

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**FRANK WEATHERSPOON**

Complainant

v.

**CHERRYHILL MANAGEMENT**

Respondent

Complaint No. 07-EMP-CIN-17791  
(CIN) 76 (17791) 06072007  
22A-2006-19812-C

**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**

Frank Weatherspoon (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on June 7, 2006.

The Commission investigated the charge and found probable cause that Cherryhill Management, Inc. (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 May 10, 2007.

The Complaint alleged Respondent subjected Complainant to different terms, conditions, and privileges of employment, including termination, based on his race.

Respondent filed an Answer to the Complaint on June 7, 2007. 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 May 20, 2008 at the Commission's Dayton Regional Office, 40 West 4<sup>th</sup> Street, Suite 1900, Dayton, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 199 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on June 1, 2009; by Respondent on June 22, 2009; and a reply brief filed by the Commission on July 1, 2009.

## **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 June 7, 2006.

2. The Commission determined on April 19, 2007 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 a corporation doing business in Ohio and an employer.

5. Complainant is African-American.

6. Complainant began working for Respondent as a driver on March 10, 2004.

7. Respondent is a thrift store business and operates three (3) stores located in Kettering, Fairfield, and Evandale, Ohio.

8. Respondent solicits donations of clothing and household goods.

9. Drivers who work for Respondent pick up the donated items which are the inventory sold at the stores.

10. Respondent's president is Pat Walsh (Walsh), who is also a co-owner along with his wife.

11. Approximately 200 employees work at Respondent's stores.

12. Diane Alsdorf (Alsdorf), Caucasian, who managed the Fairfield store, hired Complainant to work at the Kettering store. Judy Negrete (Negrete), Hispanic, became the manager after Alsdorf left to manage another store. Connie Johnson (Johnson), Caucasian, is the manager at the Evandale store.

13. Drivers who are picking up donations in route put the donated items in the back of the truck. Respondent's written rule is that drivers are to clean the cabs after unloading. (Comm. Ex. 1)

14. It was an unwritten practice that if the back of the truck was full or there was a donated item that was breakable, the driver would put the item in the cab. (Tr. 82)

15. The managers periodically checked the cabs to determine whether drivers were cleaning the cabs out after the trucks were unloaded.

16. On or around May 9, 2006, one of the drivers from the Fairfield store found a box of jewelry in one of the glove boxes of a truck. (Tr. 83)

17. It was brought to management's attention that a box of jewelry was found in one of the glove boxes of a truck.

18. At a lunch meeting the managers discussed the discovery of the jewelry box and decided they could not determine who put the box of jewelry in the truck's glove box.

19. The managers decided they would start checking the cabs of the trucks every day.

20. The managers did not tell the drivers about the new procedure.

21. Prior to the managers' meeting, drivers were not automatically terminated if they failed to clean out the cab before they unloaded the back of the truck. (Tr. 84)

22. On May 11, 2006, Complainant picked up donations on his route.

23. When Complainant returned to the store he got out of the truck and started unloading the back of his truck.

24. While he was unloading his truck, Complainant saw Negrete talking on her cell phone in the cab of his truck. (Tr. 32)

25. Complainant went to the front of the truck to clean out the cab. When he removed the donations from the cab Negrete instructed her assistant to take the items from him. Negrete then instructed Complainant to go home and to return to work the next day at 6:00 a.m. (Tr. 33)

26. The next day, May 12, 2006, Respondent terminated Complainant's 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.<sup>1</sup>

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<sup>1</sup> 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 the Respondent subjected the Complainant to different terms, conditions, and privileges of employment, including termination, based on his race.

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) and 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 proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 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. 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.<sup>2</sup>

*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 254-255, 25 FEP Cases at 116, n.8.

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.

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<sup>2</sup> 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 (10<sup>th</sup> Cir. 1992) (citations and footnote omitted).

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 the introduction of evidence that Complainant was terminated from employment for stealing donated items he had picked up on his truck route in violation of Respondent's policy.

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

against Complainant. *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 discharging Complainant 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 fact-finder to infer 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 terminating Complainant for stealing donated items. The Commission may directly challenge the credibility of the Respondent's articulated reason by showing 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 (6<sup>th</sup> 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.<sup>3</sup>

*Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

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<sup>3</sup> 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* 511, 62 FEP Cases at 100, n.4.

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" 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.*

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged Negrete treated comparable employees who are not in the protected group and who engaged in conduct of a similar nature better than Complainant was treated.

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 ... 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 circumstances that would distinguish their conduct or the employer’s treatment of them for it.

