



OHIO CIVIL RIGHTS COMMISSION

Governor Mike DeWine

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

April 27, 2021

Matthew Smucker

7794 Egypt Road
Sterling, OH 44276

Complainant

Eugene P. Nevada, Esq.

485 Metro Place South, Suite 200
Dublin, OH 43017

Counsel for Respondent

David A. Oppenheimer, Esq.

Senior Assistant Attorney General
Civil Rights Section
615 West Superior Avenue, 11th Floor
Cleveland, OH 44113

Counsel for Commission

**Re: Matthew Smucker v. Wayne County Commissioners' Office
Complaint No. 19-EMP-AKR-39574**

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 **May 20, 2021**. *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.



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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/Bradley S. S. Dunn, Acting Chief Legal Counsel



IN THE MATTER OF:

Matthew Smucker
Complainant,

Complaint No. 19-EMP-AKR-39574

v.

Wayne County Commissioners' Office
Respondent.

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

**DAVE YOST
ATTORNEY GENERAL**

David A. Oppenheimer, Esq.
Senior Assistant Attorney General
Civil Rights Section
615 West Superior Avenue,
11th Floor
Cleveland, Ohio 44113
Counsel for Commission

Eugene P. Nevada, Esq.
485 Metro Place South, Suite 200
Dublin, OH 43017
Counsel for Respondent

Bradley A. Sherman, Esq.
Sherman Boseman Legal Group, LLC
800 West St. Clair Avenue, 4th Floor
Cleveland, Ohio 44113
Counsel for Complainant

Matthew Smucker
7794 Egypt Road
Sterling, Ohio 44276
Complainant

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

Matthew Smucker (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on or about May 16, 2018.

The Commission investigated the charges and found probable cause that Wayne County Board of Commissioners (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 April 25, 2019.

The complaint alleged that Respondent retaliated against Complainant for his opposition to an unlawful discriminatory employment practice.

Respondent filed an Answer to the Complaint on May 23, 2019. Respondent admitted certain procedural allegations but denied that it had engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on March 5-6, 2020 at the Wayne County Public Library located at 220 West Liberty Street, Wooster, Ohio.

The record contains the previously described pleadings, a transcript consisting of 423 pages of testimony, exhibits admitted into evidence at the hearing, post-hearing briefs filed by the Commission on July 24, 2020, Respondent on August 13, 2020 and the Commission's reply brief filed on August 21, 2020.

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 May 16, 2018.
2. The Commission determined on February 21, 2019 that it was probable that Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).
3. The Commission attempted but failed to resolve this matter by informal methods of conciliation.

4. Respondent is a government entity operating in Wayne County, Ohio and holds title to all county property in Wayne County. (Tr. 336-340)
5. Respondent is controlled by the three member Wayne County Board of Commissioners (WCC). (id.)
6. In 2015 the Wayne County Airport (“WCA”) came under the control of WCC after the airport authority was legally dissolved.
7. The WCC controlled the oversight and operations of WCA which included making employment decisions.
8. Patrick Herron (“Herron”) worked for the Respondent for over twenty-five years in the position of County Administrator. (Tr. 333-340, 374-375)
9. Herron assisted the WCC by performing the following duties:
(1) managed the WCC office and supervised their direct staff,
(2) reviewed applications for jobs, and (3) selected candidates for interviews. (id.)
10. Barbara Chapin (“Chapin”) was the Human Resources Benefit Specialist from July 2016 until October 2019 and reported directly to Herron. (Tr. 263-264, 284)

11. Chapin was responsible for creating, posting, and advertising job announcements. (id.)
12. Respondent's handbook required job announcements to be posted at the following locations: (1) the County administration building, (2) the county courthouse, and (3) the Job and Family Services building. (Tr. 208-209)
13. Chapin also used paid platforms such as Indeed.com and the Daily Record to post job openings for publication. (Tr. 286-287)
14. It was also Respondent's practice to post job announcements for open WCA positions at the location. (Tr. 39, 49-50, 102, 149, 375-376)
15. Complainant owned and operated a business purchasing items in bulk and reselling them individually on various websites. (Tr. 134-139)¹
16. Complainant had just completed aviation ground school and was working toward a private pilot's license. (id.)

