



OHIO CIVIL RIGHTS COMMISSION

Governor Mike DeWine

Commissioners: Lori Barreras, Chair | William Patmon, III | Dr. Carolyn Peters | Madhu Singh
Executive Director Angela Phelps-White

August 5, 2020

Jessica Walker

3900 Otterbein-Ithaca Road
New Madison, OH 45346
Complainant

Emily J. Gelhaus, Esq.

Scott A. Carroll, Esq.
Daniel G. Rosenthal, Esq.
Jackson Lewis, P.C.
PNC Center, 26th Floor
201 East Fifth Street
Cincinnati, OH 45202
Counsel for Respondent

Sharon Tassie, Esq.

Assistant Section Chief
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, OH 43215 44113
Counsel for Commission

Jason P. Matthews, Esq.

Jason P. Matthews, LLC
130 West Second Street, Suite 924
Dayton, OH 45402
Counsel for Complainant

Re: Jessica Walker v. Ohio National Financial Services, Inc.
Complaint No. 18-EMP-DAY-26923

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty-three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **August 28, 2020**. *No extension of time will be granted.*

Any objections received after this date will be untimely filed and cannot be considered by the Ohio Civil Rights Commission.



OHIO CIVIL RIGHTS COMMISSION

Governor Mike DeWine

Commissioners: Lori Barreras, Chair | William Patmon, III | Dr. Carolyn Peters | Madhu Singh
Executive Director Angela Phelps-White

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, Ohio 43215-3414.** *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

Desmon Martin /kk

Desmon Martin
Director of Enforcement and Compliance

Enclosure

cc: Angela Phelps-White, Executive Director/Darlene Sweeney-Newbern, Director of Regional Operations/Stephanie Bostos-Demers, Chief Legal Counsel



IN THE MATTER OF:

Jessica Walker
Complainant,

Complaint No. 18-EMP-DAY-26923

v.

Ohio National Financial Services, Inc.
Respondent.

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

**DAVE YOST
ATTORNEY GENERAL**

Sharon Tassie, Esq.
Assistant Section Chief
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
Counsel for Commission

Jason Matthews, Esq.
Jason Matthews, LLC
130 West Second Street
Dayton, Ohio 45402
Counsel for Complainant

Jessica Walker
3900 Otterbein-Ithaca Road
New Madison, OH 45346
Complainant

Emily J. Gelhaus, Esq.
Scott A. Carroll, Esq.
Daniel G. Rosenthal, Esq.
Jackson Lewis, P.C.
PNC Center, 26th Floor
201 East Fifth Street
Cincinnati, OH 45202
Counsel for Respondent

ALJ'S REPORT

Denise M. Johnson
Ohio Civil Rights Commission
Division of Hearings
30 East Broad Street, 5th Floor
Columbus, OH 43215
(614) 466-6684
Chief Administrative Law Judge

INTRODUCTION AND PROCEDURAL HISTORY

Jessica Walker (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on December 21, 2017.

The Commission investigated the charges and found probable cause that Ohio National Financial Services, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code (R.C.) §4112.02(I).

The Commission attempted but failed to resolve the matter by informal methods of conciliation. The Commission subsequently issued a Complaint and Notice of Hearing on October 26, 2018.

The complaint alleged that Respondent was terminated in retaliation for opposing an unlawful discriminatory employment practice.

Respondent filed an Answer on November 26, 2018. Respondent admitted certain procedural allegations but denied that they engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on June 26, 2019 at the Ohio Civil Rights Commission's Cincinnati Satellite Office located at Mid-Pointe Towers, 7162 Reading Road, Suite 1005, Cincinnati, Ohio.

The record contains previously described pleadings, a transcript consisting of 425 pages of testimony, exhibits admitted into evidence at the hearing, post-hearing briefs filed by the Commission on October 15, 2019, Respondent on November 7, 2019, and the Commission's reply brief filed on November 14, 2019.

FINDINGS OF FACT

The following findings 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 was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on December 21, 2017.
2. The Commission determined on October 26, 2018 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02 (I).
3. The Commission attempted but failed to resolve this matter by informal methods of conciliation.

