

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

MARK GLASER

Complainant

v.

**HLS BONDING D/B/A
SMD/HLS BONDING COMPANY**

Respondent

Complaint No. 9496
(COL) 71053102 (29621) 081202
22A – A2 – 03805

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

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INTRODUCTION AND PROCEDURAL HISTORY

Mark Glaser (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on August 12, 2002.

The Commission investigated the charge and found probable cause that HLS Bonding LLC d/b/a SMD/HLS Bonding Company (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on April 10, 2003.

The Complaint alleged that Respondent changed Complainant's terms and conditions of employment, and terminated him, in retaliation for having engaged in activity protected by Revised Code 4112.02(I).

Respondent filed an Answer to the Complaint on June 6, 2003. Respondent admitted certain procedural allegations, but denied that it

engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.¹

A public hearing was held on September 2, 2004 at the Ohio Civil Rights Commission's Central Office in Columbus, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (285 pages), exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on June 3, 2005, by Respondent on July 8, 2005, and a reply brief filed by the Commission on July 20, 2005.

¹ On September 5, 2003, Respondent filed a Motion for Summary Judgment, the Commission filed a Memorandum in Opposition on September 23, 2003, and Respondent filed a Reply on September 30, 2003. The Administrative Law Judge (ALJ) denied Respondent's Motion for Summary Judgment.

The Commission filed a Motion to Amend the Complaint on November 24, 2003, and Respondent filed a Memorandum in Opposition on December 9, 2003. The Commission's Motion to Amend was granted. Respondent filed an Amended Answer on January 24, 2004.

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 August 12, 2002.

2. The Commission determined on April 10, 2003 that it was probable Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

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

4. Respondent is a bail bonds business located at 571 South High Street in Columbus, Ohio.

5. Respondent is owned and operated by Harvey Handler (Handler) and Lowell Fox (Fox).

6. Complainant began his employment with Respondent on May 27, 1991, working as a part-time data clerk while he was still attending college.

7. After Complainant completed his undergraduate degree he became a licensed bail bondsman and began working full-time for Respondent.

8. Respondent also made Complainant the office manager. Complainant received a substantial pay raise that compensated him for the additional duties.

9. Complainant was responsible for keeping the books, which involved writing checks, paying bills, [including bills for health insurance premiums], making deposits, and doing most of the other internal office paperwork.

10. During Complainant's attendance at a Continuing Education Class in late 2001, he learned that if an employer provided health insurance, then it should be provided to all of its employees, not just some of the employees.

11. Complainant told Michael English (English), [the only African-American employee and Complainant's long-time friend and coworker], that it was "just not right" that Respondent was not giving him insurance benefits like they were for some of the other employees. Complainant recalls first telling English sometime in late November or early December 2001. (Tr. 88-89)

12. During a discussion that Complainant had with Handler regarding Complainant buying into the business, Complainant asked Handler when he was going to provide health insurance benefits to

English. Handler told Complainant that he (and Lowell) “could handle Mike English, don’t worry about it”. (Tr. 85-86)

13. English filed a charge of discrimination with the Commission on April 22, 2002. Complainant’s name was listed on the charge as a Caucasian employee whose health insurance benefits were being paid for by Respondent.

14. On April 23, 2002, Handler was contacted by the Commission and informed that English had filed a charge of discrimination. (Tr. 19, 56-57)

15. By letter dated April 25, 2002 Respondent was notified English had filed a charge of discrimination.

16. A couple of days after English told Complainant that he had filed a charge of discrimination, Handler and Fox called Complainant into their office. They told Complainant that he was no longer going to be doing office manager duties and that Complainant needed to concentrate on his duties at the courthouse.

17. By memo dated May 3, 2002, regarding “New Employee Business Practices”, the employees were apprised of new practices and policies:

Finally, and perhaps most unfortunately, current circumstances have caused us to determine that effective July 1, 2002, H.L.S. Bonding Company will no longer provide healthcare benefits for any employee, regardless of full-time or part-time status.

(Comm. Ex. 3)

18. By memo dated May 10, 2002, Complainant received a written job description. Under “Hours of Employment” and “Compensation” the memo set forth the following:

HOURS OF EMPLOYMENT

(...) The employee is expected to be at Arraignment Court during all scheduled arraignment court hours. All other employment hours are to be spent at the Employer’s office doing necessary office work including writing bonds, answering telephones, verifying information, research and other reasonable and necessary office business required by the Employer.

COMPENSATION

Seven hundred dollars (\$700) a week payable weekly.

(Comm. Ex. 4)

19. On May 31, 2002, Complainant was terminated for cause.

The memo stated:

As a result of your recent conduct, including your unwillingness to carry out the responsibilities of your position, your refusal to comply with the terms of your Employment Contract and the May 10, 2002 memorandum, and your insubordination, your employment with H.L.S. Bonding Company is immediately terminated for cause.

(Comm. Ex. 10)

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.²

1. The Commission alleged in the Complaint that Respondent changed Complainant's terms and conditions of employment, and terminated him, in retaliation for having engaged in activity protected by R.C. 4112.02(I).

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:

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

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, 116, (1981). It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at n.8.

