OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

BETTY TANKS

Complainant

v.

JEFF YOUNT DBA MURRAY'S WINGS

Respondent

Complaint No. 9887
(CIN) E05082804 (31100) 09152004
22A-2006–05560F

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

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Betty Tanks (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on September 15, 2004.

The Commission investigated the charge and found probable cause that Jeff Yount dba Murray's Wings (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (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 June 23, 2005.

The Complaint alleged Respondent subjected Complainant to disparate terms and conditions of employment and discharged her, for reasons not applied equally to all persons without regard to their race.

Respondent failed to file an Answer, pursuant to Ohio Administrative Code (O.A.C.) 4112-3-06. Accordingly, the Commission filed a Motion for Default Judgment, pursuant to O.A.C. 4112-3-06(F). On January 9, 2006 Respondent filed a Motion Instanter to File an Answer. For good cause shown the Motion was granted by Order dated February 13, 2006.[1] Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

A public hearing was held on January 15, 2008 at the Commission's Cincinnati Regional Office, 7162 Reading Road, Cincinnati, Ohio.

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[1] The Commission's Motion for Default Judgment was denied to allow the resolution of the case through the hearing process. After numerous attempts to resolve the matter through settlement Respondent informed the Administrative Law Judge (ALJ) during an October 18, 2007 telephone status conference that he was no longer represented by counsel. Respondent proceeded *pro se*.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 193 pages, exhibits admitted into evidence during the hearing, and a post-hearing brief filed by the Commission on September 23, 2008. Respondent did not file a post-hearing brief.

JURISDICTION

1. Complainant filed a sworn charge affidavit with the Commission on September 15, 2004.

2. The Commission determined on May 26, 2005 that it was probable Respondent engaged in unlawful discrimination 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 corporation doing business in Ohio and an employer having the minimum of four (4) employees.

FINDINGS OF FACT

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

5. Complainant is African-American.

6. Jeff Yount (Respondent) owns and operates Murray's Wings, a restaurant and bar.

7. John Fox, who worked for Respondent, initially hired Complainant to work as a cashier at the Louisiana Fish Bar. (Tr. 107)

8. For a period of time, Complainant worked at the Louisiana Fish Bar, Murray's Wings, and at her previous employer, Frisch's Big Boy.

9. In November of 2003, Respondent asked Complainant to quit her job at Frisch's and work for him at Murray's Wings. (Tr. 65-66)

10. After negotiating an hourly wage Complainant began to work at Murray's Wings as a cashier/cook and worked only occasionally at the Louisiana Fish Bar.

11. Complainant and the only other African-American employee working at Murray's Wings, James Catledge (Catledge), started working at 10:30 a.m. The kitchen opened at 11:00 a.m. Complainant and Catledge worked until 2:30 a.m. when the kitchen closed. This was Complainant's daily work schedule. (Tr. 68)

12. Complainant worked this schedule until she started attending school. Respondent allowed Complainant and Catledge to alter their schedules where she would work Mondays, Tuesdays, and half a day on Thursdays. Cateledge would take off Wednesdays and the other half a day on Thursdays.

13. Respondent's bartenders were all Caucasian.

14. Complainant twice became pregnant while she worked at Murray's. Her first pregnancy ended in a miscarriage. (Tr. 99)

15. During the second pregnancy Complainant began spotting and her doctor placed her on a five-pound lifting restriction. Respondent was aware of Complainant's pregnancy and restrictions. (Tr. 90)

16. Respondent continued to direct Complainant to perform duties such as filling the ice machine, putting away heavy boxes of frozen food, and taking out the trash. (Tr. 125-126)

17. On August 28, 2004, Respondent told Complainant to move the heavy tables and chairs in the bar and sweep the floor.

18. Complainant refused because of her pregnancy restrictions.

19. Respondent terminated her employment.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.[2]

1. The Commission alleged in the Complaint that Respondent subjected Complainant to disparate terms and conditions of employment and discharged her, for reasons not applied equally to all persons without regard to their race.

[2] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice:
>
> (A) For any employer, because of the race, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

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), 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone* (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*, at 254, 25 FEP Cases at 116, n.8.