¹ From 1999-2012 Complainant was a police officer for the City of Rittman (1999-2005) and the City of Wooster (2005-2012). From 2016-2018 Complainant worked as an auxiliary police officer for the Village of Dalton. (Tr. 133-140)

17. Complainant saw an advertisement in the Farm and Dairy Newspaper for the position of part-time Line Service Technician ("LST") at WCA. (Tr. 141-142)
18. Complainant thought it was a good opportunity to continue his aviation goals as well as get back into a paid position in which he could put money into the Public Employees Retirement System. (id.)
19. Complainant went to the WCA and talked to an employee, Darin Stambaugh ("Stambaugh"), an LST, about the position. (Tr. 142-143)
20. Stambaugh told Complainant that the position was for weekends and holidays. (id.)
21. Stambaugh showed Complainant where the position description was posted on a bulletin board located in the hallway near the restrooms and kitchen break area. (id.)
22. Stambaugh made a copy of the posting and gave it to Complainant. (id.)
23. Complainant went to the WCC website and printed off an application. (Tr. 143) (Joint Exh. 2)

24. Complainant submitted an application for the position in January 2016. (id.)
25. Complainant interviewed for the position with Dave Gipp ("Gipp) who was the WCA manager and the WCC at Respondents' administration building. (Tr. 144)
26. Complainant was hired by the WCC in February 2016 as an LST, with a ninety (90) day probation period, working primarily part-time on weekends and holidays. (Tr. 145-146, 149)
27. Complainant worked with another weekend LST, Barb Palmer ("Palmer"). (Tr. 148-149)
28. Beginning in 2016, Sue Smail ("Smail") commenced her tenure as a WCC. (Tr. 56-57; 241-244)
29. Smail was very involved in operations at the airport, speaking with airport employees directly and visiting the airport often. (id.)
30. During Gipp's tenure as airport manager, Complainant spoke regularly with Gipp. (Tr. 195)

31. In 2017, WCC created an Assistant Airport Manager position at WCA based on the decision to expand management. (Tr. 151-152, 383) (Joint Exh. 4)
32. In February 2017 Gipp told Complainant that WCC was going to hire an Assistant Manager before the position was posted on the bulletin board at WCA. (Tr. 152)
33. The job posting listed the job duties and qualifications with a pay rate of \$14.00 per hour and a deadline for submission of applications of March 8, 2017. (Tr. 151-152, 379) (Joint Exh. 4)
34. Complainant did not apply for the job as the pay was advertised at only \$14.00 per hour. (Tr. 153)
35. The applicant who was offered the position turned the position down. (id.)
36. Smail asked Complainant to interview Jessica Dufner ("Dufner") for a part-time LST position. (Tr. 157)
37. Smail told Complainant that she wanted him to interview Dufner because she felt that Dufner would be a good fit for WCA but did not meet the qualifications for the position of Assistant Airport Manager that Dufner had applied for. (id.)

38. Complainant conducted the interview and recommended Dufner be hired for the part-time LST position. (id.)
39. Dufner was hired on March 12, 2017.
40. After Dufner was hired, Complainant and Palmer trained Dufner on the job duties of an LST.
41. The Assistant Manager position was re-posted with a pay scale of \$16.00 to \$25.00 per hour depending on the skill level of the applicant. (id.)
42. Complainant applied for the position. (id.)
43. At the time that the position was reposted, Complainant and Palmer were still training Dufner on the duties performed by an LST. (Tr. 153)
44. On March 26, 2017, Smail came to the airport to interview Complainant and Dufner for the Assistant Manager position. (Tr. 154-157) (Joint Exh. 5)
45. Complainant had a one-on-one, closed-door interview with Smail that lasted four minutes. (id.)

“Q: Okay. And was that it? She asked you questions? Was there any further conversation?”

A: The first question she asked, she said, “Are you seriously considering taking this position?”

I said, “Absolutely.”

She asked how I would be able to facilitate the position as I had a full-time commitment with my business. I said that I could make arrangements to change my schedule. And then she kind of candidly said, “You don’t really want the position.”

I said, “Absolutely, I do.”