4. Complainant is a licensed attorney and has an LL.M. in Business and Taxation. (Tr. 33)
5. Respondent Ohio National is a mutual life insurance company that offers insurance, variable annuities, disability insurance and retirement plan services. (Tr. 34)
6. Complainant was hired by Respondent in July 2012 as a Senior Advanced Sales Consultant (SASC) in the Advanced Planning Department (APD). (id., 210)
7. The SASCs provided planning consultation to between ten and fifteen thousand agents on estate planning topics of a general nature with a slant toward promoting Respondent's products. (Tr. 35-36, 209, 216)
8. The APD was comprised of three attorneys and a CPA. (Tr. 209)
9. Complainant worked under the supervision of David Szeremet (Szeremet), a licensed attorney, who was the head of the APD. (Tr. 36, 141-142, 210)
10. In September 2013, Complainant had her first full-year performance evaluation. (Tr. 41) (Comm. Exh. 1)

11. Complainant received a below on her presentation skills, noting that she was improving but still needed some work. (Comm. Exh. 1)
12. The evaluation noted that one of Complainant's challenges was that she needed to focus on slowing down during her talks which would allow Complainant to follow the order of content and make better word choices. (id.)
13. Under the Personal Skills section of the evaluation it was noted that there were issues with Complainant's attendance, stressing because she had six (6) unscheduled absences in a six-month period and this could be grounds for termination. (Tr. 41, Comm. Exh. 1)
14. Szeremet further wrote that "Advanced sales is a very small department and we handle a large volume of calls and email from the field. Therefore, we simply do not have the flexibility that other departments may have when it comes to time off on short notice." (id.)
15. Complainant informed Szeremet that she had a condition that often required her to take off at least one day a month. (Tr. 42)

16. Szeremet told Complainant to speak to Dorothy Bealer (Bealer), the FMLA administrator about this issue. (id.)
17. In October 2013, Complainant went to talk to Bealer to apply for FMLA after Szeremet once again approached Complainant about a sixth absence in a six month period. (Tr. 42-43)
18. Complainant received a performance evaluation on July 31, 2014. (Comm. Exh. 2)
19. Complainant received a below expectation for Presentation skills that noted that although there had been improvement, Complainant needed to work on message, follow a logical order, and concentrate on slowing down. (id.)
20. The evaluation of Complainant's presentation skills was in part based on Complainant's performance at a seminar and comments made by several agents on their seminar evaluations. (id.)
21. Szeremet once again referred to Complainant having unexcused absences. (id.)
22. Complainant told Szeremet that those absences were FMLA absences and could not be used against her. (Tr. 44-45) (Comm. Exh. 2)

23. The Complainant wrote in the Appraisee Comment section the unscheduled absences were FMLA absences. (Comm. Exh. 2)
24. The Complainant signed the evaluation on July 31, 2014. (id.)
25. Complainant contacted Dianne Hagenbuch (Hagenbuch), head of the Marketing Department, and asked for a meeting about her review. (Tr. 46)
26. At that time, Szeremet reported to Hagenbuch. (Tr. 37, 46)
27. Complainant met with Hagenbuch to discuss her concerns about her FMLA leave and expressed additional concerns about her extensive upcoming leave for surgery. (id.)
28. During the meeting, Hagenbuch told Complainant that the references to the FLMA absences would be removed from her review. (Tr. 46, 173)
29. At the conclusion of the meeting, Hagenbuch told Complainant that they might need to have a meeting with Szeremet and probably include Karl Kreunen (Kreunen), who also reported to Hagenbuch. (Tr. 57)

30. A month passed and Complainant did not hear from Hagenbuch about another meeting. (id.)
31. Complainant contacted Hagenbuch who told her there would not be another meeting. (id.)
32. Complainant received a corrected review for 2014 which did not contain any references to the absences. Nothing else in the review was altered. (Tr. 46-47) (Comm. Exh. 3)
33. Complainant disagreed with Szeremet's characterization of the number of attendees who commented about her presentation speed, writing that instead of "several" there were only three. (id.)
34. Complainant wrote in the corrected review in the Appraisee Comments section that she did not agree with his evaluation of her presentation skills, that it had "no basis that isn't pretextual". (id.)
35. Complainant signed the evaluation on August 8, 2014. (id.)
36. During a regularly scheduled marketing meeting with the marketing team, Hagenbuch announced that the Respondent was instituting a Compliance and Ethics Hotline (Hotline). (Tr. 57, 174)

37. Hagenbuch communicated that the Hotline was available for employees who had unresolved issues with management or HR to lodge a complaint. (Tr. 57, 174)
38. In November 2014, Jenna Washatka (Washatka) was hired, as a SASC in the APD. (Tr. 47, 175-176)
39. At a meeting, Szeremet announced that Washatka was being given two weeks off to study for the bar examination. (Tr. 56, 176)
40. Complainant was upset that Washatka received a leave benefit that had not been made available to the rest of the employees. (Tr. 58, 176)
41. In November 2014, Complainant filed a complaint with the Hotline. (Tr. 58)
42. On February 2, 2015 at 5:26 PM Complainant sent an email to the entire APD department scheduling a meeting, writing that "David suggested that a meeting with Doug and Karl to understand what the goals of call logging are would probably be the best way to achieve coordination." (Comm. Exh. 4)
43. At 6:05 PM Szeremet responded, copying Kreunen, that he had not asked Complainant to call a meeting for the entire

department, instructing Complainant to cancel the meeting and reschedule another meeting with herself, Szeremet, and Kreunen. (id.)

