OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

CAROLYN CALLOWAY

Complainant

v.

JOHNS MANVILLE CORPORATION

Respondent

Complaint No. 9506
(TOL) B2050802 (26685) 05232002
22A – 2001 – 02921 – C

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

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ALJ'S REPORT BY:

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Chief Administrative Law Judge
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INTRODUCTION AND PROCEDURAL HISTORY

Carolyn Calloway (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on May 23, 2002.

The Commission investigated the charge and found probable cause that Johns Manville Corporation (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint May 22, 2003.

The Complaint alleged Respondent subjected Complainant to disparate terms and conditions of employment, harassed, suspended, and discharged her, in retaliation for having engaged in protected activity.

Respondent filed an Answer to the Complaint on July 10, 2003. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on November 3-4, 2005.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 426 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 28, 2006; by Respondent on February 23, 2007; and a reply brief filed by the Commission on March 29, 2007.

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 May 23, 2002.

2. The Commission determined May 1, 2003 that it was probable Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Complainant began her employment with Respondent in November of 1995.

5. The three (3) plants operated by Respondent in Defiance, Ohio make fiberglass wool for insulation products.

6. Complainant worked as a Spooler in Plant 2 on Unit 27 in the Wool Department.

7. Complainant was a union member of Local 51 of the Glass, Molders, Pottery, Plastics, and Allied Workers' International Union of the United States (Union).

8. In March of 1999 Complainant had to go on extended sick leave. (Comm. Ex. 6)

9. Respondent terminated Complainant in February 2000 for her failure to return to work after the expiration of her disability leave, the terms of which were governed by the collective bargaining agreement. (Tr. 84-86, 365)

10. On July 12, 2000, Complainant was released by her doctor to return to work.

11. Complainant filed a union grievance against Respondent, and she also filed her first charge with the Commission against Respondent on July 31, 2000.

12. Complainant filed a second charge of retaliation with the Commission against Respondent on May 3, 2001.

13. Complainant was returned to work through the grievance procedure on November 19, 2001, and provided with full back pay. (Resp. Ex. 9)

14. The first charge filed by Complainant with the Commission resulted in the Equal Employment Opportunity Commission (EEOC) adopting the "no cause" finding of the Commission, and dismissing the charge. (Resp. Ex. 8)

15. The second charge of retaliation ended in a no cause finding and dismissal of the charge by the Commission. (Resp. Exs. 7, 10)

16. Shaun Brooks (Brooks), Complainant's Union Steward and coworker, filed a harassment complaint with the Union against Complainant on April 30, 2002.

17. Brooks briefly described the incident which led to him filing the complaint in the following manner:

> Sat April 27 in supervisor's office at plant 02 in a meeting concerning problems on Unit 27. Present was supervisor, Fred Ponce and Carolyn Calloway + myself. Fred ask Carolyn to tell him what her problem was. Her answer was screaming and pointing at me "tell the mother fucker to do his job. She yelled him an Paul Zizzleman stand over there and play pocket pool with other all day long. (...)
>
> (Resp. Ex. 11, p. 1)

18. JoEllen Frederick (Frederick), Respondent's Human Resources Supervisor for Plants 1 and 2, and Bobbie Miller (Miller), also employed in Human Resources, met with Brooks on April 30, 2002 to investigate his harassment complaint. (Resp. Ex. 11, p. 3)

19. Brooks stated prior to the meeting he had with Complainant and Fred Ponce (Ponce) that on April 27, 2002 Complainant threatened to kill coworker Julie Schutt (Schutt) and her family if she said anything against Complainant. (Resp. Ex. 11, p. 4)

20. Thereafter, Frederick's investigation involved interviewing employees about the alleged threat that Brooks said Complainant made regarding Schutt.

21. Frederick took statements from Complainant, Geri Moore (Moore), Connie Jones (Hasch), Ruben Cruz (Cruz), and Maria Barnes (Barnes). (Resp. Exs. 19-23)

22. Barnes also reported an incident that occurred between her, Complainant and Moore on May 2, 2002.

23. Based upon the statements of Brooks and Schutt and the incident reported by Barnes, Frederick and Miller decided they would temporarily separate Complainant and Moore and put them on different machines.

24. When Complainant and Moore came to work on May 4, 2002, they were told by their supervisor, Greg Phillips (Phillips), of Frederick's decision to separate them.

25. Complainant and Moore left work and called Fredericks on the phone to report their absence from work, leaving a voicemail.

26. On May 6, 2002, Complainant and Moore were suspended pending the outcome of the investigation.

27. Complainant filed a third charge of retaliation with the Commission against Respondent on May 20, 2002.

28. Complainant and Moore were informed by letter dated May 23, 2002, that they were suspended pending discharge for

violation of the Workplace Violence Policy and Shop Rule 16. (Resp. Exs. 26-27)

29. Complainant was discharged after a termination hearing held on May 29, 2002.

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]

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

1. The Commission alleged in the Complaint that Respondent subjected Complainant to disparate terms and conditions of employment, harassed, suspended, and discharged her, in retaliation for having engaged in protected activity.

