

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

LaSHAWN CHARLES

Complainant

v.

**SAFELITE GROUP, INC. DBA
SAFELITE AUTO GLASS**

Respondent

Complaint No. 07-EMP-COL-32741
(COL) B1013106 (32741) 120106
22A-2006-01655C

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

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ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
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INTRODUCTION AND PROCEDURAL HISTORY

LaShawn Charles (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on February 1, 2006.

The Commission investigated the charge and found probable cause that Safelite Group Inc. dba Safelite Auto Glass (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 February 1, 2007.

The Complaint alleged Respondent subjected Complainant to different terms, conditions, and privileges of employment, including termination, based on her race in violation of R.C. 4112.02(A).

Respondent filed an Answer to the Complaint on April 3, 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 on April 8, 2008 at Rhodes State Office Tower, Administrative Hearing Room, 3rd Floor, 30 East Broad Street, Columbus, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 90 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on September 23, 2008; by Respondent on October 14, 2008; and a reply brief filed by the Commission on October 24, 2008.

JURISDICTION

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

2. The Commission determined on January 11, 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.

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.

5. Complainant is an African-American.

6. Respondent's core business is auto glass repair/ replacement and is third-party administrator for insurance claims for auto glass claims. (Tr. 73)

7. Complainant started working for Respondent as a customer service representative on October 11, 1999. Complainant was promoted to client service representative in the accounts receivable department, billing team leader. In December of 2004 Complainant took a lateral position as an accounts payable auditor. (Tr. 37-38)

8. On October 7, 2005, Complainant was in a car accident and sustained injuries to her back and right wrist.

9. Complainant informed her supervisor, Aaron Wisenbarger (Wisenbarger), and Chris Beretich (Beretich), Human Resources, that she would need to take leave.

10. Beretich handled Complainant's Family Medical Leave Act (FMLA) paperwork. (Tr. 40)

11. On January 6, 2006, Complainant received a letter dated January 3, 2006 informing her that her FMLA leave had expired. (Comm. Ex. 5)

12. Respondent's Leave of Absence Policy states medical leave greater than twelve (12) weeks but less than twenty-seven (27) weeks in a fifty-two (52) week period may be granted without job protection at the discretion of the senior management and associate services director. (Tr. 79, Comm. Ex. 3)

13. On January 30, 2006, Complainant faxed Respondent a note from her doctor stating she was ready to return to work part-time, starting February 1, 2006.

14. On January 31, 2006, Wisenbarger called Complainant and informed her that her position was filled and that her job was terminated. (Tr. 80-81)

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

1. The Commission alleged in the Complaint Respondent subjected Complainant to different terms, conditions, and privileges of employment, including termination, based on her race in violation of R.C. 4112.02(A).

¹ 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. *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.²

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.

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 (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 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 by evidence that Complainant exhausted her leave combined with the business need to fill her position.

9. Respondent having met its burden of production, the Commission must prove 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's employment.

12. The Commission may directly challenge the credibility of 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 (6th Cir. 1994).

13. 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).

14. The Commission may indirectly challenge the credibility of Respondent's reason by showing 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. This type of showing, which tends to prove 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.*

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

16. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged Respondent allowed a Caucasian employee, in the same job position as Complainant and using leave at the same time as Complainant, to remain on leave for six (6) months before the employee was terminated.

17. Proof of disparate treatment requires similarly situated comparatives. The Commission must show 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 circum-stances 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).

18. The individuals with whom the Commission seeks to compare Complainant’s treatment to:

must have dealt with the same supervisor, have been subjected to the same standards, and engaged in the same conduct without such differentiating mitigating circumstances that would distinguish their conduct of their employer's treatment of them for it.

Mitchell v. Toledo Hospital, 964 F. 2d 577, 581 (6th Cir. 1992)

19. Respondent argues the Commission failed to prove Complainant was treated differently than similarly situated white employees. This argument is well taken.

20. Kim Barbee, Caucasian, was not similarly situated to Complainant. When Barbee took her leave of absence she was employed in a different department, and supervised by a different supervisor than Complainant. Barbee's leave was also within the job protected period (12 weeks) under Respondent's leave policy.

(Tr. 61)

21. Richard Brown, Caucasian, was not treated differently than Complainant. Brown's employment was terminated when his leave extended beyond the twelve (12) week leave period.

22. The credible testimony and documentary evidence in the record leads to a determination that Respondent began searching for a replacement for Brown's position after he was out for ten (10) or eleven (11) weeks. (Tr. 32, 62) Respondent began searching for a replacement for Complainant after twelve (12) weeks. (Tr. 15-16)

23. Consistent with Respondent's policy, Complainant was terminated from employment after she was cleared to return to work on a part-time basis. (Tr. 63)

24. Respondent's unpaid medical leave of absence states that such leave is without job protection. (Comm. Ex. 3)

25. Respondent introduced credible evidence the Accounts Payable Department was set up to cover a short period of absence (30 days) by an employee, but an extended period resulted in overburdening the remaining auditors:

Mr. Clark: Okay. Now is it your understanding that as of January 4, 2006, Ms. Charles' FMLA leave had expired?

Mr. Wisenbarger: That is correct.

Mr. Clark: Okay. And you began a search for Ms. Charles' replacement?

Mr. Wisenbarger: That is correct. Once we - once LaShawn Charles' FMLA status was up, or job protection was up, we began looking for a replacement.

Mr. Clark: Okay. Now why did you begin to look for a replacement at that time?

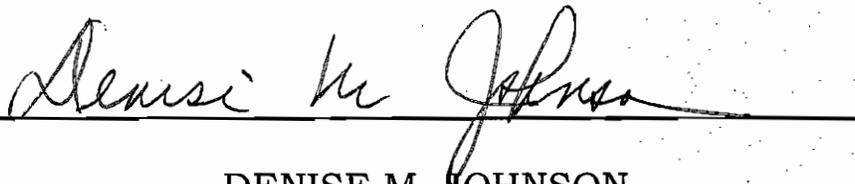
Mr. Wisenbarger: Um, well we are a department of four. Well my group was a group of four regions associates and they are responsible for processing all of the retail invoices for all of our stores across the country. And uh when Ms. Charles went on leave we took that work load of hers and divvied it up against the other three. Now we can do that because we have payment terms and we have thirty days to pay an invoice. So even though we are not paying an invoice exactly on the date that we get it - we process it in the system, but it doesn't actually issue payment. So we have some time that we can get behind in processing and we are okay as long as we don't max that payment term date and the invoices then become past due. So during the time that LaShawn was out, um I divvied up the work between the three associates knowing that we could do it short-term but long-term there's - it would not be possible. So we got to the point to where we could not wait any longer for Ms. Charles to return. We had to get an extra person in there so that we cannot become past due with our suppliers.

(Tr. 80-81)

26. The Commission failed to meet its burden of proof and persuasion that Respondent terminated Complainant because of her race.

RECOMMENDATION

For all of the foregoing reasons, it is recommended the Commission issue a Dismissal Order in Complaint No. 07-EMP-COL-32741.

A handwritten signature in cursive script, reading "Denise M. Johnson", is written over a solid horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

October 19, 2010