She said, “Well, I was hoping that you’d come in here and tell me something different because she’s a young female that needs full-time as well as benefits.”

Q: And what did you say in response?

A: I said that didn’t sway my decision. I was truly interested in the position and moving forward I truly expect to have the opportunity to have the position. (Tr. 154-155)

46. Dufner was offered the position of Assistant Manager the following day. (Tr. 157-158) (Joint Exh. 6)

47. The day after the interview, Smail called Complainant to tell him that Dufner had been selected for the Assistant Manager position. (id.)
48. Smail told Complainant that they wanted to extend an opportunity to him for a marketing position. (id.)
49. After Dufner became the Assistant Manager, there were no longer monthly meetings with staff at the WCA. (Tr. 158)
50. In August 2017, Gipp was off on medical leave. (Tr. 159) (Joint Exh. 7-8)
51. Despite Dufner's being the Assistant Manager, Complainant was tasked with being the Acting Airport Manager during Gipp's medical leave. (id.)
52. When Gipp returned from medical leave, Complainant returned to his LST position. (id.)
53. In 2018 Donald Jolliff ("Jolliff") worked five days a week, and on occasional weekends, performing aircraft maintenance for an aviation company at WCA. (Tr. 37-38)
54. Between February 2018 and October 2018, Eric Ahrens ("Ahrens") worked weekdays as an LST, working part-time at

WCA and part-time at Respondent's administration building.
(Tr. 54-55)

55. In April 2018, Dufner submitted her resignation with her official last day of employment listed as May 30, 2018. (Tr. 60-61, 187-188, 271-272, 368, 399) (Joint Exh. 24)

56. Dufner told Ahrens sometime during the period of late April and the first part of May that she was leaving her position as Assistant Airport Manager. (Tr. 60-61)

57. After Complainant considered that Smail had not extended him a job offer for a marketing position and hired Dufner because she was a female, he filed a charge of discrimination with the Commission alleging that he was denied a promotion based on his race and sex. (Tr. 162-163) (Joint Exh. 17)

58. Herron saw the charge on Monday May 14, 2018.

59. The charge was time stamped "2:01 PM" by Respondent's administrative office and on the same day Herron did the following: (1) discussed the charge with the WCC, (2) spoke to Gipp about the charge, and (3) sent Complainant and Palmer a text at 5:00 PM regarding work schedule changes for employees at WAC. (id.)

60. The work schedule changes that Herron communicated to Complainant was a rescheduling of part-time employees to work both weekdays and weekends. (id.)
61. Also, on the May 14th Smail and Herron initiated or engaged in the following communications: (1) Smail called Gipp to discuss the charge, (2) Smail texted Herron at 6:50 PM about when they should tell Dufner about the charge, (3) Herron responded that they should hold off on telling Dufner for a day or two. (id.)
62. Finally, on May 14th Gipp called Complainant and told him that something he had filed “pissed Smail off”. (Tr. 178)
63. Within a day or two after Herron received notice of the charge, Herron discussed Complainant’s charge with Dufner. (Tr. 394-396)
64. On Wednesday May 16th, Complainant texted Herron and told him that he would have a conflict on weekdays for the remainder of May because of his job as a part-time school resource officer. (Tr. 139-141, 182-184, 364-366, 388-392) (Joint Exh. 21-23)
65. On that same day, May 16th, Chapin sent an email with an attachment of the job announcement for the Assistant Airport

Manager position to both the County Courthouse and Job and Family Services for posting, listing an application submission deadline date of Wednesday, May 23, 2018. (Tr. 266-270) (Joint Ex. 25)

66. Chapin personally posted the announcement at the County Administration Building on Wednesday, May 16th. (id.)

67. Smail went to the airport on May 16th and met in person with Dufner and Ahrens. They discussed Complainant's charge. (Tr. 57-58, 94-95)

68. On Thursday May 17th Chapin sent an email to Dufner, asking her to post the job announcement at WAC. (Tr. 270) (Joint Ex. 32)

69. Chapin brought Amanda McGee (McGee), an Airforce veteran, to the attention of Herron. (Tr. 405)

70. McGee had never worked for Respondent but had applied for a position with the Respondent's Building Department in 2018. (Tr. 104-106, 119-120, 277-280, 312-313, 404-406) (Joint Exh. 29)

