OHIO CIVIL RIGHTS COMMISSION

May 2, 2018

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Winona Robinson
929 Avondale Avenue
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Complainant

Re: Winona Robinson v. Rescue, Inc. a.k.a. Rescue Mental Health & Addiction Services
Complaint No. 17-EMP-TOL-37717

A copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report) is enclosed. In accordance with Ohio Administrative Code § 4112-3-09, any person or aggrieved party may file and serve a written statement of objections to the ALJ's Report within twenty-three (23) calendar days from this mailing. No extension of time will be granted and untimely objections will not be considered.

Mail the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, 30 East Broad Street, 5th Floor, Columbus, OH 43215-3414**. Please serve all parties and the Administrative Law Judge copies of your Statement of Objections.

Responses to the objections must be filed with the Compliance Department within fourteen (14) calendar days [seventeen (17) if served by mail] from the date the objections were served.

All requests for oral arguments must be noted on the submission.

FOR THE COMMISSION:
Desmon Martin /eks
Desmon Martin
Director of Enforcement and Compliance

cc: Lori A. Anthony, Section Chief – Civil Rights Section
Kari Jackson, Administrative Secretary
G. Michael Payton, Executive Director
Darlene Newburn, Director of Operations and Regional Counsel
Stephanie Bostos Demers, Chief Legal Counsel

INTRODUCTION AND PROCEDURAL HISTORY

Winona Robinson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 5, 2016.

The Commission investigated the charge and found probable cause that Rescue Inc. a.k.a. Rescue Mental Health & Addiction Services (Respondent) engaged in discriminatory practices in violation of 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 March 16, 2017.

The Complaint alleged that Respondent violated R.C. 4112.02(A) by suspending and terminating an employee due to age and race.

Respondent filed an Answer on April 14, 2017.

A public hearing was held on December 12, 2017 at One Government Center, located at 640 Jackson Street, Toledo, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 93 pages, exhibits admitted into evidence during the hearing, a post-hearing brief filed by the Commission on January 25, 2018, and a post-hearing brief filed by Respondent on February 15, 2018.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the ALJ's credibility assessment of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered the witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether her or his 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, the witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of the witness. Finally, the ALJ considered the extent to which the witness's testimony was supported or contradicted by reliable documentary evidence.

1. Winona Robinson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 5, 2016.

2. In a letter dated January 12, 2017, Respondent was notified of the Commission's probable cause finding that Respondent had engaged in unlawful discriminatory practices 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. Respondent is a mental health crisis facility for members of the public. (Tr. 10)

5. Complainant, who is African American, was born April 24, 1953. (Tr. 8)

6. Complainant is a Licensed Practical Nurse (LPN) who began her employment with Respondent in 2010 as a Mental Health Nurse 1. (Tr. 8-9)

7. Complainant's responsibilities included attending to the medical needs of the clients, administering medications, processing client admissions and discharges. (Tr. 10)

8. Complainant's position was a bargaining-unit position covered by the collective bargaining agreement that was entered into between Respondent and Service Employees International Union Local 1199 (SEIU). (Tr. 13)

9. The SEIU represented Respondent's non-management employees including the counselors, nurses, techs, and clerical staff. (*Id.*)

10. Under Respondent's attendance policy, employees are given points for tardiness. (Tr. 17, Comm. Exh. D)

11. Points accumulate the longer an employee is late for an assigned shift and four points equal one occurrence. (Tr. 17-18, Comm. Exh. D)

12. Tardiness points are considered on a rolling six month period and occurrences are considered on a rolling twelve month period. (Comm. Exh. D)

13. Under the attendance policy, violations are handled by Human Resources (HR). (Tr. 62)

14. By October or November of 2015, Complainant had accumulated enough points under the tardiness policy to be terminated. (Tr. 12)

15. Jason Fuller (Fuller) was Respondent's HR manager. (Tr. 11)

16. Fuller was responsible for monitoring the employees' attendance and disciplining employees for violations of the attendance policy. (Tr. 61-62)

17. In October or November of 2015, Fuller attempted to terminate Complainant for her accumulated points. (Tr. 11-12)

18. Marianna Barabash (Barabash), the SEIU president, challenged Fuller's termination recommendation by showing that a younger white employee had more attendance points than Complainant. (Tr. 11-12, 14)

19. As a result of the SEIU challenge to Complainant's termination, Respondent rescinded its action to terminate Complainant. (Tr. 14, 56)

20. On December 16, 2015, Respondent's President and CEO John DeBruyne (DeBruyne) sent an email stating that the attendance policy would be strictly enforced. (Tr. 14-15, Comm. Exh. H)

21. Complainant's granddaughter was in surgery on February 2, 2016. (Tr. 21, 59)

22. Complainant came to work but ended up leaving after being there for less than an hour because her daughter called with concerns about her granddaughter's surgery. (Tr. 21, 59)

23. Complainant's unscheduled absence in February 2016 was her sixth absence within a rolling twelve month period. (Res. Exh. 1)

24. Fuller sent an email scheduling a pre-disciplinary meeting with Complainant to take place between 3:00 PM and 4:00 PM

on February 26, 2016 to discuss Complainant's attendance. (Tr. 20, 57-58)