44. Instead of doing as Szeremet had instructed, Complainant responded with “When we talked you said at the meeting to talk about these things would necessarily need to include Doug and Karl?” (id.)
45. Szeremet responded writing “Then you misunderstood our conversation. I did not ask you to schedule a department meeting. I said that at some point, we will adjust and evolve how we log calls and will involve Karl and Doug.” (id.)
46. Complainant responded that she did not understand Szeremet’s position, giving her rationale as to why she felt the meeting needed to be held. (id.)
47. Szeremet responded to Complainant writing “Jessica, you are refusing to follow my instructions. As the head of the Advanced Sales department, I am instructing you to cancel the meeting. This is not up for discussion. Cancel the meeting. Do not send any group emails as to why it is being cancelled-just cancel it.” (id.)

48. Complainant, Szeremet, Kreunen, and Doug Cooke (Cooke), the head of the Strategic Business Unit, met with Pam Webb (Webb), Vice President Human Resources, to discuss the issue involving the meeting. (Tr. 38, 75, 154) (Resp. Exh. A)
49. At the end of this meeting, Webb told Complainant that the tone of Complainant's emails was disrespectful. (Tr. 75, 154, 303-304)
50. After a couple of days, Complainant cancelled the meeting. (id.)
51. On February 12, 2015, Complainant received an addendum to her 2014 Performance Evaluation. (Comm. Exh. 5)
52. Szeremet wrote that the addendum was to provide additional insight concerning Complainant's below performance rating for her Presentation Skills adding that "It is the opinion of her supervisor that her presentation skills, for a Senior Advanced Sales Consultant, were below expectations in 2014." (id.)
53. Complainant had surgery in March 2015 and was out for a month. (Tr. 43-44, 59-60)

54. In odd calendar years Respondent conducted advanced training forums for their top performing agents. (Tr. 63, 213-215)
55. The SASC team members were responsible for preparing their own presentation materials. (id.)
56. Complainant returned from medical leave and began preparations for her portion of the advanced forum. (Tr. 63)
57. While preparing for the advanced forum, Complainant conducted research and determined that she needed additional research materials for one of the topics she was presenting. (id.)
58. Complainant had a one on one meeting with Szeremet where she discussed with him her preparation for the advanced forum. (Tr. 67, 215-216)
59. Complainant asked him to add on to Respondent's Lexis subscription authoritative resources to enhance her ability to prepare her presentation materials. (id.)
60. Szeremet offered to give Complainant help preparing her slides and told her he would send her slides that he had

prepared on the topic to use in his presentations. (Tr. 69-70, 217) (Comm. Exh. 6, Resp. Exh. B)

61. On June 2, 2015 at 10:53 AM, Szeremet emailed Complainant and attached the slides that he had offered as help. (Comm. Exh. 6, Resp. Exh. B)
62. Complainant responded to Szeremet by thanking him, stating that they were materials that she already had and was looking for material that comes from “experts or authorities.” (id.)
63. Szeremet responded to Complainant by saying he was sorry that Complainant did not find the slides helpful. (id.)
64. Szeremet told Complainant that because of his schedule, he anticipated addressing the issue of additional resources in late summer or early fall and that she had access to resources that were sufficient for performing research for her presentation. (id.)
65. Szeremet also attached a client approved “white paper, a couple of competitor pieces (for a general comparison of what other carriers are doing), “and an article” he used previously in his research. (id.)

66. Complainant responded, rejecting his recommendations because she “would like to make a higher quality with analytical information.” (id.)
67. Szeremet responded, stating that “For now, access to AALU (which is the best resource in the advanced sales community), Forefield (which is excellent), Trust & Estates magazine, Brentmark, Estate Planning magazine, Tax Facts, Lexis and various on-line resources is what we have.” (id.)
68. Szeremet further communicated that if Complainant was not comfortable preparing for the training, that she should advise him of that, and he would make alternative arrangements. (id.)
69. On June 3, 2015 Szeremet emailed Complainant and asked her to come see him because he had an idea to help her with the topic on which she was seeking additional resources through a Lexis subscription. (Tr. 69-70, 217) (Comm. Exh. 6, Resp. Exh. B)
70. Instead of going to see Szeremet, Complainant responded that she needed more material for the entirety of her presentation and asked Szeremet if he had an authoritative source that discussed all the material she needed to cover in her presentation. (id.)

71. On June 4, 2015 at 9:47 AM Szeremet sent an email to Complainant, copying Kreunen, summarizing his email exchanges with Complainant, and ending with the following:

“Again, I am instructing you to drop the matter. The decision has been made to remove you from the Forum agenda and we must move forward as a team. Your assistance (along with Jenna) on the phones during the Forum will be crucial and I appreciate your cooperation with that.