71. Chapin took McGee's resume from the application she had previously submitted to the Building Department and provided

it to Smail, Herron, and Carol Zemrock. (id.) (Joint Exh. 28-29)

72. On May 17th, Herron directed Chapin to call McGee and ask her to apply for the position of Assistant Airport Manager. (Tr. 405-406)

73. Prior to receiving the call, McGee was unaware that there was an open position at the airport. (id.)

74. Chapin scheduled an interview for McGee before her application had been submitted. (Tr. 314-315)

75. On Saturday May 19th, Complainant received a copy of a memorandum and work schedule in the mail informing him that he was scheduled to work on the weekdays in May. (Tr. 184-187, 366-367, 392-393) (Joint Exh. 22, 30, 36)

76. Complainant left a letter for Dufner on the keyboard of the common area computer informing her of his conflict with the schedule. Complainant then texted Herron informing him of the conflict. (Tr. 184-187, 366-367, 392-393) (Joint Exh. 30)

77. As a result of the conflict, Complainant only worked the last two Sundays in May 2018, the 20th and the 27th. (id.)

78. During May 2018, Ahrens was working weekdays mostly at the airport. (Tr. 58-59)
79. During May 2018, Jolliff worked at the airport 5 days or more a week. (Tr. 38)
80. On Sunday May 20th, Ahrens worked his scheduled shift at the airport. (Tr. 63) (Joint Exh. 47)
81. May 20th was the first time Ahrens worked with Complainant. (id.)
82. On May 20th, Jim Rosenow (Rosenow), an airport patron, asked Complainant if he intended to apply for the Assistant Airport Manager position. (Tr. 187-188)
83. Complainant replied that he would apply once the position was posted. (id.)
84. Ahrens confirmed to Complainant that there was an opening for the Assistant Airport Manager position and directed Complainant to Dufner's resignation letter that was on a public computer at the airport. (id.)
85. Ahrens also told Complainant that he was awaiting the posting. (id.)

86. Complainant checked the Wayne County Website and bulletin board at the airport and the position was not posted there on May 20, 2018. (Tr. 189-190, 223-224)
87. Upon arriving home, Complainant checked the website Indeed.com as well as the local newspaper, the Wooster Daily Record. There was no posting on either location. (id.)
88. Complainant also traveled to the airport each day after finishing his shift as a school resource officer to see if the posting was on the bulletin board but never saw a posting. (id.)
89. When Jolliff was at work, he walked past the bulletin board multiple times a day and did not see the posting until the afternoon of May 23rd, which was the submission deadline. (Tr. 37-38, 44-45)
90. Ahrens smoked and he had to walk past the bulletin board where job announcements were posted whenever he entered or left the building to smoke. (Tr. 59)
91. Ahrens walked past the bulletin board at least 15 to 20 times a day on the days that he worked in May 2018 but never saw the job announcement posted for the Assistant Manager position. (Tr. 58-59, 61-63) (Joint Exh. 27)

92. Ahrens received a text from Dufner on Tuesday May 22, 2018 at 7:20 PM, encouraging him to apply for the Assistant Manager position. (Tr. 60-61) (Joint Exh. 31)

93. Ahrens immediately responded to Dufner's text.

“We have an assistant manager! [smiley face emoji]”

“So they posted it?”

“I can't make you stay but wish you would.”

“It's just my wishful thinking.” (id.)