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

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

(2) Complainant was qualified for the position;

(3) Respondent discharged Complainant; and

(4) Respondent discharged Complainant under circumstances which give rise to an inference of discrimination.

Burdine, *supra* at 253, 25 FEP Cases at 115.

7. There is no dispute that Complainant is a member of a protected class based on race.

8. Prior to working for Respondent, Complainant held similar positions with other restaurants performing the duties of cook and cashier. Complainant was qualified for the position of cook/cashier.

9. The evidence introduced by the Commission established Complainant was discharged from her employment by Respondent because she was unable and unwilling to perform heavy cleaning tasks due to doctor-imposed restrictions based on her pregnancy.

10. The Commission introduced evidence of a comparable employee who was pregnant and was not required to perform heavy cleaning duties that Complainant, who was on doctor's restrictions, was required to perform. Comparable **white e**mployee?

11. The Commission having established a *prima facie* case of race discrimination, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action.[3] *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action.
>
> *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

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[3] Although the burden of production shifts to Respondent at this point, the Commission retains the burden of persuasion throughout the proceeding. *Burdine, supra* at 254, 25 FEP Cases at 116.

> The defendant's burden is merely to articulate through some proof a facially nondiscriminatory reason for the termination; the defendant does not at this stage of the proceedings need to litigate the merits of the reasoning, nor does it need to prove that the reason relied upon was bona fide, nor does it need to prove that the reasoning was applied in a nondiscriminatory fashion.
>
> *EEOC v. Flasher Co.,* 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

The presumption created by the establishment of a *prima facie* case "drops out of the picture" when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

12. Respondent met its burden of production with the introduction of evidence that he did not fire Complainant, but that she quit.

13. Respondent having met its burden of production, the Commission must prove Respondent unlawfully discriminated against Complainant because of her race. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for Complainant's discharge was not the true reason, but was "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases at 115.

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

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

14. 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 race is correct. That remains a question for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

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

15. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for terminating Complainant's employment. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the factfinder to

infer intentional discrimination from the rejection of the reason without additional evidence of unlawful discrimination.

> The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination ... [n]o additional proof is required.[4]
>
> *Hicks*, *supra* at 511, 62 FEP Cases at 100 (emphasis added).

16. 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" the reason is a pretext for unlawful discrimination. *Manzer*, *supra* at 1084. This type of showing, which tends to prove 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.*

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[4] Even though rejection of a respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Hicks*, *supra* at 511, 62 FEP Cases at 100, n.4.

17. Respondent's testimony that Complainant quit was not credible.

18. Even though Complainant told Respondent she was unable to perform some duties due to her pregnancy-related doctor's restrictions he testified as follows:

> Ms. Anthony: So when she resisted you told her she'd either do the job or take time off?
>
> Mr. Yount: I told her, I suggested that she take time off. She said I am not taking time off.
>
> (Tr. 27)

19. A reasonable inference can be drawn from Respondent's testimony that, given a choice, Complainant had no desire to quit or terminate her employment with Respondent.

20. The Commission also introduced evidence of disparate treatment to show pretext in this case. Specifically, the Commission alleged that Mariah, a white female bartender who was pregnant during Complainant's employment, was not required to perform heavy cleaning duties during her pregnancy.

21. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were "similarly situated in all respects":

> Thus to be deemed "similarly situated", the individuals with whom ... [Complainant] seeks to compare ... her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circum-stances that would distinguish their conduct or the employer's treatment of them for it.
>
> *Mitchell v. Toledo Hospital*, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

22. 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.
>
> *Hollins v. Atlantic Co., Inc.*, 76 FEP Cases 553, 557 (N.D. Ohio 1997), *quoting Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

23. Respondent's management style was informal and employees did not have written job descriptions.

24. Respondent did not have written employee or leave policies. (Tr. 23-24)

25. Respondent supervised all of the employees.

26. Complainant testified regarding Respondent's treatment of Mariah:

> Ms. Anthony: And you testified earlier what you saw the bartenders-the duties the bartenders performed. Did Mariah perform those duties?
>
> Ms. Tanks: No. Mariah was not allowed, as a matter of fact Mr. Yount himself was there one day and Mariah was there. And she was behind the bar and she was kind of cleaning the tables and sweeping and mopping. And then after he was bringing his mop water back, he specifically told me if I saw Mariah with a broom or a mop in her hand to make her put it down. Then he went in the back emptied that mop water out, made some more mop water, brought it around and told me your mop water is ready, I need you to mop this floor because I don't think James did a good job last night.
>
> Ms. Anthony: And uh were you pregnant at the time?
>
> Ms. Tanks: Yes.
>
> (Tr. 106)

27. It is also appropriate to offer examples of discriminatory acts against protected employees to demonstrate the alleged bias of the decision-makers.