This is the last email I will send concerning these issues (the Advanced Forum and/or research resources).” (Comm. Exh. 6)

72. On June 4, 2015 at 10:24 AM Complainant sent an email to Szeremet copying Kreunen and blind copying a co-worker, Kelly Hall (Hall). (id.)
73. In the email Complainant summarized her previous discussion with Szeremet about Lexis as an additional resource. (id.)
74. In addition, Complainant also responded to Szeremet’s offer of help in the following manner:

“Concerning the “help” that you offered, I’m afraid I don’t consider you to be an “authoritative source”, I also don’t think that the bar or the state’s that are authorizing continuing legal education would consider you such, either. As we discussed, we are

two different people and the way you fill time and present is not the same as me. I need to be able to answer questions in an expert manner. That's what I said to you concerning why I felt I needed the tactics, based on authoritative resources, I was describing to you during our meeting. That's my perspective.

I do understand that you want to stop talking about this and I am happy to, but I will respond to your statements with my perspective. I hope this clears the air on the matter." (id.)

75. Szeremet talked with his supervisor Kreunen and they both spoke to Cooke. (Tr. 220)
76. Szeremet recommended that Complainant be terminated because of ongoing issues with communications between them. (id.)
77. The consensus was to issue Complainant a written reprimand rather than terminate her. (id.)
78. Complainant received a written reprimand dated July 7, 2015, for (1) repeated tardiness and failure to attend one-on-one meetings and (2) tone and tenor of communications with her supervisor. (Tr. 79, 162-163) (Comm. Exh. 7) (Resp. Exh. C)

79. The memo said that Complainant's communications with Szeremet had been "disrespectful and had shown an unwillingness to follow instructions." (id.)
80. The reprimand also mentioned that Complainant's conduct created discord within the department in her relationship with Szeremet. (id.)
81. Approximately two (2) months after the written reprimand, Complainant received her 2015 annual review. (Tr. 81, 164, 221)
82. The evaluation noted that Complainant needed to improve her communication with Szeremet and that in the past she had occasionally been confrontational and unprofessional. (Comm. Exh. 8, Resp. Exh. D)
83. The evaluation also noted that although there had been improvements in that area, it was an issue that still needed to be worked on. (id.)
84. Under Personal Development Objectives the evaluation noted that Complainant needed to "display an ability to consistently respect management decisions and communicate in a respectful manner" and "increase public speaking competence." (id.)

85. In September 2016, Complainant received her 2016 annual review. (Tr. 82-83, 165-166, 222-223) (Comm. Exh. 9, Resp. Exh. E)
86. The evaluation noted that Complainant's communications with Szeremet had improved but "occasionally her tone and word choices come across as confrontational (in particular with internal/home office associates)." (id.)
87. Complainant signed the evaluation on September 9, 2016. (Comm. Exh. 9, Resp. Exh. E)
88. During Szeremet and Complainant's weekly one-on-one meeting, Complainant brought up the use of Paid Time Off (PTO) and how she had been tracking everyone's time on her wall calendar. (Tr. 88, 167, 177, 225)
89. Complainant specifically questioned Washatka's use of PTO. (id.)
90. Szeremet told Complainant that he would not discuss other employees with her. (Tr. 172, 225, 230, 326)
91. Szeremet emailed Webb, copying Kreunen and another employee related to a matter discussed during the meeting,

about the items Complainant raised during her one-on-one. (Tr. 324-325, 360-361) (Comm. Exh. 10, Resp. Exh. J)

92. Szeremet communicated that Complainant again raised her concern about Washatka having received time off to study for the bar and now she had raised the issue of everyone's PTO use. (id.)
93. Szeremet tracked everyone's PTO and Complainant was the only employee who had a negative leave balance. (id.)
94. Szeremet asked Webb to address these points with Complainant and tell Complainant he tracks everyone's PTO. (Tr. 229, 326) (Comm. Exh. 10, Resp. Exh. J)
95. Webb responded that she agreed with his assessment and he was responsible for tracking his direct reports' PTO. (Tr. 172, 225, 230, 326) (Comm. Exh. 10, Resp. Exh. J)
96. On November 22, 2016 at 9:11 AM, Complainant emailed Szeremet and asked if she could have January 3-6 off. (Comm. Exh. 11)
97. Szeremet responded at 9:28 AM, copying Kreunen, stating that he wanted to "alert" her that she had a negative balance

for her PTO and that her pay would be docked in the first paycheck from 2017. (Tr. 91-92, 231) (Comm. Exh. 11)

98. Szeremet explained that he was asking because he wanted to make sure that Complainant did not go into a negative leave balance. (Tr. 91-94, 231)
99. Szeremet then emailed Complainant at 9:34 AM, asking if she would have enough PTO by then because he wanted to make sure that she didn't go into a negative balance. (Comm. Exh. 11)
100. Complainant responded to Szeremet and questioned and disagreed with Szeremet's application of the leave policy to her request. (id.)
101. At one point, Complainant wrote "Should I have HR get with you for better understanding of the policy and how a negative balance works?" (id.)
102. Although Szeremet checked with HR and informed Complainant that his understanding of the PTO policy was correct, he told her that she could go ahead and take the requested time off, but requested that Complainant keep track of her PTO balance to avoid a negative leave balance at the end of the year. (id.)

