimidation, ridicule, and insult.” *Id.*

12. O.A.C. 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

- (J) Sexual harassment.
 - (1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 - (c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Whether the alleged conduct constitutes sexual harassment is determined on a case-by-case basis by examining the record as a whole and the totality of the circumstances. O.A.C. 4112-5-05(J)(2).

13. The Commission’s evidence is based on allegations that her coworkers used derogatory and insulting words regarding her ability as a female to perform the job of Street Maintenance Worker. Verbal harassment based on an employee’s sex may create a hostile work

environment even if the alleged harassment is not explicitly sexual in nature.

It is sufficient that “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”

Harris, supra at 229 (Ginsburg, J. concurring).

14. Thus, the “pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile work environment.” *Andrews v. City of Philadelphia*, 54 FEP Cases 184 (3d Cir. 1990); *See also Ruffino v. State Street Bank & Trust*, 71 FEP Cases 109 (D. Mass. 1995) (“pervasive use of insulting and demeaning terms relative to women in general and sex stereotyping may serve as evidence of hostile environment sexual harassment”).

15. In order to create a hostile work environment, the conduct must be “sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.” *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *quoting Meritor, supra* at 67. The conduct must be unwelcome. *Meritor, supra* at 68. The victim must

perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris, supra* at 21-22.

16. In examining the work environment from both subjective and objective viewpoints, the fact-finder must examine “all the circumstances”, including the employee’s psychological harm and other relevant factors such as:

... the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Id., at 23.

17. The “reasonable person” standard is used to determine the existence of a hostile work environment. The reasonable person standard has been explained by the U.S. Supreme Court as a standard that:

... takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.

Harris, supra at 21.

18. Assuming *arguendo* Complainant was subjected to a hostile work environment, Respondent would not be liable for conduct by Complainant's coworkers unless it knew or should have know of the conduct and failed to take immediate and appropriate remedial action. *Pierce v. Commonwealth Life Ins. Co.*, 66 FEP Cases 600 (6th Cir. 1994).

O.A.C. 4112-5-05(J)(4) provides:

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the work place where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

19. An employer does not have to select the remedy that the employee demands. *Saxton v. AT&T Co.*, 10 F.3d 526 (7th Cir. 1993). An employer only has to take "steps reasonably likely to stop the harassment." *Id.*, at 536 (citations omitted).

20. The Commission failed to meet its burden to prove that Complainant was subjected to a hostile work environment.

21. The evidence introduced by the Commission regarding sexist comments by male coworkers was through the testimony of Jerry Grooms who told Complainant about her male coworkers' dislike for having to work with a female. (Tr. 33-35)

22. Complainant was only able to testify to one incident where she overheard a conversation where Pete Harapee (while in Jim Clay's office) said, "Well, I don't want to work with her either". (Tr. 73)

23. A hostile work environment is usually "characterized by multiple and varied combinations and frequencies of offensive exposures." *Rose v. Figgie International*, 56 FEP Cases 41, 44 (8th Cir. 1990).

24. Complainant was only exposed to one comment that she believed to be sexist. The other two incidents she complained of involved her belief that her attempt to get a CDL was sabotaged and comments of coworkers of a sexist nature that were communicated to her by Grooms and Miller.

25. The Commission also alleged that Complainant was treated differently by her male coworker, Pete Harapee, in regard to the availability of the truck used to train her and Chase Fast for the CDL test.

26. The only evidence offered by the Commission to support this allegation was the testimony of Jimmy Miller whose testimony amounted to what he believed Respondent could or should have done when the truck (trailer) was “broke down” when Complainant needed it for training, compared to what was done for Chase Fast when the truck (trailer) broke down. (Tr. 40)

27. Additionally, Complainant admitted to Respondent on cross-examination that she did not have any “evidence” that Respondent sabotaged the trailer so that she could not take the test. (Tr. 115)

28. A reasonable person in Complainant’s position would not have viewed her complaints as creating a hostile work environment.

RETALIATION

29. The proof required to establish a *prima facie* case of retaliation is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

- (1) Complainant engaged in an activity protected by R.C. Chapter 4112;
- (2) The alleged retaliator knew about the protected activity;
- (3) Thereafter, Respondent subjected Complainant to an adverse employment action; and
- (4) There was a causal connection between the protected activity and the adverse employment action.

Hollins v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

30. During Complainant's February 21, 2003 meeting with Burbage, McCoy, Clay and Heath, her job performance was discussed. Heath pointed out that Complainant "had gotten herself off on the wrong foot when she complained about job discrimination (...)." (Comm. Ex. 8)

31. After Complainant left the February 21, 2003 meeting, McCoy asked to speak privately to Burbage.

32. McCoy felt that the circumstances surrounding Complainant's placement in the position "was contributing to her inability to get along with the other employees". (Comm. Ex. 8)

33. On February 26, 2003, Complainant was notified about a probationary assessment meeting on March 4, 2003.

34. During the March 4, 2003 meeting Complainant was told that, pursuant to the LOA, she was being demoted to the position of Custodian.

35. Respondent based its evaluation on the discussions with Complainant's supervisors and coworkers during the investigation of Complainant's sex discrimination complaint.

36. The Commission established the first, second, and third elements of a *prima facie* case of retaliation.

37. Complainant believed that the conduct and comments of her male coworkers were intended to prevent her from being a Street Maintenance Worker because she is a female.

38. Complainant complained about what she believed to be sex discrimination to her supervisor, Joe Burbage.

39. The Commission has also established a causal connection between Complainant's complaint of sex discrimination and her demotion.