25. Fuller sent the email to Complainant approximately a week prior to the scheduled meeting. (Tr. 20)

26. Complainant responded to Fuller's email and asked what the meeting was about. (*Id.*)

27. Fuller gave no additional details other than the meeting was about absenteeism. (*Id.*)

28. Complainant did not show up on February 26, 2016 for the 3:00 PM meeting with Fuller. (*Id.*)

29. Complainant arrived at work on February 26, 2016 at her scheduled work time of 4:00 PM. (*Id.*)

30. Fuller called Complainant to ask why she wasn't at the meeting and asked why she was absent February 2, 2016. (Tr. 20-21)

31. Complainant explained to Fuller that she left work to see her granddaughter at the hospital because of the problems with her granddaughter's surgery and she had supervisory approval. (Tr. 21)

32. Fuller requested that Complainant provide written documentation from her supervisor regarding Complainant's representation that she had approval to leave. (*Id.*)

33. Ten to fifteen minutes later Fuller told Complainant that she had to leave the premises and was suspended until she had a pre-disciplinary meeting. (Tr. 21-22)

34. When Complainant questioned Fuller as to why she had to leave work, Fuller told her he had spoken with Respondent's lawyer who stated that Respondent doesn't want employees to think they are able to not attend a pre-disciplinary meeting just because they feel like they're going to be terminated. (Tr. 21, 23)

35. Complainant was suspended until the following Monday, missing five shifts that weekend. (Tr. 23)

36. Respondent terminated Complainant's employment on February 29, 2016. (Comm. Exh. G)

CONCLUSIONS OF LAW

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.

1. The Commission alleged in the Complaint that Respondent violated R.C. 4112.02(A) when Respondent terminated Complainant due to age and race.

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 race [or] . . . age . . . of any person . . . to discharge without just cause . . . 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. *Plumbers and Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission,* 66 Ohio St.2d 192, 196 (1981).

5. 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).

6. 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. Green,* 411 U.S. 792 (1973).

7. The burden of establishing a prima facie case is not onerous. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981).

8. It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 255, n.8.

9. The proof required to establish a prima facie case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas,* 411 U.S. at 802, n.13.

10. In this case, the Commission may establish a prima facie case of race and age discrimination by proving that:

    (1) Complainant is a member of a protected class; and

    (2) Respondent treated Complainant differently from similarly-situated non-minority employees for the same or similar conduct.

Hollins v. Atlantic Co., Inc., 188 F.3d 652, 658 (6th Cir. 1999).

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

12. 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, 714-715 (1983), *quoting Burdine*, 450 U.S. at 255.

> 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*, 460 U.S. at 715.

13. Respondent met its burden of production with the introduction of evidence that Complainant was terminated because she had accumulated points to be disciplined under

the attendance policy and failed to show up to a pre-disciplinary meeting to discuss her absenteeism. (Tr. 63)

14. Respondent having met its burden of production, the inquiry moves to the ultimate issue of the case, i.e., whether Respondent terminated Complainant because of her age and race. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993).

15. 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, *quoting Burdine*, 450 U.S. at 253.

> [A] reason cannot be proved to be "a pretext for *discrimination*" unless it is shown *both* that the reason is false, *and* that discrimination was the real reason. *Id.* at 515.

16. 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 [age and] race is correct. That

> remains a question for the factfinder to answer . . . . *Id.* at 524.

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

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

19. 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. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 393 (6th Cir. 2008).

20. 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. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of

discrimination is *required.*[2] *Hicks*, 509 U.S. at 511, (bracket removed); *See also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

21. 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 age and race discrimination. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

22. 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.*

23. The Commission attempted to show pretext in this case by alleging disparate treatment.

24. Specifically, the Commission alleged the Respondent permitted a younger white employee who exceeded the absences permitted under the attendance policy to resign instead of be terminated.

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[2] 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*, 509 U.S. at 511, n.4.

25. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects." *Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992) (citations omitted).

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

26. To be deemed similarly situated, a "precise equivalence in culpability" is not required; misconduct of "[c]omparable seriousness" may suffice. *McDonald v. Santa Fe Trail Transp. Co.* 427 U.S. 273, 283 n.11 (1976).

27. 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." *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

28. Respondent argues that the Commission failed to prove that Complainant was treated differently than younger white employees. This argument is well taken.

29. The Commission's evidence consisted of Complainant offering speculation and opinion about the circumstances under which a younger white employee, Joy Webster (Webster), was treated.

30. The Complainant testified that her supervisor had approved her absence on February 2, 2016. (Tr. 21)

31. However it's reasonable to infer that Complainant's supervisor did not have the authority to approve Complainant's absence after DeBruyne's December 16, 2015 email stating that the attendance policy would strictly enforced. (Comm. Exh. H)

32. This inference is supported by HR having the responsibility to monitor an employee's attendance and to mete out discipline. (Tr. 61-62)

33. The Complainant testified that Webster was asked to resign with the understanding that she could come back in six months. (Tr. 33)

34. However, the credible evidence in the record does not support the Commission's assertions.

35. The Complainant did not have firsthand knowledge of Webster's termination nor did the Complainant offer any hearsay evidence that was credible.

36. The Complainant was unable to identify another employee, including Webster, who had not shown up for a pre-disciplinary meeting. (Tr. 64-65)

37. The only evidence introduced by the Commission to prove that Webster was given preferential treatment by Respondent was Complainant's speculation and opinion.

38. I did not find the Commission's evidence to be credible.

39. The Commission failed to introduce any reliable, probative, and substantial evidence in the record that Complainant's termination was based on her age and race.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint 17-EMP-TOL-37717.

Denise M. Johnson
ADMINISTRATIVE LAW JUDGE

May 2, 2018