103. At the end of 2016 and during 2017, Complainant would rarely talk to Szeremet. (Tr. 238)
104. On April 28, 2017, Complainant emailed Webb, copying Kreunen and Chris Colabro (Colabro), the head of the Strategic Business Unit, because Szeremet had expressed concerns to Complainant about her negative PTO daily balance. (Tr. 172) (Resp. Exh. J)
105. Webb attempted to address Complainant's concern by communicating that managers are asked to monitor their direct reports balances to make sure that they don't have a negative PTO balance at the end of the year. (id.)
106. Complainant communicated that since Szeremet had asked her in the past about her leave balance when she requested leave that "it can cause one to feel bullied about how this company benefit is used by direct reports". (id.)
107. Webb responded that she didn't "view this as being bullied and only viewing it as your manager is wanting to make sure you were aware of your negative PTO balance because you ended 2016 with a negative balance and he wanted to make sure it that didn't happen again." (id.)

108. On July 25, 2017 during regularly scheduled one on one meetings with his employees, Szeremet communicated that when Washatka returned from maternity leave, she would work a modified full-time schedule. (Tr. 97-98, 179) (Resp. Exh. K)
109. When Szeremet asked Complainant if she had any questions, she said, “Not for you. For HR.” (id.)
110. After the meeting at 10:49 AM, Complainant emailed Webb, copying Kreunen and Colabro about her meeting with Szeremet, writing that “The rest of the team that is not receiving this special treatment objects.” (Tr. 99-100, 179) (Comm. Exh. 13)
111. Complainant wrote that this may be a fair employment issue. Complainant also requested to meet with Kreunen. (id.)
112. At 10:52 AM Szeremet emailed Webb and Bealer, cc’d Kreunen and Colabro, and wrote that Complainant had questions/concerns, but she would not address them to him directly. (Tr. 253, 313, 317, 369) (Resp. Exh. K)
113. Szeremet further wrote that “as her direct supervisor, I would prefer that she give me a chance to address any concerns she has but she refused.” (id.)

114. After Szeremet sent the email to Kreunen he went to him and talked about Complainant's curt manner, negative attitude, and the lack of good working relationship between them which he described as the "final straw":

Q: What did you tell Karl?

A: Quite frankly, I went to Karl and said, I can't do this anymore. I try to talk to her about—really, just about anything work-related. She doesn't want to meet with me. She's very curt with me or she'll challenge. I just am at the point where I—and at this point she won't even talk to me anymore. So as her supervisor, how can I—how can I provide guidance and run a department where I have a senior member, you know, who wants to be viewed as a leader who won't talk to me. Not just this—I mean, I think people need to remember, this is just the final—final straw of a whole bale of hay. And just happened to be this modified work arrangement that tipped the scale.

But this is no way—I never said to anybody, only Jenna will get this, only. No. It's the door is open. Anyone who would like to consider it—you know, I can't promise we're going to give it to everybody. But the offer is there to consider it and discuss it and see if it's an appropriate fit.

But I just don't want to avoid, like, this issue being some giant weight on the scale. This is more – it just happened to be the one issue, the final one of many where she wouldn't work with me. That's all this is. (Tr. 254-255)

115. Szeremet discussed terminating Complainant's employment with Kreunen during the meeting. (Tr. 255-256)
116. Between 10:58 AM and 11:04 AM Complainant and Adam Curry (Curry), her co-worker, exchanged ten text messages regarding "Jenna stuff?" where Complainant wrote that she was going to call the EEOC and Curry responded that he was likely going to "stay out of it". (Tr. 185-186) (Comm Exh. 22)
117. At 11:03 AM Kreunen responded to Complainant, copying Webb and Colabro, giving some additional information about the modified full time position, offering to meet with Complainant and stating that he wanted her to have the correct information before moving ahead. (Tr. 371) (Comm. Exh. 13)
118. Kreunen further wrote that he would be happy to answer any other factual questions if she had any. (id.)
119. Kreunen also wrote that he would discuss the meeting with Webb and afterward they could then set the meeting up. (id.)
120. The next day, July 26, 2017 at 9:46 AM, Complainant sent Kreunen an email with "some other questions" she would like to understand regarding "Jenna's special treatment". After posing the questions Complainant wrote "At the end of the

day: Why don't the rest of us deserve to be treated so favorably"? (id.)