*Mitchell v. Toledo Hospital*, 59 FEP Cases 76, 81 (6<sup>th</sup> 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 (6<sup>th</sup> 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. Respondent maintains security cameras in different areas of the store. Security cameras are inside the store and are also in the area where the trucks are unloaded.

17. Respondent has successfully used this method to terminate employees for stealing. (Resp. Ex. G, F)

18. In Complainant's case, Negrete did not use the security cameras to determine whether the items in plain view in the truck driven by Complainant were taken from the truck and put into Complainant's personal automobile or otherwise removed from Respondent's property.

19. Negrete's conduct was not consistent with Respondent's policy that permits drivers to put items in their cabs under certain circumstances and the requirement that the back of the truck be unloaded before cleaning out the cab.

20. The credible evidence in the record supports the determination that Negrete's investigation of Complainant for theft

and the subsequent decision to terminate his employment was not just bad business judgment.

21. An “employer’s business judgment is not an absolute defense to unlawful discrimination.” *Wexler v. White’s Fine Furniture, Inc.*, (6<sup>th</sup> Cir. 2003), 317 F.3d 564, 576.

Although it is true that a factfinder should refrain from probing an employer’s business judgment, a decision to terminate an employee based upon unlawful considerations does not become legitimate because it can be characterized as a business decision.

*EEOC v. Yenkin-Majestic Paint Corp.*, 112 F.3d 831, 835 (6<sup>th</sup> Cir. 1997).

22. Complainant was the only African-American truck driver who worked for Respondent.

23. Some of the most compelling testimony that sheds light on Negrete’s motivation for the rushed investigation she conducted on Complainant came from Mark Byanski (Byanski), a Caucasian truck driver who trained Complainant:

Ms. Terrell: Okay. And when you worked at Cherryhill um how did Judy treat Mr. Weatherspoon compared to other employees?

Mr. Byanski: Um, there, I mean in general when Frank would come into the room he was very polite ... he would say hi to everybody. I would watch her turn away from him, not respond to him and then in particular after I trained Frank we had got a truck for him. He had a small route the following day and had some other things he had to do before the route and um this was his first day on his own. And um, he um, we were sitting at some tables and I was mapping my route, he was looking at his and he asked Judy uh okay so I'm doing this, I'm doing this and she kind of just snapped and said you weren't even listening to me, you know, you are doing it! This is what you are doing! And I don't want to hear a word out of you kind of thing. And it took me aback because um you know in this job it is a very physical job, you have a lot of turnover. I mean I would probably train eight guys before I would get a guy that would stay for a number of months. And Frank was a guy that had an enthusiasm for the job and for her to snap at him and this was in the first few weeks of being there, kind of took me aback. And I did approach her but she just walked away and I ... so ... there was something between them that, you know, I don't know what it was but I didn't see Frank do anything to her so I have no idea.

(Tr. 126)

24. Byanski also gave credible testimony that Negrete was giving Complainant less favorable routes than the other drivers.

(Tr. 129)

25. This was confirmed by Alsdorf:

Ms. Terrell: Okay. And did Frank Weatherspoon ever complain to you about the size of the routes that Judy Negrete gave him?

Ms. Alsdorf: Yes.

Ms. Terrell: And what did he say?

Ms. Alsdorf: Um he would say that when Connie and I dispatched the trucks he would make money. When Judy did he wasn't making enough money to feed his family.

Ms. Terrell: And was there any merit to Mr. Weatherspoon's complaints about the size of his routes?

Ms. Alsdorf: Um, yes.

Ms. Terrell: Why?

Ms. Alsdorf: Uh, there were drivers that hadn't been there as long that were probably equal to Frank that were getting full routes. Frank would receive a lot of partial routes.

Ms. Terrell: And what were the races of the other drivers?

Ms. Alsdorf: Uh, White or Hispanic.

(Tr. 106)

26. Byanski was in an accident with one of Respondent's trucks which caused major damage. Negrete did not require Byanski to be drug tested pursuant to Respondent's policy.

27. Complainant was in a minor accident with one of Respondent's trucks where he was driving down an alley and a tree branch scraped the side of the truck. Although it was considered a minor accident under Respondent's policy (where Respondent could waive the requirement that the employee take a drug test), Negrete required Complainant to take a drug test.

28. Byanski also testified that he put donated items in the cab of the truck he was driving all the time:

Ms. Terrell: So you are saying that sometimes if the back wasn't full you would toss stuff into the cab?

Mr. Byanski: Oh yeah. Like uh, well you know, like I said you are going to 150 houses a day. You are in and out of that truck 150 times. You reach your last stop and they got a little Kroger bag with a couple of shirts in it, you just throw it in the cab. I've had stuff sit in the cab for a couple of days.

[...]

Ms. Terrell: And did you ever unload items from the back of the truck before you unloaded stuff from your cab?

