

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**LISA CROSBY**

Complainant

v.

**DRAKE CENTER, INC.**

Respondent

Complaint No. 9584  
(CIN) 75022703 (30229) 04032003  
22A-2003-01985C

**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

Lisa Crosby (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 3, 2003.

The Commission investigated the charge and found probable cause that Drake Center Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on November 20, 2003.

The Complaint alleged the following: (1) that Respondent subjected Complainant to unwanted and unwelcomed acts of sexual harassment that had the purpose or effect of creating a sexually offensive, intimidating, or hostile work environment for reasons not applied equally to all persons without regard to their sex, and (2) that Respondent subjected Complainant to a disciplinary

suspension and subsequently terminated her, in retaliation for having engaged in a protected activity. R.C. 4112.02(A) and (I).

Respondent filed an Answer to the Complaint on December 23, 2003. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.<sup>1</sup>

A public hearing was held on September 26-27, 2006.<sup>2</sup> A trial deposition was held on November 15, 2006.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 365 pages, the transcript of the evidentiary deposition of Brian Fearer consisting of 145 pages, exhibits admitted into evidence during the hearing, and the post-

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<sup>1</sup> Case was stayed by Order dated June 28, 2004, pursuant to an unopposed motion by the Commission. Complainant filed a civil action in Hamilton County on February 27, 2004. The Commission received notice from Complainant on December 30, 2004 that she dismissed her civil action. The Commission filed a Motion to Reschedule Hearing on November 18, 2005.

<sup>2</sup> Problems with the first transcriber involving length of time of transcription and quality led to two attempts over a thirteen-month period to do transcription of the hearing. After securing the services of a new transcriber the transcript was delivered on February 19, 2008.

hearing briefs filed by the Commission on March 18, 2008; by Respondent on May 8, 2008; and a reply brief filed by the Commission on May 15, 2008.

### **FINDINGS OF FACT**

The following Findings of Fact are based, in part, upon the ALJ's 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 April 3, 2003.

2. The Commission determined on October 9, 2003 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

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 health care organization that specializes in rehabilitation and offers comprehensive care for individuals with a wide range of conditions from those with complex illnesses and injuries to individuals requiring minimal out-patient therapy.  
(Tr. 225-226)

5. Complainant was hired by Respondent on October 8, 2001 as an Environmental Services Technician.

6. Complainant's job required her to perform cleaning tasks which were assigned to her by her supervisor.

7. Complainant worked the second shift from approximately 3:00 p.m. to 11:30 p.m. (Tr. 13)

8. When Complainant first started working for Respondent her immediate supervisor was Darren Wilson (Wilson). Wilson resigned and Respondent hired Don Tolke (Tolke) as the second shift supervisor in the Housekeeping Department.

9. Brian Fearer (Fearer) was the Manager of Environmental Services. Tolke reported directly to Fearer.

10. On December 29, 2002, Complainant submitted a written complaint to Human Resources. Her complaint was about Tolke making certain comments to her that she found offensive, beginning the complaint by stating:

I am writing this letter because I feel like I'm being treated like a sex object by Don Tolke. I don't feel comfortable around Don Tolke. (...)

Comm. Ex. 6

11. In Respondent's Employee Handbook it states that "all complaints will be investigated immediately, and appropriate action will be taken." (Resp. Ex. G)

12. Respondent's Chief Human Resources Officer Ernie Prater (Prater), Human Resource Specialist Sharon Hancock (Hancock) and Fearer met with Complainant on January 7, 2003. (Tr. 107, 241-250; Comm. Ex. 7)

13. They also met with other members of the Environmental Services Department as part of the investigation specifically individuals that Complainant indicated were aware or had experienced inappropriate behavior of a sexual nature by Tolke. (Tr. 107, 241-255)

14. On January 9, 2003, they met with Tolke. (Comm. Ex. 18)

15. Prater determined that Tolke had not sexually harassed Complainant, but that he may have made some inappropriate comments. (Tr. 253)

16. Prater told the employees involved in the investigation the outcome of the investigation. *Id.* After telling the employees about the investigation Prater saw Complainant during the time that she was cleaning in the H.R. area. He asked Complainant if she was having any continuing problems with Tolke. Complainant said that she was not. When asked if she was okay continuing to work with Tolke, she said that she was. (Tr. 255)

17. During January of 2003 Respondent required every employee to take and pass a computerized test on the federal government's new HIPPA requirements. (Tr. 77)

18. Respondent's Human Resources Department monitored all departments' compliance with the testing deadline and which employees had not yet taken the test. (Tr. 258-259)

19. Employees who did not pass the test by January 31, 2003 could not return to work. (Tr. 256)

20. Complainant was on vacation from January 12 to January 26, 2003. (Tr. 78)

21. When Complainant returned to work on January 27, the first shift supervisor, Idabelle Pennington (Pennington), told Complainant she needed to take the test. (Tr. 78)