121. At 11:16 AM Kreunen responded, answering some of the questions but stated that if she wanted to know full details it would be "best to find out from HR after the full rollout". (id.)

122. Kreunen told Complainant that he would be happy to discuss the issues in the meeting. (id.)

123. At 2:08 PM Complainant responded to Kreunen and Webb, thanking him for his response and writing that she was not aware that it was a new policy and therefore they might not need to have the meeting as she could get the details from Webb. (id.)

124. At 3:32 PM Webb responded to Complainant, copying Kreunen, writing that Respondent would be announcing the policy with guidelines for area management to work with. (id.)

125. Webb also wrote that "We have many different benefit options for associates and not everyone is able to take advantage of them. ... We understand that not everyone will not (sic) be able to take advantage of working from home or the modified work schedule." (id.)

126. At 3:58 PM Complainant responded to Webb, copying Kreunen and both of her co-workers. (id.)
127. Complainant thanked HR for creating the programs, writing that if the policy was not applied equally to all employees in individual departments it would be a discriminatory application and the Respondent would be liable. (id.)
128. Complainant questioned the need for a meeting just with her because her co-workers had questions to discuss “the parameters of equal and fair application of the Company policies to all members of the department.” (id.)
129. Complainant further wrote that she didn’t see the need to have a meeting with HR’s input into the equal application of the policy unless there was an intent not to apply the policy equally. (id.)
130. Complainant added that if the intent was not to apply the policy equally then HR and Legal should be included in a meeting with the team. (id.)
131. At 8:50 PM Kreunen responded to Complainant, copying Webb, Curry, and Hall, that he was going to keep the meeting with her that already been scheduled. (id.)

132. Kreunen further wrote that if Hall and Curry had questions, he would be happy to meet with them but because Complainant had expressed other concerns beyond the modified full-time position that he believed it would be best handled without her co-workers present. (id.)
133. Kreunen ended the e-mail with “Thank you, the matter is closed until our meeting Friday.” (id.)
134. On July 27, 2017 at 9:45 AM Complainant responded, copying Webb, writing “Sounds good. I look forward to speaking. Again, the concerns I’ve expressed are about the equal application of company policies to the whole department for all of those similarly situated in it - this is a legal standard - so do you think Legal should be present?” (id.)
135. Webb responded writing that it was not a legal issue and legal did not need to be present at the meeting. (id.)
136. Complainant responded writing that she was having trouble seeing how it wasn’t legal in nature and attached information from the EEOC to help them understand the legal basis for her concerns. (Tr. 105-108) (id.)

137. Kreunen was concerned about Complainant's drawing her coworkers into an issue that they had not raised with management and in doing so Complainant was creating a negative work environment for her co-workers, management, and HR. (Tr. 319-320, 374-375, 379-381)
138. Curry sent an email to Kreunen stating "I want no part of this. If I have questions or want to participate in a program, I will direct my questions to David or you." (Tr. 314, 376) (Resp. Exh. O)
139. A meeting with Complainant was scheduled for Friday July 28, 2017 which included Kreunen, Szeremet, and Webb.
140. After Kreunen forwarded the email from Curry, Kreunen followed up with Webb in person. (Tr. 110-112, 327-328)
141. Kreunen felt like Complainant was bringing coworkers in without their permission and that Complainant's conduct was a continual problem with being insubordinate, disrespectful, and also creating an uncomfortable work environment. (id.)
142. Kreunen felt that Complainant was becoming harmful with productivity and he was at the point where he wanted to terminate Complainant's employment. (id.)

143. Because the meeting had already been scheduled for the 28th, Kreunen decided to go ahead with the meeting to see what Complainant's approach would be to discussing the issues she had raised about the policy. (Tr. 327, 384)
144. Kreunen wanted to see if Complainant would come to the meeting with the attitude that she had an opportunity to think about the issue and admit that maybe she had "jumped the gun" because she "didn't know all the facts", or that she didn't "even understand the policy." (Tr. 384)
145. Attending the meeting on Friday July 28th were Kreunen, Szeremet, Webb, Terri McDonough (McDonough), the HR attorney, and Complainant. (Tr. 382-383)
146. Complainant passed around EEOC handouts and the Ohio law. (Tr. 110)
147. Complainant secretly recorded the meeting. (Tr. 111) (Comm. Exh. 24)
148. Complainant began the meeting putting forward her position that, in her opinion, the policy is compensation discrimination and that "ultimately if we decide to go through with just offering it to one person and not everybody, we'd

ask the EEOC for an investigation as to that.” (Comm. Exh. 24)