> Demonstrated bias by a decision maker is probative of discriminatory animus, and is therefore admissible even if that bias was directed against employees not similarly situated to the plaintiff ... Courts have routinely admitted evidence of past acts of discrimination as proof of discriminatory intent.
>
> *Rifkinson v. CBS, Inc.*, 75 FEP Cases 693, 696 (D.C.N.Y. 1997) (citations omitted).

28. Complainant and Catledge testified Respondent made offensive racial comments at work.

29. Respondent asked Complainant whether she thought black men or white men were better lovers, referring to an African-American customer as a "black monkey". (Tr. 37, 102)

30. While Respondent was sitting with white customers Complainant overheard a customer ask Respondent, "Why did you hire that big black cow?" Respondent replied, "Somebody has to hire them." (Tr. 83)

31. Respondent told Catledge not to send black customers to wait at the bar until their take-out orders were ready. He referred to them as "thugs" and stated that they would drive his white customers away. (Tr. 36, 43)

32. The ALJ is persuaded Respondent treated Complainant differently than a similarly situated white employee because of her race.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 9887 that:

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

2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of cook/cashier. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a cook/cashier on August 24, 2004 and continued to be so employed up to the date of Respondent's offer of employment;

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days after the issuance of the Commission's Final Order a certified check made payable to Complainant for the amount she would have

earned had she been employed as a cook/cashier on August 24, 2004 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law;[5]

4. The Commission has calculated an award amount of $5,274.00. The Commission's calculation is based on the date just before Complainant's baby was born on January 5, 2005;

5. The Commission has requested a front pay award of three (3) years for Complainant;

6. Front pay can be awarded in cases in which reinstatement is not viable because of continuing hostility between the plaintiff and the employer or its workers. *Abuan v. Level 3 Communications, Inc.*, 353 F. 3d 1158, 1176 (10th Cir. 2003);

[5] Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

7. In determining whether, and how much, front pay is appropriate, the court must attempt to make the plaintiff whole, yet the court must avoid granting the plaintiff a windfall. *Id.* at 1176;

8. The evidence in the record did not reflect that if Complainant were reinstated into the work environment there would be continuing hostility between Respondent and her;[6]

9. The position of cook/cashier is one that does not require specific training, advanced education or certification. Complainant was able to find other comparable employment, but not at the same rate. Granting Complainant three years of front pay would be tantamount to a windfall;

10. Therefore, Complainant is not only entitled to the back pay requested by the Commission as set forth in paragraph four (4) of this section. In addition, she is entitled to back pay from twelve (12) weeks after her baby was born up until the date Respondent makes an offer of employment;

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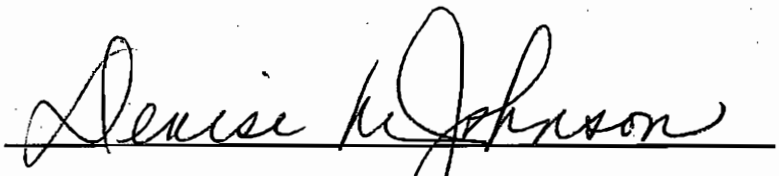
[6] At the time of the hearing Catledge, who is African American, was still employed by Respondent.

11. The Commission order Respondent to receive training on the anti-discrimination laws in Ohio within six (6) months of the date of the Commission's Final Order. 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

12. The Commission order 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, *including but not limited to*, sections regarding:

- Zero tolerance for any form of discrimination based upon race, color, religion, sex, military status, national origin, disability, age, or ancestry
- Sexual harassment
- Racial harassment

- Pregnancy
- Disabilities
- Progressive discipline and disciplinary grid
- Reporting and investigation of complaints



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 15, 2010