Mr. Byanski: Yes. I would um ... if my cab was full, there were times where you'd come in the store, fax your sheets to the office and start unloading your truck, which was normal process. But if you had a big day and your cab was full, you had stuff in your cab as well. Sometimes I would do it first, sometimes I would forget and just start unloading, you know, normal process type deal and then get it afterwards. Sometimes I would have a bag that sat in there for a couple of days just cause I would you know, cause I am on the go, I am ready to get out of there everyday. And so.

(Tr. 132)

29. Negrete told Martha Kehoe (Kehoe), an employee, that if it was up to her she would not have African-Americans working for her.

[T]he impact and relevance of racial remarks must be determined on a case-by-case basis after consideration of the totality of the circumstances.

*Cassells v. University Hosp.*, 62 FEP Cases 963, 966 (D.C. Cir. 1992) (citations omitted). *EEOC v. Alton Packing Corp.*, 52 FEP Cases 1734 (11<sup>th</sup> Cir. 1990) (general manager's statement that if it were his company he would not hire blacks is direct evidence of discriminatory animus in failing to promote the plaintiff).

30. Denise Cauley (Cauley), an employee, observed that after an African-American employee used the telephone Negrete sprayed the phone with disinfectant.

31. Cauley observed that Negrete treated African-American employees “rougher” than other employees. (Tr. 154-155)

32. As if to ensure Complainant would be viewed in a bad light, Negrete opened up Complainant’s personal backpack in which she found a condom, and took a picture of it.

33. I find Negrete was motivated by a discriminatory animus toward African-Americans when she used techniques to investigate Complainant that were inconsistent with Respondent’s policies and past practices.

34. Although the decision to terminate Complainant was made by Patrick Walsh, Respondent's owner, Walsh accepted Negrete's determination that Complainant put the donated items in the cab with the intent to steal them without conducting an independent investigation.

35. Alsdorf agreed to Negrete's determination without questioning her about the investigation or allowing Complainant to explain, even though he attempted to call. Alsdorf knew Complainant felt Negrete treated him differently than other truck drivers based on his race:

Ms. Terrell: Did Mr. Weatherspoon ever complain to you that he thought Ms. Negrete didn't like him because he was Black?

Ms. Alsdorf: Yes.

Ms. Terrell: And how often - how many times did Mr. Weatherspoon tell you that?

Ms. Alsdorf: I'm gonna say ten/twelve, usually when Judy dispatched the trucks and he didn't make any money that week is when he would call or when he was unloading he would say something.

(Tr. 107)

36. Although Negrete did not have the authority to terminate Complainant's employment, it was her recommendation that influenced the termination.

“When an adverse hiring decision is made by a supervisor who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias, (...) the employer may be held liable under a ‘rubber-stamp’ or ‘cat’s paw’ theory of liability.”

*Arendale v. City of Memphis*, (6<sup>th</sup> Cir. 2008), 519 F.3d 587 at 604.

37. After a careful review of the entire record, ALJ disbelieves the underlying reason Respondent articulated for Complainant's discharge and concludes that, more likely than not, it was a pretext or a cover-up for race discrimination.

38. Complainant is entitled to relief as a matter of law.

## RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 07-EMP-CIN-17791 that:

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

2. Complainant is awarded reinstatement and back pay, pursuant to R.C. 4112.05(G)(1). Within ten (10) days of the Commission's Final Order, Respondent is thereby ordered to make an offer of employment to Complainant for the position of truck driver. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage he would have been paid had he been employed as a truck driver on May 12, 2006 and continued to be so employed up to the date of Respondent's offer of employment; and

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the Commission's Final Order a certified check payable to

Complainant for the amount he would have earned had he been employed as a truck driver on May 12, 2006, and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits he would have received, less his interim earnings, plus interest at the maximum rate allowed by law;<sup>4</sup>

4. The Commission's calculations of back pay based on Complainant's wage statements and his federal W-2 Form for 2005 are as follows:

2006: \$27,051.08

2007: \$41,372.24

2008: \$15,912.00

The amount of back pay from the date of Complainant's termination until the date of the hearing is \$84,335.32, which continues to accrue from the date of the hearing, plus interest until the date of the offer of employment;

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<sup>4</sup> 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.

5. The Commission order Respondent to receive training regarding the anti-discrimination laws of the State of Ohio. 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 anti-discrimination 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

6. Respondent shall post state and federal prohibitions against discrimination in the workplace in a conspicuous location on its premises.<sup>5</sup>



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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

April 22, 2011

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<sup>5</sup> Downloadable, printable materials for employers may be accessed at [www.crc.ohio.gov](http://www.crc.ohio.gov).