94. Dufner did not respond to Ahrens' text. (id)

95. On that same day Ahrens spoke to Dufner, he went to Respondent's website and printed off an application. (Tr. 79)

96. Ahrens texted Dufner on May 23, 2018 at 11:32 A.M. and asked her if she had time to talk. (Tr. 63) (Joint Exh. 31)

97. Ahrens took a half day off from work to make sure that he submitted his application before the deadline. (Tr. 81)

98. After Ahrens submitted his application, Smail called Ahrens because she had found out that Ahrens had a “rant” because he didn’t know about the posting. (Tr. 80)
99. Smail offered to extend the deadline for Ahrens but he informed her that he had already completed and submitted the application. (Tr. 77-78, 80)
100. Smail contacted Chapin and Dufner regarding the posting at the airport. (Tr. 270-271, 302-305) (Joint Exh. 32)
101. Dufner posted the job announcement at 12:30 PM on May 23rd, five hours prior to the deadline for submission of applications. (id.)
102. At approximately 1:15 PM on May 23rd, Jolliff saw the job announcement posted on the airport bulletin board. (Tr. 190-192) (Joint Exh. 34)
103. Jolliff posted on Facebook that the announcement was just put up and that the deadline was later the same day. (id.)
104. Jolliff was interested in applying for the position but did not because by the time he saw the posting there was not much time left to submit an application before the deadline. (Tr. 45-47)

105. Complainant, who was Facebook friends with Jolliff, saw a posting by Jolliff that was talking about the WCC but did not open up the comments. (Tr. 190-191)
106. On Sunday May 27th, Daniel Hodge contacted Complainant and asked if he could work Hodge's shift that day. (Tr. 192-195) (Joint Exh. 25, 33-34)
107. During the call, Hodge asked Complainant if he had seen the job announcement for the Assistant Manager position. (id.)
108. When Complainant went to the airport to cover Hodge's shift, he saw the job announcement on the bulletin board. (id.)
109. Complainant then reviewed Jolliff's Facebook page posting on the afternoon of May 23, 2018 and learned that the job announcement had been posted on that date. (id.)
110. Gipp had recently returned from medical leave. (Tr. 195-196, 199-200)
111. At the end of Complainant's shift on May 27th, Complainant called Gipp as was standard practice. (id.)
112. Complainant and Gipp discussed the job announcement with Gipp encouraging Complainant to apply. (id.)

113. Smail traveled to the airport on May 27, 2018 and communicated to Ahrens that McGee was going to be interim Assistant Manager and be trained and would eventually be the Airport Manager. (Tr. 66-67)
114. Complainant printed the application, filled it out, and mailed it on May 29, 2018 because May 28, 2018 was a holiday. (Tr. 200-201, 203, 232, 322-323, 410-411) (Joint Exh. 38, 40)
115. On May 29th Ahrens went to the county administration building to drop off a backup for a point of sale machine at WAC. (Tr. 82-83)
116. While Ahrens was at the county administration building, he was told to see Smail and Herron. (id.)
117. Smail and Herron told Ahrens that Gipp was going to cease being an employee on the next day, May 30th, and told Ahrens not to tell Gipp. (id.)
118. On May 29th Chapin received confirmation that McGee's starting salary would be \$17.09 per hour. (Tr. 273-274) (Joint Exh. 39)

119. During the evening of May 29th Gipp called Complainant and told Complainant that the WCC wanted to meet with Gipp at the Administration Building. (Tr. 201-203)
120. During the morning of May 30th Gipp called Complainant and told him that WCC had terminated Gipp's employment. (id.)
121. Herron sent a letter to Complainant dated June 8, 2018 telling him that his application was received after the deadline and the position had already been filled. (id.)
122. When McGee first started working at WAC, she introduced herself to Complainant as the assistant manager and indicated that the WCC had informed her that after a ninety (90) day probation period that she would move up to the manager's position and that Ahrens would move into the assistant manager position. (Tr. 206)
123. Complainant questioned McGee that she was going to be appointed to the position and McGee responded "yes". (id.)
124. Complainant questioned McGee further, asking "So you don't have to fill out an application?" (id.)
125. McGee replied, "My application is already on file." (id.)

126. On June 30, 2018, Smail initiated a text message conversation with Ahrens about the Assistant Manager posting that had been filled by McGee.

“Did you ever see the Assistant Manager position posted on the bulletin board? He claims Jess never posted it”

“Am figuring that out and have limited my conversations with him to small talk.”

“Good!”

“And did you see the position posted?”

“I never really saw the posting till Jess said that I needed to apply for the position but am pretty sure u guys had made up your minds n e how as to who was being hired. Moot point! Remember u were going to extend the posting because I had not applied and had not seen it?”