22. Complainant did not take the test on that date.

23. Complainant attempted to take the test on January 28 and 29 but was having difficulty logging onto the computer system. (Tr. 37)

24. Complainant was scheduled for a day off on January 31, 2003. (Fearer Depo, p. 34)

25. Fearer set up a specific time for Complainant to take the test on January 30 at 4:30 p.m.

26. Fearer told Complainant he wanted Tolke to be present when Complainant took the test, both to assure that it was completed and to assist Complainant in the event that she had trouble logging onto the computer. (Tr. 80; Fearer Depo, pp. 33, 98-99)

27. Complainant later told Tolke she was not going to take the test that day. She also called Fearer and told him that she was not going to take the test at 4:30 p.m. because she had other work to do. (Tr. 24-25; Fearer Depo, pp. 101-102)

28. Fearer then explained the importance of Complainant taking the test and that he would have someone cover her work. (Fearer Depo, pp. 101-102)

29. Complainant attempted to take the test while Tolke was standing behind her in the room where she was taking the test, but she could not pass it. (Tr. 24)

30. Complainant came in on January 31 to take the test and she passed.

31. Later that same day, Prater, Hancock, and Fearer suspended Complainant for three (3) days for not taking the HIPAA test on January 30, as directed by her manager. (Tr. 32, 148; Comm./Resp. Ex. 2)

32. On February 25, 2003, Complainant was engaged in a verbal confrontation with a coworker, Angela Grayson (Grayson). (Tr. 330)

33. Hancock and Fearer met separately with Complainant and Grayson the next day. (Tr. 333)

34. Hancock specifically instructed Complainant not to discuss any of the conversation, details or facts of the investigation of the incident as it was an on-going investigation. (Tr. 334)

35. Thirty (30) minutes after Complainant left Hancock's office he received a call from Complainant's coworker and friend, Victoria Shipley (Shipley). (Tr. 335-336)

36. The purpose of Shipley's call was to provide Hancock with information about similar behavior that Grayson had engaged in with other employees. Shipley admitted during the conversation that she had talked to Complainant. (Tr. 336)

37. Complainant was terminated on February 27, 2003 for breach of confidentiality and a second act of insubordination. (Tr. 337-338)

## CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent 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 the testimony of various witnesses is not in accord with the findings therein, it is not credited.<sup>3</sup>

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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.

1. The Commission alleged the following in the Complaint:  
(1) that Respondent subjected Complainant to unwanted and unwelcomed acts of sexual harassment that had the purpose or effect of creating a sexually offensive, intimidating, or hostile work environment for reasons not applied equally to all persons without regard to their sex, and (2) that Respondent subjected Complainant to a disciplinary suspension and subsequently terminated her, in retaliation for having engaged in a protected activity.

2. These allegations, 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 discriminate against that person with respect to ..., terms, conditions, or privileges of employment, and
- (I) For any person to discriminate in any manner against another person because that person has opposed any unlawful 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(A) and (I) 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. *Hample v. Food Ingredients Specialist, Inc.* (2000), 89 Ohio St., 3d 169, 176 (citing, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66(1986)). Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination or retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

### **SEXUAL HARASSMENT**

5. The Commission can prove a violation of R.C. 4112.02(A) sex discrimination/hostile work environment claim with the introduction of the following evidence:

- (1) That the harassment was unwelcome;
- (2) That the harassment was based on sex;
- (3) That the harassing conduct was sufficiently severe or pervasive to affect the "terms, conditions, or privileges of employment; and
- (4) That either (a) the harassment was committed by a supervisor or (b) the employer through its agents or supervisory personnel knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

*Hample, 89 Ohio St. 3d, at 176-77 (quoting, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993)).*

6. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Adm. Code (O.A.C.) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)* (sexual harassment is sex discrimination under Title VII). There are two forms of sexual harassment: *quid pro quo* and hostile work environment. *Id.*, at 65. The latter form of sexual harassment, which the Commission alleges in this case, recognizes that employees have the "right to work in an environment free of discriminatory intimidation, ridicule, and insult." *Id.*

7. O.A.C. 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

(J) Sexual harassment.

(1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Whether the alleged conduct constitutes sexual harassment is determined on a case-by-case basis by examining the record as a whole and the totality of the circumstances. O.A.C. 4112-5-05(J)(2).

8. In order to create a hostile work environment, the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor, supra* at 67. The conduct must be unwelcome. *Meritor, supra* at 68. The victim must perceive the work environment to be hostile or abusive, and the work

environment must be one that a reasonable person would find hostile or abusive. *Harris, supra* at 21-22.

