OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

BYRON PATRICK

Complainant

v.

STATE OF OHIO, DEPARTMENT OF REHABILITATION & CORRECTION, MANSFIELD CORRECTIONAL INSTITUTION

Respondent

Complaint No. 9147
(CLE) 7405192000 (32464) 10262000
22A – 2001 – 00037 – C

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

RICHARD CORDRAY
ATTORNEY GENERAL

Stefan J. Schmidt, Esq.
Assistant Attorney General
Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 – 466 – 7900

Counsel for the Commission

RICHARD CORDRAY
ATTORNEY GENERAL

Joseph N. Rosenthal, Esq.
Nicole S. Moss, Esq.
Timothy M. Miller, Esq.
Assistant Attorneys General
Employment Law Section
30 East Broad Street, 23rd Floor
Columbus, OH 43215-3414
614 – 644 – 7257

Counsel for Respondent

Byron Patrick
606 Lida Street
Mansfield, OH 44903

Complainant

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
614 – 466 – 6684

INTRODUCTION AND PROCEDURAL HISTORY

Byron Patrick (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 26, 2000.

The Commission investigated the charge and found probable cause that the State of Ohio, Department of Rehabilitation and Correction, Mansfield Correctional Institution (Respondent, MANCI) 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 August 30, 2001.

The Complaint alleged that Complainant was discharged in consideration of his race.

Respondent filed an Answer to the Complaint on October 1, 2001. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.[1]

A public hearing was held June 28-29, 2006.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 345 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on July 9, 2007; by Respondent on August 17, 2007; and a reply brief filed by the Commission on August 27, 2007.

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[1] On May 20, 2002, Counsel for the Commission filed a Motion to Stay the administrative hearing in this matter pending the outcome/resolution of an action filed by Complainant in the Court of Claims against Respondent. The parties engaged in an attempt to settle the claims raised by Complainant over the course between 2002 and 2005, but the settlement attempts failed. The Commission moved to reinstate the hearing date in 2005.

FINDINGS OF FACT

The following findings of fact 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's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on October 26, 2000.

2. The Commission determined on July 19, 2001 that it was probable that 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 an agency of a political subdivision doing business in Ohio and an employer.

5. Complainant is African-American.

6. The Mansfield Correctional Institution (MANCI) is a closed security facility (which is one step below maximum security) that, at full capacity, incarcerates 2,615 inmates and employs over 400 Corrections Officers (CO).

7. MANCI is one of the largest prisons in Ohio.

8. Complainant began his employment with Respondent as a CO on December 17, 1990.

9. Respondent has a policy that requires employees to disclose any relationship(s) they have with any individual(s) they know are (currently) or have been (formerly) under Respondent's supervision. (Resp. Ex. 14)

10. The policy is Rule 46(b) of Respondent's Rules Governing Union and Exempt Employee Standards of Conduct. (Comm. Ex. 1)

11. Respondent's internal investigator, Joseph Masi (Masi), was given information by Trooper M.D. Vincent (Trooper Vincent) of the Ohio State Highway Patrol as a result of a criminal investigation he was conducting on former MANCI inmate, Larry Cobb (Cobb), involving the theft of a credit card from a person on the grounds of a state educational institution.

12. Trooper Vinson sent Masi an inter-office communication dated March 16, 2000, informing him that during his investigation

of Cobb he stated he uncovered information that "might be of interest to you". (Resp. Ex. 2)

13. Trooper Vincent gave Masi copies of cell phone call records which showed seven (7) calls were made from the cell phone to Complainant's unlisted home number, all after 10:30 p.m. The cell phone was purchased with the stolen credit card in Dublin, Ohio.

14. Masi conducted interviews with Cobb, Complainant and Marvin Tanner (Tanner), African-American, who was also employed at MANCI as a CO.

15. Throughout his life, Complainant worked out and played basketball at the Friendly House, a community recreation center.

16. Tanner also worked out at the Friendly House.

17. Complainant was employed at MANCI during the time that Cobb was an inmate. Complainant was aware of who Cobb was and knew that he was an inmate. (Vol. I, p. 23)

18. When Cobb was released on parole he began to work out at Friendly House.

19. Masi interviewed Tanner after his interview with Cobb, wherein Tanner indicated that he saw Complainant and Cobb working out when he was at Friendly House.

20. As part of Masi's investigation, he requested sign-in sheets from Friendly House.

21. He obtained four (4) sign-in sheets that contained records of individuals who signed in and out between January 5, 2000 and January 26, 2000. (Vol. II, p. 129, Resp. Ex. 5)

22. The four (4) sign-in sheets recorded Cobb was present at the Friendly House at the same times as Complainant and Tanner.

23. Tanner did not work at MANCI during the time period Cobb was incarcerated (an inmate).

24. Masi completed a "Just Cause" worksheet and submitted it to the labor relations officer with a recommendation of disciplinary action against Complainant.

