

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**JESSICA SCHAAF**

Complainant

v.

**VOCA CORPORATION  
OF OHIO**

Respondent

Complaint No. 06-EMP-AKR-31653  
AKR 73 (31653) 09192006  
22A-2007-00996-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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## **INTRODUCTION AND PROCEDURAL HISTORY**

Jessica Schaaf (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on September 19, 2006.

The Commission investigated the charge and found probable cause that VOCA Corporation of Ohio (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 August 2, 2007.

The Complaint alleged Respondent subjected Complainant to different terms and conditions and privileges of employment, and forced her to go on leave based on her sex, in violation of R.C. 4112.02(A).

Respondent filed an Answer to the Complaint on August 30, 2007. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

The public hearing was waived by the Commission and Respondent in lieu of Stipulated Facts.

The record consists of the previously described pleadings; Joint Stipulations of Fact, filed January 9, 2009; and the post-hearing briefs filed by the Commission on January 29, 2009; by Respondent on February 20, 2009; and a reply brief filed by the Commission on March 6, 2009.<sup>1</sup>

### **FINDINGS OF FACT** <sup>2</sup>

1. Complainant filed a sworn charge affidavit with the Commission on September 19, 2006.

2. The Commission determined on December 14, 2006 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.

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<sup>1</sup> The Commission filed a Notice of Supplemental Authority on March 3, 2009; Respondent filed a Motion to File a Sur-Reply Instantly on March 20, 2009 and Sur-Reply; and the Commission's Reply to Respondent's Sur-Reply on March 31, 2009. No ruling was made pending the outcome of the *McFee* decision, *infra*.

<sup>2</sup> Only those Stipulated Facts deemed relevant by the Administrative Law Judge [ALJ] for the resolution of the legal issues contained herein are included in the Findings of Fact.

4. Respondent provides social, educational and vocational services to individuals who are mentally and physically disabled in a home-like environment. Respondent operates 183 facilities in Ohio. (Ex. F)

5. All facilities operated by Respondent follow the policy to only provide light-duty job assignments to those employees who have suffered a work-related injury.

6. Complainant was hired by Respondent on July 25, 2003 as a Support Associate at the David Street Group Home (DSGH).

7. Complainant resigned from her position with Respondent in July of 2005.

8. Complainant was rehired by Respondent on October 27, 2005 as a Support Associate at the DSGH.

9. Complainant's job duties required her to have the ability to bend, stoop, push, pull, reach, sit, and walk for periods of time. Additionally, Complainant was required to assist in transferring consumers weighing up to 250 pounds. (Ex. A)

10. Complainant was required to take a physical examination to determine whether she was physically able to perform the job duties required of a Support Associate. (Ex. H)

11. All of the residents at the DSGH are non-ambulatory and must be transferred from one location to another by Support Associates.

12. In September 2006 Complainant informed her supervisor, Dorothy Johnson (Johnson), that she was pregnant.

13. On or about September 13, 2006, Complainant presented Johnson with a note from her physician indicating for the remainder of her pregnancy she could not lift anything in excess of twenty (20) pounds. (Ex. B)

14. On September 13, 2006, Johnson faxed a copy of the note from Complainant's physician outlining her lifting restriction to Tina Kress (Kress), Human Resources Director for Respondent.

15. Kress informed Johnson that Complainant would need to be placed on leave until her physician released her to work without restrictions.

16. Complainant was on leave from her position as a Support Associate from September 13, 2006 through April 4, 2007.

## CONCLUSIONS OF LAW AND DISCUSSION <sup>3</sup>

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.

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

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 ... sex, ... 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.

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<sup>3</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

3. The term “because of sex” for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

4. 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).

5. 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. Thus, 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), as amended by the Pregnancy Discrimination Act (PDA). *Priest v. TFH-EB, Inc. dba Electra Bore, Inc.*, 1998 Ohio App. LEXIS 1384; See 42 U.S.C. § 2000e(k).

6. Federal case law is especially relevant in this case because R.C. 4112.01(B) reads “almost verbatim to the Pregnancy Discrimination Act” of 1978. *Id.*

7. 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.

8. 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 sex discrimination by proving that:

- (1) Complainant was pregnant;
- (2) Complainant was qualified for the position;
- (3) Respondent subjected Complainant to an adverse employment action; and

- (4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

*Ensley-Gaines v. Runyon*, 72 FEP Cases 602 (6<sup>th</sup> Cir. 1996).

9. The Commission established, without dispute, the first three elements of a *prima facie* case of pregnancy discrimination under the framework set forth in *Ensley-Gaines* which uses a modified *McDonnell Douglas* framework.

10. The Commission asserts R.C. 4112.01(B) mandates preferential treatment for pregnant women, analogizing pregnancy discrimination claims with disability discrimination claims brought pursuant to R.C. 4112 where the employer has an affirmative duty to reasonably accommodate a disabled employee.

11. However, this interpretation of R.C. 4112.01(B) has been rejected by the court in *McFee v. Nursing Care Mgt. of Am., Inc.*, (2010) 126 Ohio St.3d. In finding that an employer's uniform length of service requirement is not a *per se* violation of R.C. 4112.02(A) the court reasoned:

The phrase "treated the same" in R.C. 4112.01(B) ensures that pregnant employees will receive the same consideration as other employees "not so affected but similar in their ability or inability to work." Thus, the statute does not provide greater protections for pregnant employees than nonpregnant employees. (...)

*Citing Tysinger v. Zanesville Police Dept.*, (C.A. 6, 2006), 463 F.3d 569, 575; *accord Mullet v. Wayne-Dalton Corp.*, (N.D. Ohio 2004), 338 F.Supp. 2d 806, 811; *Armstrong v. Flowers Hosp, Inc.*, (C.A. 11, 1994), 33 F.3d 1308, 1316-1317, and cases cited therein.

12. Respondent has made a distinction in which employees who are injured on the job are accommodated by receiving light duty work as opposed to employees whose injuries are not work-related and, therefore, are not eligible for an accommodation of light duty work.

13. The Commission focuses on the last element of the *prima facie* case in *Ensley Gaines* to support the assertion that the language “that the employee be similar in his or her ability or inability to work” somehow changes the requirement of proving intent to discriminate with a mandate to give preferential treatment to employees who are experiencing a pregnancy-related disability and need a job accommodation.

14. The *Ensley Gaines* decision actually stands for the following proposition:

(...) when a Title VII litigant alleges discrimination on the basis of pregnancy in violation of PDA, in order to establish a *prima facie* case of discrimination, she must demonstrate only that another employee who is similarly situated in her or his ability or inability to work received more favorable benefits.

100 F.3d 1220, 1226 (6<sup>th</sup> Cir. 1996).

15. *Ensley Gaines* merely follows the parameters laid out in *McDonnell Douglas* by applying flexibility to the framework of a *prima facie* case of discrimination, creating an inference of intentional pregnancy discrimination.

16. Respondent's policy treats non-pregnant females, males, and pregnant females who are not injured on the job differently than male and female and pregnant female employees who are injured on the job.

Under [the PDA], the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. *Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.*

*Mullet, supra* at 812, citing *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 646 (8<sup>th</sup> Cir. 1987) (quoting S.Rep. No. 95-331, 95<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3-4 (1977)) (Emphasis added.)

17. The Commission has not introduced any evidence that Respondent's policy intentionally discriminates against pregnant employees.

18. Neither the language of R.C. 4112.01(B) nor R.C. 4112.02(A) requires employers give preferential treatment to pregnant employees.

### **RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 06-EMP-AKR-31653.



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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

June 30, 2011