149. Complainant brought up Washatka as an employee who received benefits that were not offered to the rest of the employees, giving her opinion as to how that could be viewed as a discriminatory practice. (id.)
150. Complainant continued throughout the meeting to make assertions that if one person is offered benefits, such as part-time or flex-time that they should be offered to all employees and that the employees should be able to coordinate their schedules to enable the use of those benefits. (id.)
151. Webb stated that although the benefits would be offered to everyone, not all employees would be able to take advantage of the benefits for a variety of reasons, whether it’s the department, the position, or whether or not they are in good standing. (id.)
152. Complainant responded to Webb her belief that members of her team were similarly situated and if one person, the junior member of the team with the least experience, gets to take advantage of all the benefits when everybody else in the same position does not, “I think that is going to be difficult to defend.” (id.)

153. Both Webb and McDonough told Complainant that it was up to management to determine the staffing needs and requirements in their departments. (id.)
154. Complainant wanted management to offer her and her co-workers the same benefits offered to Washatka. (id.)
155. Kreunen responded that no one has used the benefits that are being offered in the program yet. (id.)
156. Kreunen added that management does not know what the impact the policy would have on a department and therefore could not say that the policy would last for an indeterminate period of time. (id.)
157. Kreunen communicated that the benefits were offered to Washatka because she asked for them and he would expect that if someone wanted them, they could come and ask for them. (id.)
158. The meeting did not change Kreunen's mind about his decision to terminate complainant. (Tr. 387)
159. After the meeting, Kreunen had a conversation with Webb regarding when the best time was to terminate Complainant and he wanted to do it as quickly as possible. (Tr. 387)

160. Since the meeting ended late on Friday afternoon, it was decided to do it early the next week.
161. On Monday, July 31, 2017, Complainant emailed Szeremet at 9:15 AM, copying Kreunen and made a request to be afforded the opportunity to work a modified schedule. (Tr. 116) (Comm. Exh. 19)
162. Complainant did not receive a response to the email. (Tr. 117)
163. At 3:00 pm on July 31, 2017, Kreunen called Complainant and asked her to come to HR. (Tr. 117)
164. Kreunen informed Complainant that her employment was being terminated for disrespect, creating a negative work environment, and going over her manager's head. (Tr. 117-118, 189, 388)
165. Complainant then made comments about compensation discrimination, EEOC and retaliation. (Tr. 350)

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.¹

1. The Commission alleged Respondent was terminated in retaliation for opposing an unlawful discriminatory employment practice.

2. This allegation, if proven, would constitute a violation of R.C. §4112.02 (I) which provides that it is an unlawful discriminatory practice:

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

¹ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02 by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).
4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Little Forest Med. Ctr. v. Ohio Civil Rights Com.*, 61 Ohio St.3d 607, 609-610 (1991).
5. Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1967 (Title VII).
6. Under Title VII case law, the evidentiary framework normally requires the Commission to prove a prima facie case of unlawful retaliation by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973).
7. To establish a prima facie case of unlawful retaliation, the Commission must demonstrate by a preponderance of the evidence that:

- (1) Complainant engaged in a protected activity,
- (2) Respondent was aware that Complainant had engaged in that activity,
- (3) Respondent took an adverse employment action against the Complainant, and
- (4) There is a causal connection between the protected activity and adverse action.

Greer-Burger, 116 Ohio St.3d 324 at ¶ 13.

8. The “temporal relationship between a [Complainant’s] participation in protected activities and a [Respondent’s] alleged retaliatory conduct is an important factor in establishing a causal connection.” *Gonzales v. Ohio Dept. of Taxation*, 183 F.R.D 514, 518, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).
9. However, the temporal relationship is not the only relevant evidence that courts consider depending on other circumstances that occur between the protected activity and the adverse action. *Devera v. Adams*, 874 F.Supp. 17, 21, 67 FEP Cases 102 (D.C.Circ. 1995).
10. The Commission introduced the following evidence to establish a prima facie case of retaliation.

11. At a meeting to on July 28, 2017 with Kruenen, Szeremet, and Webb, Complainant complained about the denial of leave and part-time work benefits to herself and her co-workers and she articulated her belief that the denial was based on prohibited discriminatory practices. (Tr. 99-100, 179) (Comm. Exh. 13)
12. Kreunen informed Complainant that her employment was being terminated for disrespect, creating a negative work environment, and going over her manager's head.
13. The Commission established a prima facie case of retaliation.
14. 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, 254, (1981).
15. 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 (1993), quoting *Burdine*, 450 U.S. at 254-55.
16. 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. *Id.* at 511.

17. Respondent's articulated reason for terminating Complainant was because, despite past warnings, Complainant treated her supervisors disrespectfully, was unwilling to work with her supervisors, and disrupted the department. (Tr. 317-320)

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

19. To meet this burden of production, Respondent must:

[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. *Id.* at 515.