25. After Complainant attended a pre-disciplinary hearing, Respondent determined, based upon the evidence from Masi's investigation and Complainant's failure to fill out a nexus form, that he had violated Rule 46(b) and should be disciplined. (Resp. Ex. 9)

26. Margaret Bagley (Bagley) became the warden of MANCI on March 28, 2000.

27. After receiving the Hearing Officer's Report from the pre-disciplinary hearing Bagley recommended the termination of Complainant's employment.

28. Complainant was discharged on May 19, 2000.

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent 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 Complainant was discharged in consideration of his race.

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

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

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.

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of a legitimate, nondiscriminatory reason for Complainant's discharge removes any need to determine whether the Commission proved a *prima facie* case, and the "factual inquiry proceeds to a new level of specificity." *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713, 31 FEP Cases 609, 611 (1983), *quoting Burdine, supra* at 255, 25 FEP Cases at 116.

> Where the defendant has done everything that would be required of him if the plaintiff has properly made out a prima facie case, whether the plaintiff really did so is no longer relevant.
>
> *Aikens, supra* at 713, 31 FEP Cases at 611.

8. Respondent met its burden of production with introduction of evidence that Complainant violated Respondent's policy regarding having contact or relationships with ex-offenders.

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of his 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.

10. 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.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for discharging Complainant. 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 fact finder 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.[3]
>
> *Hicks*, *supra* at 511, 62 FEP Cases at 100 (emphasis added).

12. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason is a pretext for unlawful discrimination. *Manzer*, *supra* at 1084. This type of showing, which tends to prove that the reason did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

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[3] 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.

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged that Caucasian employees who engaged in the same or similar conduct were treated more leniently than Complainant. The individuals alleged to be comparables by the Commission are LeMaster, Porter, Scherer, Amero, and Smith.

14. 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 ... [his] 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.
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> *Mitchell v. Toledo Hospital*, 59 FEP Cases 76, 81 (6th Cir. 1992) (citations omitted).

15. To be deemed similarly situated, "a precise equivalence in culpability" is not required; misconduct of "comparable seriousness" may suffice. *Harrison v. Metro. Gov't. of Nashville and Davidson Cty.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted). Likewise, similarly situated employees "need not hold the exact same jobs; however, the duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable." *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).

16. The decision at the MANCI level to terminate Complainant was made by Warden Bagley.

17. The decision to discipline LeMaster was made by Warden Betty Mitchell. (Tr. Vol. I, pp. 17, 70, 72-73; Tr. Vol. II, p. 87; Comm. Ex. 14)

18. The decision to discipline Porter was made by Warden Ralph Coyle. (Tr. Vol. I, p. 76; Tr. Vol. II, p. 93)

19. Smith was an employee who worked in food services at the Richland Correctional Institution at the time she was disciplined. Smith was disciplined for receiving a package from a former inmate who is currently under the supervision of the Department and for failing to immediately report receiving the package. Smith reported receiving the package sometime between February 11, 2000 and February 17, 2000.

20. Amero was a CO at Northeast Pre-release Center under Warden Norman Rose when he was disciplined. (Tr. Vol. I, pp. 80-81)

21. LeMaster, Porter, Scherer, Amero, and Smith are not comparables because the decision to discipline them was not made by Warden Bagley. *Mitchell*, 964 F.2d at 583.

22. Mansfield CO Ted Sherer (Sherer) and Mansfield Food Service Coordinator Erika Faulkner (Faulkner) were disciplined by Warden Bagley.

23. Sherer was disciplined for making unauthorized telephone calls for two inmates and also giving donuts to a few inmates on another occasion. (Tr. Vol. I, pp. 81-82; Tr. Vol. II, pp. 40-41)

24. Faulkner on one occasion allowed an inmate to braid her hair.

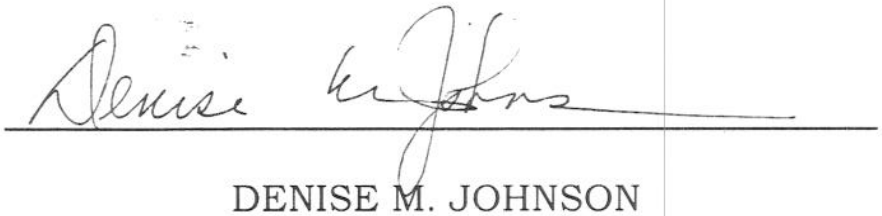
25. Sherer and Faulkner are not comparables because the infractions they committed were not the same type (level of severity) as committed by Complainant.

> [An] employer is not guilty of racial discrimination, unless plaintiff proves that he was treated differently on account of his race from other employees with *the same work history*, committing the same type infraction.
>
> *Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 199 (citation and quotations omitted) (emphasis added).

26. The ALJ did not believe the Commission carried its burden of proof to show Respondent's reasons for terminating Complainant were a cover-up to mask an illegal discriminatory motive based on Complainant's race.

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 9147.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 8, 2009