6. The proof required to establish a *prima facie* case 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).

7. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

Aldridge v. Tougaloo College, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6th Cir. 1989).

Courts usually grant absolute protection for participation activities such as filing a discrimination charge, testifying in civil rights proceedings, or otherwise participating in such proceedings. *Proulx v. CitiBank*, 44 FEP Cases 371 (S.D. N.Y. 1987).

8. As a threshold matter, the Commission must prove that Complainant engaged in activity protected by R.C. 4112.02(I). A wide array of conduct, including verbal complaints to management, may constitute opposition to unlawful discrimination. See *Reed v. A.W. Lawrence & Co., Inc.*, 72 FEP Cases 1345 (2d Cir. 1996) (employee engaged in protected activity by complaining about a coworker's allegedly unlawful conduct to an officer of company and maintaining same complaint throughout internal investigation); *EEOC v. Hacienda Hotel*, 50 FEP Cases 877 (9th Cir. 1989) (employee engaged in protected activity when she complained to management about her supervisor's refusal to accommodate her religious beliefs). Employees engage in protected activity under the opposition clause when they oppose, in good faith, what they reasonably believed at the time was unlawful discrimination on the part of their employer.

It is critical to emphasize that a plaintiff's burden under this standard has both a subjective and an objective component. A plaintiff must not only show that he *subjectively* (that is, in good faith) believed that his employer was engaged in unlawful discriminatory practices, but also that his belief was *objectively* reasonable in light of the facts and record presented.

Little v. United Technologies, Carrier Transicold Div., 72 FEP Cases 1560, 1563 (11th Cir. 1997) (Emphasis added.).

An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.

EEOC v. Wilson Metal Casket Co., 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

9. In the instant case Respondent argues that it did not have knowledge of Complainant opposing a discriminatory practice or engaging in a protected activity prior to his termination.

10. The Commission, on the other hand, asserts that Respondent was aware of Complainant's opposition to discriminatory practices when he questioned Handler about when health insurance benefits were going to be provided to English. Additionally, the Commission asserts that Respondent was aware of Complainant's participation in the Commission's proceedings because Complainant's name was on the charge as one of the Caucasian employees who was receiving health insurance from Respondent.

11. Complainant testified that he attended a seminar in late 2001 where he learned that it was state law that if an employer was providing

insurance benefits to some of its employees then the benefits should be provided to all employees.

12. Complainant approached Handler about health insurance benefits and when they were going to be provided to English.³

13. English was the only African-American employee working for Respondent and Complainant was aware, through the payment of health insurance premiums, that English was not receiving health insurance from Respondent.

14. Because there was no express declaration to Handler or Fox by Complainant that he believed what was happening to English was because of his race, there is no legal support for the Commission's assertion.

³ Other than Handler and Fox, Complainant, as office manager, was the only other individual privy to which employees received health insurance from Respondent. Handler and Fox kept the employees' insurance records in locked file cabinets, and they kept the keys. (Tr. 108, 113)

15. Courts have consistently held that there is no “protected activity” when there is no discussion of or allegation of discriminatory conduct (see *Smith v. Wayne County Dept of Human Serv.*, 2003 Ohio App. LEXIS 386, *Jackson v. Champaign Nat’l. Bank & Trust Co.*, 2000 Ohio App. LEXIS 4390, *Gate v. Cincinnati Bell Telephone Co.*, 898 F. 2d 153 (6th Cir. 1990).

16. Complainant testified that the first time that he approached Handler about the issue he did not know why English was not receiving health insurance:

Q: Do you know why Mr. English wasn’t offered health insurance benefits?

A: At that particular time, no, I really didn’t know why. But after being in the – the room with Lowell and Mike English approaching Lowell about the – the banana issue, then my opinion changed.

(Tr. 86)

17. English testified that after he received the information from Complainant he asked Handler and Fox for health insurance benefits. Complainant testified that he was in the room with English and that he knew that English was wearing a hidden recording device.

18. After English approached Handler and Fox, Handler started writing the checks for the health insurance premiums.

19. Soon after Respondent received notice of the charge of discrimination dated April 23, 2002,⁴ wherein Complainant was listed as one of the Caucasian employees receiving health insurance, actions were taken to relieve Complainant of his duties as office manager, and Respondent reduced his salary.

20. Handler testified that Complainant had asked to be relieved of his duties sometime in early 2002 because he did not like to manage people. Complainant denied he asked to be relieved of his management duties.

21. I find Handler's testimony lacking in credibility because he admitted that he had asked Complainant to buy into the business in April of 2002, approximately one month before Complainant was terminated.

⁴ Handler testified that he was contacted by the Commission on April 23, 2002 and informed that English had filed a charge of discrimination against them. (Tr. 56-57)

(Tr. 70, 83) Both Handler and Fox testified under cross-examination that they would not let a bad employee become one of their partners. (Tr. 31, 69, 70, 71)

22. A reasonable inference can be drawn that Handler and Fox knew that Complainant participated in English's charge of discrimination from the following conduct:

- Complainant's questioning of Handler about English's receipt of health insurance benefits;
- English's request for health insurance benefits;
- Complainant's change in responsibilities regarding the writing of checks for health care premiums; and
- Complainant's name on the April 22, 2002 charge of discrimination.