20. Therefore, the Commission must demonstrate by a preponderance of the evidence that Respondent's "proffered legitimate reason: (1) has no basis in fact; (2) did not actually motivate the defendant's challenged conduct; or (3) was insufficient to warrant the challenged conduct." *Dews v. A.B. Dick Co.* 231 F.3d 1016, 1021 (6th Cir. 2000).

21. The Commission must also prove that the adverse action would not have occurred “but for” Respondent having engaged in unlawful retaliation. *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533, 186 L. Ed. 2d 503 (2013).

“[T]o prevail on a retaliation claim, a plaintiff must show that retaliation is a determinative factor—not just a motivating factor—in the employer's decision to take adverse employment action. Thus, the causation standard imposed in retaliation cases (but-for causation) is a higher standard than that applied in USERRA or Title VII discrimination claims (‘motivating factor’).” *Id.*

22. The Commission concedes that Complainant and Szeremet’s communications were “not always pleasant”, or that Szeremet was not entitled “to deference as a supervisor”, or that Complainant “may or may not have been wrong about the benefits order to” Washatka.

23. The Commission asserts that the Respondent’s articulated reason is pretextual because Complainant’s conduct should have properly been dealt with through the Respondent’s corrective action and progressive discipline pursuant to Respondent’s policies and procedures.

24. I found the Commission’s assertions to be unpersuasive and incredible.

25. Complainant's conversations and email exchanges with Szeremet and finally with Kreunen are credible evidence that supports Respondent's basis for terminating Complainant.
26. Complainant was put on notice in her 2015 performance evaluation that although she had shown some improvement in her communications with Szeremet, she still needed to "display an ability to consistently respect management decisions and communicate in a respectful manner." (id.)
27. Szeremet also noted in Complainant's 2016 performance evaluation that Complainant needed to "communicate in a positive and respectful manner." (id.)
28. The evaluation also noted that although there had been improvements in that area, it was an issue that still needed to be worked on and "occasionally her tone and word choices come across as confrontational (in particular with internal/home office associates." (id.)
29. Szeremet testified that during his bi-weekly meetings with Kreunen he had talked about Complainant's lack of respect for his capabilities, his knowledge, and his management style. (Tr. 355-356, 358) (Resp. Exh. B)

30. Szeremet also testified that at the end of 2016 and during 2017, Complainant would rarely talk to him. (Tr. 238)
31. I found Szeremet's testimony credible.
32. Kreunen testified that the email exchanges between he and Complainant were "representative of the way Jessica would work through the email process with David, is he would say something, and she would come back and counterpunch. And he would say something, and she would counterpunch." (Tr. 355-356, 358) (Resp. Ex. B)
33. Kreunen testified about the meeting with Complainant with Complainant did not change his decision to terminate her employment.

Q: Why did you go through and have the meeting on that Friday?

A: It's entirely possible that Jessica might have said something to change my mind. It's entirely possible—she should have—she could have said, you know what, I've been thinking about this overnight. I jumped the gun. I didn't know all the facts. Let's talk about this. And I don't even understand the policy, and I haven't actually asked for anything at this point in time. So, let's just have a discussion.

That's not what happened.

Q: What happened?

A: What happened was somebody came in—Jessica came in. I shouldn't say somebody.

Jessica came in, and the conversation was more along the lines of you're doing this and giving this to Jenna, and I don't like it and—it just was—it was right off the bat saying—it was confrontational. There was nothing that would suggest that we were in a position where we had an employee that was going to work with us on anything.

Bear in mind, we had not even had a chance to discuss at this point in time the modified full-time program. She hadn't had a chance to even ask to be part of it because she did not even know the details of the program, and neither did I. We didn't have a chance to formulate any rules for the department at that point in time, including whether or not we would be doing this on a temporary or permanent basis. Though, I would assume that it would all be temporary until we felt comfortable.

So, we come right in, and we get into an antagonistic meeting where we don't really have a conversation I'm looking for.

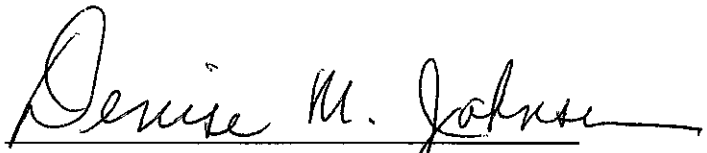
Q: Did the meeting change your opinion about terminating Jessica Walker's employment?

A: It did not. (Tr. 384-385)

34. I found Kreunen's testimony credible.
35. The Commission failed to introduce any credible evidence that, but for the Complainant's opposition to what she believed to be a discriminatory employment practice, the Respondent would not have terminated Complainant's employment.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint Number 18-EMP-DAY-26923.


DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 5, 2020

DMJ/kk