9. In examining the work environment from both subjective and objective viewpoints, the fact-finder must examine "all the circumstances", including the employee's psychological harm and other relevant factors such as:

... the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

*Id.*, at 23.

This inquiry also requires "careful consideration of the social context" in which the particular behavior occurred since the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships." *Oncale v. Sundowner Offshores Services, Inc.*, 118 S.Ct. 998 (1998).

10. Page eight (8) of Respondent's employee handbook contains a definition of "sexual harassment" and the following Directive 8:

If you believe that you have been sexually harassed, report the event immediately to the Human Resources Department, the Corporate Compliance Officer or to your supervisor. All complaints will be investigated immediately, and appropriate action will be taken.

(Resp. Ex. G)

11. Complainant submitted a handwritten complaint to Human Resources on December 29, 2002 alleging Tolke had made several comments to her which she found offensive, dating back to early November, 2002. Complainant reported the following comments made by Tolke:

- (1) November 18<sup>th</sup> - I'm 41 years old, I don't need Viagra. I said I don't want to know that-he just laughed-I walked away.
- (2) November 25<sup>th</sup> - Don Tolke pulled his employee badge at arms length and said who am I? what does this say. I said I have been here for 1 ½ years. I have been doing this kinda of work for 15 years I know what I'm doing. He said if you know what you are doing than what in the fuck am I doing here. I just walked away. As I was walking away from him he said I want to be your friend. Me and you could

go out after work and get some beer and wings. I said no.

12. Complainant again submitted additional notes of complaint to Human Resources on December 31, 2002, this time about comments allegedly made to her by Tolke on December 16 and December 18:

- (1) December 16<sup>th</sup> - Don was sitting in his office-I was in the hallway. He said do you shop at Victoria Secrets. I didn't say nothing back. He said you must shop there because you didn't say anything. I said why did you ask me that. He said I bet you would look good in a French maid outfit. I said no and left the area and went to the first floor.
- (2) December 18<sup>th</sup> - I called Don Tolke to tell him about a coffee stain in medical services. I said do you know who this is. He said well it doesn't sound like Santa Claus it must be my Easter Bunny Lisa.
- (3) Sometime between December 16<sup>th</sup> and 18<sup>th</sup> - After Christmas party (twice) in the dining room I would go clean it up a little bit. He said I could have some cookies. He told me to eat only 2 because if I ate more it would ruin my figure would go straight to my hips.

13. Chief Human Resources Office Ernie Prater, Hancock and Fearer met with Complainant, Tolke and other members of the Environmental Services Department. (Tr. 107, 241-250)

14. The November 18 comment of a sexual nature was a single, isolated comment.

15. The November 25 invitation to go out after work for beer and wings was an isolated comment.

16. The next complaint letter complains of comments of a sexual nature that occurred on December 16, 21 days after the previous comments.

17. The next comment of a sexual nature complained of occurred between December 16 and December 18 at the Christmas party. The comment about the cookies was made twice to Complainant.

18. In the instant case, Complainant's complaint of sexual harassment involved no physical contact, one comment of a sexual nature that occurred on November 18, one comment of a sexual nature that occurred on November 25, one comment of a sexual nature on December 16, two comments of a sexual nature that

occurred sometime between December 16 and December 18. Based on Complainant's documentation her complaints are about five comments that were made over a period of 24 days.

19. A hostile work environment is usually "characterized by multiple and varied combinations and frequencies of offensive exposures." *Rose v. Figgie International*, 56 FEP Cases 41, 44 (8<sup>th</sup> Cir. 1990).

20. Five (5) comments arguably of a sexual nature within a 24-day period are not "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor, supra* at 67.

*e.g. Price v. Roanoke City Bd. of Educ.*, 101 FEP 1769 (M.D. Ala. 2007).

The plaintiff claimed that on a daily basis, over the course of several years, her coworker made unsolicited, inappropriate remarks about her appearance, for example telling her she was pretty, that she had nice legs and eyes, and that she "looked good enough to eat." She also said her colleague frequently touched her face and asked her out despite her constant rejections of him. The plaintiff brought a hostile environment claim based

on this conduct. The court found that on a severity scale, the coworker's behavior ranked somewhere in the middle. However, because the unwanted acts occurred so often, the court ruled their frequency tipped the balance in favor of the plaintiff. Summary judgment for the defendant was thus denied and the plaintiff's claim allowed to move forward.

*Teresa Faye Smith v. Dr. John Jordan, D.D.S. Complaint No. 9281 (Ohio Civil Rights Commission, Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations, Cease and Desist Final Order Issued June 23, 2005.)*

Complainant was a dental assistant for Respondent. Over a period of six work days, from Monday, February 19, her first day on the job, until Tuesday, February 27, Complainant testified that Respondent engaged in the following types of sexual behavior: (i) sexual comments, both innuendo and explicit: sixteen (16) single incidents where the same comments or acts were made on more than one occasion, (ii) physical contact of a sexual nature, one (1) incident where Respondent tried to hug Complainant from behind.

