OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

JAMES A. BOLDEN

Complainant

v.

COMBINED HEALH DISTRICT OF MONTGOMERY COUNTY

Respondent

Complaint No. 06–EMP–[DAY–17572]
DAY 76 (17572) 01182006
22A–2006–01512C

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

RICHARD CORDRAY
ATTORNEY GENERAL

Lori A. Anthony, Esq.
Chief, Civil Rights Section
State Office Tower, 15th Floor
30 East Broad Street
Columbus, OH 43215-3428
614 – 466 – 7900

Counsel for the Commission

Robert J. Surdyk, Esq.
Dawn M. Frick, Esq.
Surdyk, Dowd & Turner
One Prestige Place, Suite 700
Miamisburg, OH 45342-6148
937 – 222 – 2333

Counsel for Respondent

James A. Bolden
5853 Hillary Street
Trotwood, OH 45426

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

Clarence L. Johnson and James A. Bolden (Complainants) filed sworn charge affidavits with the Ohio Civil Rights Commission (the Commission) on January 18, 2006.

The Commission investigated the charges and found probable cause that the Combined Health District of Montgomery County (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve these matters by informal methods of conciliation. The Commission subsequently issued Complaints on December 14, 2006.

The Complaints alleged Respondent subjected Complainants to different terms, conditions, and privileges of employment, and paid them less wages due to their race, in violation of R.C. 4112.02(A).

Respondent filed Answers to the Complaints on January 18, 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 March 4, 2008 at the Commission's Dayton Regional Office.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 129 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on November 5, 2008; by Respondent on December 19, 2008; and a reply brief filed by the Commission on January 14, 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 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. Complainants filed sworn charge affidavits with the Commission on January 18, 2006.

2. The Commission determined on November 16, 2006 it was probable Respondent engaged in unlawful employment practices in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve these matters by informal methods of conciliation. The Commission issued the Complaints after conciliation failed.

4. Respondent is an agency of a political subdivision, doing business in Ohio and an employer.

5. Complainants are African-American.

6. Respondent is Montgomery County's public health department, responsible for a wide variety of services including, but not limited to, food inspection, monitoring and inspection of sewage systems and regional air pollution and control. (Tr. 11)

7. Respondent is governed by the Board of Health which consists of approximately nine (9) members. Directly below the Board of Health is the Health Commissioner. (Tr. 13)

8. The Health Commissioner supervises six (6) divisions: the Division of Community Health, the Division of Environmental Health, the Division of Personal Health, the Division of Special Services, the Division of Programs/Outcomes, and the Division of Administration. (Comm. Ex. 2)

9. Each division is headed by a Division Director.

10. Minority Programs is under the Division of Special Services.

11. Complainants Johnson and Bolden started working for Respondent on April 6, 1987 and September 1992, respectively.

12. Complainant Johnson was a Supervisor of Minority Programs in the Division of Special Services from 1995 to 2005.

Complainant Bolden was a Supervisor of Minority Programs in the Division of Community Health from 2000 to 2007. (Tr. 36, 80)

13. Due to budgetary concerns the Division of Special Services was eliminated and the programs and services contained in the Division of Special Services were transferred into other divisions as of February 1, 2006. (Tr. 51, 70)

14. The Division of Special Services was started by E. Ricky Boyd (Boyd), an African-American. (Tr. 13, 68)

15. Boyd started the Division to specifically provide programs for minorities that have unique health care issues that may not be adequately addressed. (Tr. 11, 116)

16. Boyd was the Division's Director of Special Services.

17. Reporting to Boyd was the Bureau Supervisor of Minority Programs, Jill Vaniman (Vaniman), Caucasian. (Tr. 13, 15)

18. Reporting to Vaniman was the Program Administrator, Marilyn McFadgen (McFadgen), African-American. (Tr. 47)

19. Each of the Supervisors of Minority Programs generally supervised multiple programs. (Comm. Ex. 2)

20. The Supervisor of Minority Programs' duties included coordinating the functions of multiple community-based programs within the area of minority health care, supervision of staff, development and implementation of evaluation assessments, and program outreach. (Comm. Ex. 5)

21. Respondent has three (3) wage scales: A, B, and C. (Tr. 16)

22. The "A" scale is comprised of supervisors and/or management.

23. The "B" and "C" scales are comprised of professional employees, including nurses and registered sanitarians, and clerical positions.