“OK thanks”

(Tr. 67-70) (Joint Exhibit 41)²

127. In August 2018, Respondent posted an announcement for the position of Airport Manager at the locations listed in

² During Ahrens deposition he testified that the “him” he was referring to was Smucker. At the hearing, on cross, Ahrens said that he was referring to Rosenow. Rosenow was not employed by the Respondent and lived on the north side of the airport runway. Rosenow and his wife had a hangar and an aircraft at WAC. (Tr. 70-71)

Respondent's policy manual and at WAC on the bulletin board.
(Tr. 82-84, 110-111, 204) (Joint Exh. 42)

128. McGee posted the announcement on the WAC bulletin board, leaving it up until the submission deadline passed. (id.)
129. Complainant saw the posting on the WAC bulletin board. McGee gave Complainant a copy and asked if he had any interest in the position. (Tr. 204-205)
130. Complainant told McGee that he was interested in the position, but he did not submit a written application.
131. Complainant did not submit a written application because he concluded that he had a written application on file and that his verbal application was sufficient based on his first conversation with McGee when she started working at the airport. (Tr. 205-207)
132. McGee was promoted to Airport Manager in September 2018. (Tr. 112)
133. Respondent did not post a position for Assistant Airport Manager until March 2019. (Tr. 113-116) (Joint Exhibit 44)

134. Matt Long was hired by the Respondent on April 8, 2019 to fill the position which was full time at a rate of pay of \$17.09 an hour. (id.)

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.³

1. The Commission's complaint alleged that the Respondent denied Complainant the opportunity to apply for the position of Assistant Airport Manager 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

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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.
4. 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).
5. 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).
6. Thus, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful retaliation under Title VII of the Civil Rights Act of 1967 (Title VII).
7. 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).
8. 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.

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).

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).

9. The Commission introduced the following evidence to establish a prima facie case of retaliation.
10. Complainant filed a charge of discrimination with the OCRC on May 4, 2018. (Tr. 162-163) (Joint Exh. 17)

11. The Respondent became aware of Complainant's charge on May 14, 2018. (Tr. 180, 265, 364, 393-394) (Joint Exh. 17, 21, 23)
12. On May 15, 2018, Complainant gave notice to Herron and Dufner that due to changes that were made to the WAC employees' work schedules he would not be able to work the rescheduled hours in May 2018 because of his part-time position. (Tr. 184-187)
13. The Respondent posted the open position on May 16, 2017 according to written policy but did not follow its practice of posting open positions for WAC on the WAC bulletin board.
14. The Commission established a prima facie case of retaliation.
15. 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).
16. 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.

- (1) Respondent met its burden of production with the introduction of evidence that: (1) Dufner posted the job opening on 5/17/18 but it was not seen by Complainant, Ahrens, and Jolliff because it was removed from the bulletin board by an unknown person; (2) When Complainant found out that he had missed the deadline he did not ask Respondent for an extension of time; and (3) McGee was the most qualified candidate for the position of Airport Assistant Manager, so even if Complainant's application had been timely he would not have been selected.

17. The presumption of unlawful retaliation created by the establishment of a prima facie case "drops out of the picture" when the Respondent articulates a legitimate, nondiscriminatory reason for its action. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 at 511 (1993).

18. Commission must then show by a preponderance of the evidence that Respondent's articulated reasons for not promoting Complainant were not the true reasons but were a "pretext for... [unlawful retaliation]." Quoting *Burdine*, 450 U.S. at 253.

[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.

19. 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.*

20. In the instant case the Commission introduced evidence that Respondents’ reasons that the position of Assistant Airport Manager was not seen by Complainant in-time to submit an application before the deadline are pretextual.

21. I found the Commission’s evidence credible.

22. Respondent had made the decision prior to May of 2018 to post open positions for WAC at the WAC location. (Tr. 290-293)

23. Respondent had posted other positions at WAC on paid platforms but did not post the May 2018 opening for Assistant Airport manager on a paid platform. (Tr. 141-142, 286-287)