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:

> (I) 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 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(I) 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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene,* 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13. 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, 25 FEP Cases 113 (1981).

6. In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

(1) Complainant engaged in an activity protected by R.C. Chapter 4112;

(2) The alleged retaliator knew about the protected activity;

(3) Thereafter, Respondent subjected Complainant to an adverse employment action; and

(4) There was a causal connection between the protected activity and the adverse employment action.

Hollins v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

7. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action.[2] *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.

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[2] 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.

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.

8. Once the Commission has disproved the reasons offered by Respondent, the fact-finder is permitted to infer discrimination. The Commission does not need to introduce additional evidence of discrimination to prevail on the merits. Once the Commission establishes its *prima facie* case, this, along with disbelief of the Respondent's proffered reasons for the negative employment action, will permit a finding of discrimination by the fact-finder. *Kline v. Tennessee Valley Authority*, 128 F. 3d 337, at 347 (6th Cir. 1997).

9. 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.

10. Respondent met its burden of production with the introduction of evidence that Complainant made serious threats of violence toward coworkers which occurred over a period of successive days.

11. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because she engaged in protected activity. *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 ... [unlawful retaliation]." *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 [unlawful retaliation]" unless it is shown *both* that the reason is false, *and* that ... [unlawful retaliation] is the real reason.
>
> *Hicks*, *supra* at 515, 62 FEP Cases at 102.

12. 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 ... [unlawful retaliation] 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 unlawful retaliation.

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

14. 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.

15. The Commission alleges Respondent and its employees began retaliating against Complainant immediately after she returned to work in November of 2001.

16. The record has numerous examples of testimony regarding interpersonal conflicts between Complainant and her coworkers. However, I was not persuaded that the interpersonal conflicts between Complainant and her coworkers and Respondent were in retaliation for her having filed two previous charges against Respondent.

17. I found Brooks' testimony to be credible.

18. I also found the testimony by Maria Barnes credible. She filed a police report alleging Complainant and a friend pulled their

car beside the car in which Barnes was a passenger, even though they were required to drive through designated (but unoccupied) parking spaces. (Resp. Ex. 21-A)

19. I did not find Complainant's testimony that the phone message recorded on the Human Resources' voicemail the same weekend Complainant and Moore were suspended was not meant as a threat of violent behavior.

20. The voicemail recorded Complainant and Moore as stating that "some people were not OK and that everybody's gonna get it." (Tr. 344, Resp. Exs. 13, 19)

21. Complainant's testimony was that this comment was in regard to filing charges of discrimination. I did not find her explanation credible.

22. Although the Commission argues that there were other employees who violated the same work rule as Complainant they were not terminated. However, the employees compared to Complainant by the Commission were not comparable.

23. Respondent has a zero tolerance workplace policy. It was revised in June of 1999 after a murder/suicide took place at Respondent's Plant II location in May of 1998. (Resp's Ex. 2, Tr. 326)

24. Maria Garcia, who threatened a coworker with a knife, was terminated. Davis and Boff engaged in verbal name-calling over the installation of a lawn mower spark plug, and they were subjected to a 3-day layoff. (Comm. Exs. 14-16, Resp. Ex. 46, Tr. 116-123, 354-364)

25. In the case at bar, it was reported to HR that Complainant threatened to kill a coworker and intimidated coworkers with threatening behavior, left a threatening message on HR's voicemail, and repeated a threat that people were going to "get it" during the termination hearing.

26. The Commission also alleges Complainant complained to her supervisor and HR regarding what she believed to be discriminatory treatment.

27. However, the record is void of any credible evidence that Complainant filed a grievance with the Union based on what she believed to be discriminatory conduct or made complaints to HR or threatened to file a third charge of discrimination with the Commission or the EEOC or a lawsuit prior to her termination hearing in May of 2002.[3] (Tr. 83-86, Tr. 331)

28. Additionally, the Commission failed to provide any credible evidence of a nexus between Complainant's termination in May of 2002 and her filing of the first two charges of discrimination against Respondent in 2000 and 2001.

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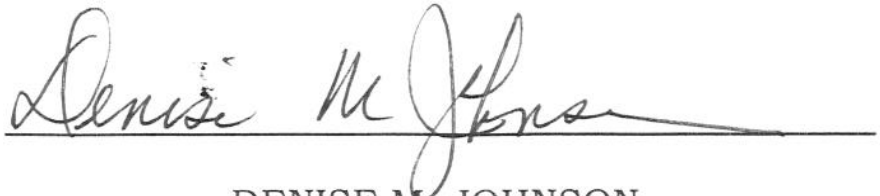
[3] Complainant's third charge was signed by her on May 20, 2002. The charge was date stamped as received by the Commission on May 23, 2002. (Resp's Ex. 28)

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 9506.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

September 1, 2009