21. Tolke and Complainant were not in constant contact with one another in the work environment. Complainant did not make a written complaint to Human Resources until almost a month after the first alleged incident of conduct of a sexual nature.

22. Even though Complainant expressed in her written complaint that she perceived the work environment to be hostile, a reasonable person would also have to perceive that the environment was "hostile or abusive". *Harris, supra* at 21-22.

As Supreme Court emphasized in *Meritor* and *Harris*, that (Title VII) does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.

*Oncala, supra* at 1002-1003.

23. I did not find the behavior complained of by Complainant to be objectively offensive so as to alter the conditions of her employment.

24. Pursuant to Respondent's written sexual harassment policy, Human Resources conducted an investigation and determined that although some of the comments that Tolke made to Complainant were inappropriate because they were of a sexual nature, they did not rise to the level of illegal sexual harassment.

25. During the meeting where Complainant was told the results of the investigation she was asked by Prater if she felt uncomfortable being around Tolke. Complainant's response to Prater was "No, I'm OK". (Resp. Ex. O, Fearer Depo, p. 83)

26. Human Resources gave Tolke a warning that any future conduct complained of about him of an inappropriate nature he would be terminated.

### **RETALIATION**

27. 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).

28. 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>4</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 254-55, 25 FEP Cases at 116, n.8.

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<sup>4</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).

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.

29. 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 969, n.13. 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 (6<sup>th</sup> Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

30. 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.

31. Respondent met its burden of production with the introduction of evidence that Complainant's termination was based on her violation of the confidentiality policy during an open investigation.

32. 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.

33. 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 fact-finder to infer that Complainant was, more likely than not, the victim of unlawful retaliation.

34. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for discharging 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 (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>5</sup>

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

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<sup>5</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* 2749, 62 FEP Cases at 100, n.4.

35. 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.*

36. The Commission attempted to show pretext by alleging that the basis for Complainant's suspension for refusing to take a test before the end of January 2003 lacked credibility.

37. Employees were required to take the HIPPA test to assure they were aware of, and adhered to, the new federal requirements related to the privacy of medical information. (Tr. 77)

38. Respondent required that all employees pass the HIPPA test by January 31, 2003 to assure its compliance with this new federal requirement. (Tr. 256-257, 312)

39. Prater was monitoring all departments' compliance with this testing deadline, and which employees had not yet taken the test. (Tr. 258-259)

40. Complainant had taken some vacation time in January of 2003 and as of January 28 her name was still on the list of employees who still needed to pass the test. (Tr. 78)

41. Additionally, Complainant was scheduled for a day off on January 31, 2003. (Tr. 80)

42. Complainant had attempted to take the test on January 28 and 29, but had trouble logging onto the computer. (Tr. 79)

43. Because of the problems that Complainant had logging on and the impending deadline, Fearer asked Tolke to assist Complainant with the process of logging on. (Fearer Depo, pp. 98-99)

44. Fearer set up a specific time on January 30 for Complainant to take the test.

45. Respondent disciplined Complainant because she refused to take the test when instructed to do.

46. Although the Commission attempted to create the inference Complainant did not want to take the test because she was uncomfortable around Tolke because of harassment, there is no credible evidence in the record to support such a determination.

47. As a result of Complainant's refusal to take the test as instructed by her supervisor, she was suspended for three (3) days.

48. On February 25, 2003, Complainant was engaged in a verbal confrontation with a coworker in Environmental Services, Angela Grayson. (Tr. 330)

49. Both employees were separated by H.R. and asked to submit written statements.

50. Hancock informed Complainant not to discuss the investigation with anyone as it was an on-going investigation. (Tr. 334)

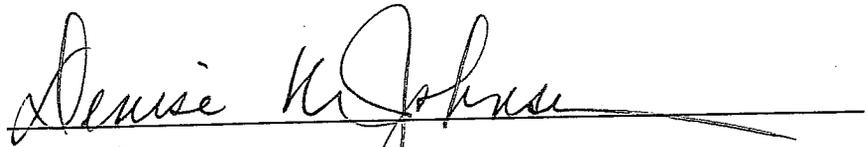
51. Approximately thirty (30) minutes after Complainant left Hancock's office she received a phone call from Victoria Shipley, a friend and coworker of Complainant. (Tr. 335-336)

52. Shipley informed Hancock she had called to discuss the incident between Complainant and Grayson. (Tr. 335-336)

53. I found Respondent's basis for Complainant's termination to be credible.

**RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint 9584.

A handwritten signature in cursive script, reading "Denise M. Johnson", is written over a horizontal line. The signature is fluid and extends slightly beyond the line on both sides.

DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

March 26, 2010