24. Dufner was informed about Complainant's charge one day before she received an email on May 17, 2018 from Chapin that instructed her to post the opening.
25. From May 17, 2018 through May 23, 2018, WAC employees who knew that Dufner had submitted a resignation letter to Respondent with a last day of employment on May 30, 2018, walked past the bulletin board every day and did not see a posting for Assistant Airport Manager. (Tr. 37-38, 44-45, 58-59, 61-63, 189-190, 223-224) (Joint Exh. 27)
26. From May 17, 2018 through May 23, 2018 neither Herron, Chapin, or any of the WCC went to the WCA and therefore had no personal knowledge of the absence or presence of the posting on the bulletin board.
27. Ahrens, who communicated with Dufner during April and May of 2018, knew about Dufner's resignation. (Tr. 60-61)
28. Dufner initiated a text with Ahrens on May 22, 2018 at 7:20 PM encouraging him to apply for the Assistant Manager position. (Tr. 60-61) (Joint Exh. 31)
29. When Ahrens asked Dufner if the position had been posted, she did not respond. (id.)

30. It is reasonable to infer that Dufner did not respond to Ahrens May 22nd text because she did not post the position during the period of time of May 17, 2018 through May 22, 2018.
31. Herron testified that after the he had notice that Complainant filed a charge of discrimination on May 14, 2018, he wanted to ensure that Complainant knew about the Assistant Airport Manager position being open in time for submitting his application. (Tr. 401-402)
32. I found Herron's testimony to be incredible.
33. Despite Herron's testimony that he wanted to ensure that Complainant knew about the position, Herron did nothing personally to contact Complainant to ensure that he knew about the Assistant Airport Manager position posting.
34. Herron asserted that McGee was the most qualified based her application and interview.

Q: What's the value of an interview?

A: Meet somebody face-to-face.

Q: Ask them questions correct?

A: Correct.

Q: See what their answers are?

A: Correct.

Q: You can't know what might be said in an interview without actually holding the interview, correct?

A: Correct.

Q: Okay. You were present for Ms. McGee's interview, weren't you?

A: Yes, I was.

Q: Now, earlier you were asked to evaluate Mr. Smucker's resume in comparison to Ms. McGee's resume, correct.

A: Correct.

Q: And Mr. Smucker, however, did not have an opportunity to interview for the position, did he?

A: He had an opportunity to. He didn't apply for it in time.

(Tr. 406-407)

35. It is reasonable to infer that Herron was not interested in having a face-to-face interview with Complainant in order to compare Complainant's answers to the only other candidates, McGee and Ahrens. (id.)
36. Herron asserted that Complainant could have reached out to one of WCC or Human Resources to ask for an extension of time but instead he chose to mail his application.
37. I found Herron's assertion incredible.
38. Herron directed Chapin to contact McGee to apply for the position that McGee did not know was open.
39. Smail reached out to Ahrens and offered to extend the deadline date.
40. Unlike Complainant, McGee and Ahrens had not filed a charge with the OCRC.
41. It is reasonable to infer from the credible evidence in the record that after Respondent had notice of Complainant's charge that Respondent mounted an elaborate scheme to ensure that Complainant would not have an opportunity to apply for the open position of Assistant Airport Manager in May 2018.

42. But for the Complainant filing a charge of discrimination, the Respondent would not have denied Complainant an opportunity to apply for the Assistant Airport Manager position.

43. Therefore, the Respondent has engaged in illegal retaliation in violation of R.C. 4112.02(I) and the Complainant is therefore entitled to relief as a matter of law.

For all of the foregoing reasons, it is recommended in Complaint No. 19-EMP-AKR-39574 that:

1. The Commission orders Respondent to cease and desist from all discriminatory practice in violation of R.C. Chapter 4112; and
2. The Commission orders Respondent to place Complainant in the next available Airport Assistant Manager position and Reimburse Complainant for lost wages until such time as he is placed in the position.
3. The Commission further orders Respondent to receive training on the anti-discrimination laws in Ohio within six (6) months of the date of the Commission's Final Order.
4. As proof of participation in anti-discrimination training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the training. The letter of certification shall be submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order; and the Commission orders Respondent within nine (9) months of the date of the Commission's Final Order to submit to the Compliance Department a draft for an Employee

Handbook outlining Respondent's policies and procedures regarding Ohio's anti-discrimination laws.

A handwritten signature in black ink, appearing to read "Denise Johnson", written over a horizontal line.

Denise M. Johnson
Chief Administrative Law Judge

Date Mailed: April 27, 2021