I find that Respondents Handler and Fox were aware of Complainant's participation in English's charge of discrimination.

CAUSAL CONNECTION

23. In determining whether a causal connection exists, the proximity between the protected activity and the adverse employment action is often “telling.” *Holland v. Jefferson Natl. Life Ins. Co.*, 50 FEP Cases 1215, 1221 (7th Cir. 1989), quoting *Reeder-Baker v. Lincoln Nat’l Corp.*, 42 FEP Cases 1567 (N.D. Ind. 1986). The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal connection becomes. See *Johnson v. Sullivan*, 57 FEP Cases 124 (7th Cir. 1991) (court held that plaintiff showed causal connection and established *prima facie* case of retaliation where plaintiff was discharged within days of filing a handicap and race discrimination lawsuit); *Waddell v. Small Tube Prods., Inc.*, 41 FEP Cases 988 (3d Cir. 1986) (court properly inferred retaliatory motive from evidence that defendant’s decision to rehire plaintiff was rescinded one day after the defendant received notice that state FEP agency had dismissed plaintiff’s charges of discrimination).

24. A causal connection may be established with evidence that the adverse employment action closely followed the protected activity. *Holland v. Jefferson National Life Ins. Co.*, 50 FEP Cases 1215 (7th Cir. 1989).

... a court may look to the temporal proximity of the adverse action to the protected activity to determine where there is a causal connection.

EEOC v. Avery Dennison Corp., 72 FEP Cases 1602, 1609 (6th Cir. 1997) (citation and quote within a quote omitted).

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).

25. By memo dated May 3, 2002 to employees entitled "New Employee Benefits", Respondent stated the following in the first paragraph:

As a result of recent events, and in complying with the advice of our corporate counsel, we wanted to advise you that we will begin immediately implement(ing) [sic] certain new business practices that will affect all employee, both full time and part-time positions, regarding your employment at H.L.S. Bonding Company. (...)

Comm. Ex. 3

26. Respondent changed Complainant's job duties and reduced his pay pursuant to a memo dated May 10, 2002. (Comm. Ex. 4)

27. Handler testified that when he and Fox responded to English's charge of discrimination they became aware that there was an Ohio insurance law that requires small employers to offer insurance to all employees if they offered it to any employee. (Tr. 24) This testimony was offered as a reason for the May 3, 2002 memo wherein Respondent notified employees that it would no longer be paying for employee health insurance benefits. I find this testimony to lack credibility.

28. The testimony by Complainant was credible regarding his attending a seminar in late 2001 and finding out about the law related to health insurance benefits. Complainant's testimony that he approached Handler in late 2001 about when English was going to receive health care benefits is also credible.

29. Complainant's acquired knowledge (state law) became the catalyst for raising the issue to Handler. Handler's response to Complainant ["We can handle Mike English, don't worry about it."] and his

failure to take corrective action led Complainant to disclose information to English about who was and who was not receiving health insurance coverage. (Tr. 43-44)

30. 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.

31. Respondent met its burden of production with the introduction of evidence that Complainant's job performance had declined and that Handler was threatened by Complainant's conduct during a meeting.

32. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because he 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 reasons for Complainant's discharge were not its true reasons, but were 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.

33. Thus, even if the Commission proves that Respondent's articulated reasons are false or incomplete, the Commission does not automatically succeed in meeting its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the ... [Commission's] proffered reason of ... [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, a victim of unlawful retaliation.

34. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that the reasons had no basis *in fact* or they were *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 fact-finder to infer intentional discrimination from the rejection of the reasons 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.⁵

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

35. I found Handler's testimony regarding the reasons for Complainant's termination to lack credibility. On cross-examination Handler could not be specific about having a conversation with Complainant about his declining job performance. In April of 2002 Handler asked Complainant about becoming a partner in the business, something he admitted he would not ask of an employee with poor performance.

36. English testified that on the day and time when Handler allegedly felt threatened by Complainant at the courthouse, Handler's outward demeanor did not indicate that he was feeling threatened or upset.⁶ (Tr. 45-46) I found English's testimony to be credible.

⁵ 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.

⁶ Complainant and English were on the fourth floor of the courthouse when Handler told Complainant that he wanted to talk to him. Handler and Complainant went to the ninth floor. After the discussion with Handler, Complainant went back to the office per Handler's instructions, and Handler returned to the fourth floor.

37. After a careful review of the entire record, the ALJ disbelieves the underlying reasons that Respondent articulated for Complainant's reduction in pay and discharge and concludes that, more likely than not, they were a pretext for unlawful retaliation.

38. These actions by Respondent constitute unlawful retaliation and entitle Complainant to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9496 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of office manager. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same

wage he would have been paid had he been employed as an office manager at the salary of \$800.00 per week on May 31, 2002 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 he would have earned had he been employed as an office manager at the salary of \$800.00 per week on May 31, 2002 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less his interim earnings, plus interest at the maximum rate allowed by law.⁷

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 31, 2006

⁷ 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.