40. Complainant complained on Friday, February 21, 2003, about sex discrimination. Respondent investigated the complaint that same day. During that investigation and meeting with her supervisors and coworkers, comments were made that support a reasonable inference that the evaluation of Complainant's work performance was tainted by her protesting what she believed was discriminatory conduct.

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

41. Five days later, Complainant was notified that she would have a probationary assessment meeting on the following Monday, March 4, 2003.

42. The Commission established a *prima facie* case of retaliation.

43. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action. *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.

The presumption of unlawful retaliation 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.

44. Respondent met its burden of production with the introduction of evidence that Complainant was demoted due to unsatisfactory job performance and progress.

45. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because she engaged in protected activity. *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 [demotion] was not its true reason, but was a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. at 253, 25 FEP Cases at 115.

[A] reason cannot be proved to be a "pretext for ... [unlawful retaliation]" unless it is shown *both* that the reason was false, *and* that ... [unlawful retaliation] was the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

46. 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 ... [unlawful retaliation] is correct. That remains 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 unlawful retaliation.

47. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for demoting 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 511, 62 FEP Cases at 100 (emphasis added).

48. 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 is 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.*

49. The "Note to File" created by Burbage regarding Complainant's complaint of sex discrimination contains more than the investigation of Complainant's sexual harassment complaint.

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.

50. It also contains evidence that Heath determined that Complainant's work performance was affected by her getting off on the "wrong foot" when she complained about job discrimination.

51. Heath and Burbage also discussed the "circumstances surrounding [Complainant's] placement in the position." Heath felt that it contributed to her inability to get along with the other employees.

52. The Commission introduced evidence of two of Complainant's coworkers, [Grooms and Miller], that Dean, Harapee and Dawson made disparaging statements about Complainant because she is a female.

53. Grooms testified that he had overheard Dean, Harapee and Dawson make the following statements:

Q: Okay. What did Gary Dean say that gave you the idea that he didn't want to work with Tina?

A: Just stuff like women shouldn't be down here working and stuff that she had done that he didn't think was right. And then Pete would join in and say, yeah, you know, she did this, she did that, I about dropped a tree on her today and—I mean, just back—you know, what—what do you call it where you talk—just standing around talking at the end of the day or whatever.

(Tr. 34)

54. A reasonable inference can be drawn that Complainant's "getting off on the wrong foot" when she complained about sex discrimination, and the "circumstances surrounding her getting the job" was the motivating factor in demoting the Complainant.

55. I find the testimony of Grooms and Miller to be credible regarding their observation of Complainant's attempts to work with her male coworkers and her male coworkers' mischaracterization of her effort because they did not want to work with a female.

56. After a careful review of the entire record, the ALJ disbelieves the underlying reason that Respondent articulated for Complainant's demotion and concludes that, more likely than not, it is a pretext for unlawful retaliation.

CONSTRUCTIVE DISCHARGE

57. Although Complainant was the victim of unlawful retaliation, Respondent would not be liable for back pay unless she was constructively discharged.

58. Normally, employees who are subjected to unlawful discrimination must remain on the job while they seek legal redress. *Brooms v. Regal Tube Co.*, 50 FEP Cases 1499 (7th Cir. 1989). However, an employee may be compelled to resign when confronted with an “aggravated situation beyond ordinary discrimination.” *Id.*, at 1506; see also *Yates v. AVCO Corp.*, 43 FEP Cases 1595, 1600 (6th Cir. 1987) (“proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors”). This is known as constructive discharge.

59. When there is an allegation of constructive discharge, the factfinder must examine “the objective feelings of [the] employee and the intent of the employer.” *Wheeler v. Southland Corp.*, 50 FEP Cases 86, 88 (6th Cir. 1989), *quoting Yates, supra* at 1600.

60. To meet the objective standard, the Commission must show that “working conditions ... [were] so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.” *Yates, supra* at 1600, *quoting Held v. Gulf Oil Co.*, 29 FEP Cases 837, 841 (6th Cir. 1982).

61. To meet the intent requirement, the Commission must show that a “reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged.” *Wheeler, supra* at 89.

62. When Complainant went back to return the keys to Connie Watson in Human Resources, she testified she told Watson, “And I told her I would not go back into custodial after all these lies on papers.” (Tr. 87)

63. In addition to the above mentioned reason, on cross-examination Complainant testified that “there was no way that [she was] going back to clean their potties.” (Tr. 93)

64. Other than Complainant’s feelings, her evaluation and her desire not to “clean their potties”, the Commission failed to establish that Complainant’s working conditions were so difficult or unpleasant that a reasonable person in Complainant’s shoes would have felt compelled to resign. Complainant did not have first-hand knowledge of the sexist

comments that she alleged her coworkers had made about her and her job performance.

65. Complainant voluntarily resigned her position and was not constructively discharged.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9646 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. 4112;

2. The Commission order Respondent to receive training in compliance with Ohio's Laws Against Discrimination, with an emphasis on the impropriety of retaliating against individuals who exercise their rights under R.C. 4112 in general, and R.C. 4112.02(I), specifically. Respondent shall receive this training within six (6) months of the date of the Commission's Final Order. If Respondent does not utilize the training services provided by the Commission, Respondent shall submit the

Agenda and qualifications of the trainer to the Commission's Office of Special Investigations (OSI). As proof of participation and completion in the training, Respondent shall submit certification from the trainer or provider to OSI within seven (7) months of the date of the Commission's Final Order.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 20, 2006