24. Within each wage scale there are "Grades".

25. The Grades represent, among other things, job knowledge, skill, discretion, scope of supervision, and budgeting. (Tr. 16)

26. Every three to four years, Respondent performs a Labor Market Survey (LMS) to determine if their wages are competitive with other agencies. If they are not, there is a wage scale adjustment. (Tr. 19-20)

27. During a 2001 LMS Respondent performed an "A" scale survey. (Tr. 22, Resp. Ex. C, D)

28. "A" Wage Scale includes coordinators, supervisors, assistant supervisors, directors, bureau supervisors, and all other supervisory personnel, regardless of whether their title included the word "supervisor". (Tr. 102, Resp. Ex. D)

29. Complainants did not receive wage scale adjustments in February 2006 pursuant to a Wage Scale Adjustment done in 2005.[1] (Tr. 32)

---

[1] (B)(1) (...) shall be filed with the commission within six months after the alleged unlawful discriminatory practice was committed. (...)

The charges were filed on January 18, 2006. The allegation that Complainants were not reclassified in 2001 is untimely, and the Commission does not have jurisdiction over employment actions that occurred in 2001. Additionally, the Commission presented evidence at the hearing regarding other allegations of employment discrimination, i.e. having titles with a racial connotation rather than one describing actual job duties, being located in an inferior office location away from the administration, working with a decreased training budget. All of the allegations were not supported by any type of credible evidence regarding when the actions occurred, only by the self-serving statements of Complainants.

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 Complaints Respondent subjected Complainants to different terms, conditions, and privileges of employment and paid them less wages due 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) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Little Forest Medical Center v. Ohio Civil Rights Comm.*, 61 Ohio St.3d 607 (1991). 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.[3]

---

[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 [wage differential], 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).

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.

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.

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 Complainants' wage differential 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 Complainants were not similar to employees within the "A" Wage Scale.

9. Respondent having met its burden of production, the Commission must prove Respondent unlawfully discriminated against Complainants. *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 Complainants' wage differential 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 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 wage differential between Complainants and similarly situated employees who are not in the protected class. 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).

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.*

---

[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* 511, 62 FEP Cases at 100, n.4.

13. The Commission attempted to show pretext in these cases by alleging disparate treatment. Specifically, the Commission alleged that employees who were supervisors of minority programs were all African-Americans and were treated differently after reclassification than employees who did not have the term "minority" in their job title.

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 ... [Complainants] seeks to compare ... [their] 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 (6th Cir. 1992) (citations omitted).

15. To be deemed 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 argues the Commission failed to prove Complainants were treated differently than similarly situated Caucasian employees. This argument is well-taken.

17. During the 2001 Wage Scale Adjustment, seven (7) supervisory positions reviewed did not change grade. (Tr. 101, Resp. Ex. D)

18. There were eleven (11) other supervisory positions that were not included in the survey. (Tr. 102)

19. Some of the supervisory positions that changed in Grade A were positions held by African-Americans. (Tr. 103-105)

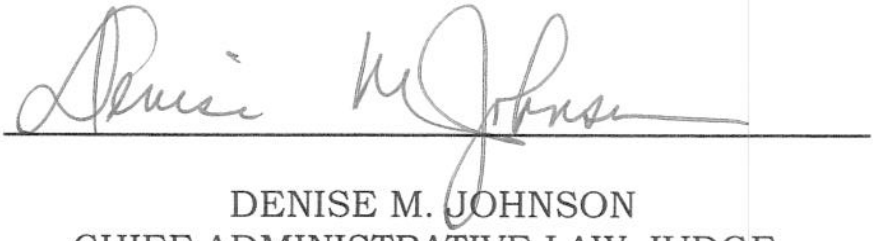
20. Some of the positions that did not change in Grade A were held by Caucasians. (Tr. 105-106)

21. The evidence presented by the Commission regarding allegedly comparable supervisory employees in the Wage Scale "A" classification involves the self-serving testimony of Complainants.

22. The Commission cannot prove pretext through disparate treatment without evidence that a similarly situated comparative was treated more favorably than Complainants.

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue Dismissal Orders in Complaint No. 06-EMP-[DAY-17571] for Complainant Johnson and Complaint No. 06-EMP-[DAY-17572] for Complainant Bolden.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 24, 2010