

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**MARIETTA REED**

Complainant

v.

**GENERAL MOTORS  
CORPORATION**

Respondent

Complaint No. 10084  
(AKR) B3012606 (30794) 012606  
22A-2006-01351C

**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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**Complainant**

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## **INTRODUCTION AND PROCEDURAL HISTORY**

Marietta Reed (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on January 20, 2006.

The Commission investigated the charge and found probable cause that General Motors Corporation (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on September 14, 2006.

The Complaint alleged Respondent subjected Complainant to disparate terms and conditions of employment, and decreased her opportunity to work overtime hours, in retaliation for having engaged in activity protected by R.C. 4112.02(I).

Respondent filed an Answer to the Complaint on October 17, 2006. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on September 17-18, 2008 at the Trumbull County Common Pleas Court, 161 High Street N.W., Warren, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 288 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on August 31, 2009; by Respondent on December 18, 2009; a reply brief and Motion to Strike filed by the Commission on December 18, 2009; and Respondent's Response Thereto, filed on December 31, 2009.<sup>1</sup>

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<sup>1</sup> Commission's Motion to Strike is based on statements in Respondent's post-hearing brief regarding settlement discussions. The Administrative Law Judge (ALJ) did not rely on the statements in Respondent's brief as Respondent's cross-examination of Complainant on the same subject during the hearing was objected to by the Commission, and sustained by the ALJ.

## **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 January 20, 2006.

2. The Commission determined on June 1, 2006 it was probable Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(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 manufacturer of automobiles and trucks.

5. Complainant started working for Respondent at its Lordstown, Ohio facility in September 1979.

6. At all times during her employment with Respondent, Complainant has been a member of the United Auto Workers Union (UAW).

7. After working in a variety of departments Complainant moved into a skilled trades position in 1991.

8. In 1995 Complainant completed an apprenticeship program and received her journeyman certificate in truck repair with the job title of truck repairman. (Tr. 13, 21, 29)

9. As a truck repairman, Complainant's duties included working on a wide variety of Respondent's mobile equipment which supports the operations at the Lordstown complex. (Tr. 218-219)

10. In 1996 Complainant sustained injuries while working in the battery room.

11. The batteries weigh 3,000 to 5,000 pounds. (Tr. 17-18)

12. As a result of her injuries, Complainant developed subclavian vein thrombosis, which is a blood clot in the main vein into the heart. (Tr. 17-18)

13. The blood clot prevented Complainant from lifting over twenty (20) pounds or moving her left arm above shoulder height. (Tr. 17-18)

14. Dr. Patchen, Complainant's personal physician, issued work restrictions for Complainant. She gave them to Respondent's Medical Department. (Tr. 23, Comm. Ex. 19)

15. Respondent allowed Complainant to work in its Truck Repair Department (TRD) with her 20-pound lifting restriction and arm movement restriction from 1997 until 2006. (Tr. 20-21, 29)

16. Meanwhile, Respondent's TRD was decreasing in size. (Tr. 91)

17. In 1999, Respondent had 24 truck repair employees in the Lordstown assembly plant.

18. From 2006 to 2008 Respondent had only 8-10 truck repair employees.

19. The reduction in truck repair personnel occurred due to technological advances and other related changes to how the department functioned. (Tr. 197, 217-218)

20. Although the truck repair personnel saw a reduction in numbers, the Lordstown complex was the largest single auto-manufacturing line in the world, having approximately 5,000 employees and a large fleet of mobile equipment that truck repair employees were responsible for maintaining. (Tr. 197, 215)

21. In November or December 2005 Dale Anderson (Anderson) became the Facility Area Manager (FAM) for the entire Lordstown complex. (Tr. 190-191)

22. Anderson reported to Respondent's Worldwide Facilities Group which assigns FAMs to assembly plants. (Tr. 178)

23. The FAM is responsible for various facility issues and activities which support the manufacturing/production operation, including the TRD and maintenance of the mobile equipment fleet. (Tr. 179-182)

24. Upon assuming his new position Anderson looked to increase efficiencies and reduce costs to increase Respondent's competitiveness in the global market.

25. Anderson identified three (3) areas under his management that were inefficient and needed improvement: (1) housekeeping, (2) heating ventilation and air conditioning (HVAC), and (3) truck repair. (Tr. 192-193)

26. With respect to truck repair, Anderson observed significant deficiencies in: (i) keeping the mobile vehicle fleet running, and (ii) maintaining the preventative maintenance schedule required by Occupational Safety & Health Administration (OSHA). (Tr. 192-193)

27. In order to determine the cause of the inefficiencies in those areas the review process initiated by Anderson included the evaluation of employees' medical restrictions.

28. In August of 2000 Complainant was asked to go to Respondent's Medical Department to have her restrictions updated. (Tr. 31, Comm. Ex. 6)

29. Initially Respondent labeled Complainant's condition as temporary, but then labeled it permanent in December 2001. (Tr. 31-33, Comm. Ex. 6, 7)

30. Respondent only issued restrictions for a certain length of time. Upon expiration of the restriction date, the restrictions were no longer in effect.

31. It was the employee's responsibility to present documentation to Respondent's Medical Department substantiating the need to continue the restriction on or before it expired. (Tr. 153, 161-162, 166)

32. Respondent's policy was not affected by a determination from private physicians that the employees' restrictions were permanent.

33. Gerald Butler (Butler) became Respondent's Complex Personnel Director for Lordstown in 2004. (Tr. 214-115)

34. Complainant filed several discrimination charges against Respondent during the 1990s up to and including 2000. (Tr. 83-84)

35. Sometime between 2002 and 2004 Complainant filed a federal lawsuit alleging discrimination based on sexual harassment against Respondent. (Tr. 84)

36. On August 4, 2005, a jury returned an advisory verdict for Respondent as a result of a summary jury trial. (Tr. 84)

37. On or around November 7, 2005, Complainant sent a letter to Troy Clarke (Clarke), then President of Respondent's European business operations. Prior to that position Clarke had served as Respondent's Vice President of Labor Relations for North America. (Tr. 120, 241)

38. Complainant's letter complained about "bullying", hostile work environment, and disparate treatment. (Comm. Ex. 3)

39. Since Clarke was no longer at Lordstown the letter was forwarded to Butler.

40. Butler first met Complainant when he participated in the federal lawsuit as Respondent's representative.

41. Butler, in conjunction with his staff, investigated the allegations contained in Complainant's letter and on January 5, 2005 he reviewed the results of the investigation with her. (Tr. 242, Comm. Ex. 4)

42. Anderson's evaluation of the three departments was contemporaneous with the letter written by Complainant.

43. Upon receiving information from the plant Medical Department, Anderson's staff identified individuals who had active or expired restrictions.

44. Anderson instructed his employees with expired restrictions to follow procedures to update their restrictions. If they were unable to do so, they would be expected to assume the full duties of their jobs. (Tr. 194-195)

45. Anderson's review of Complainant's medical restrictions revealed that, should they be renewed, they would prevent her from performing approximately 75% of the truck repair duties. (Tr. 160, 196)

46. During the meeting of January 5, 2006, Butler asked Complainant about her medical restrictions. (Tr. 51, 252)

47. Butler told Complainant she would need to talk with her doctor and that Respondent wanted her to update her medical restrictions. (Tr. 102, 267)

48. Dr. Brian Gordon (Dr. Gordon) is Respondent's Lordstown Complex Medical Director. (Tr. 143-144, 158)

49. After the meeting Butler spoke with Dr. Gordon about Complainant's medical restrictions.

50. On January 6 and 9, 2006, Complainant reported to the plant Medical Department that her weight-lifting and left-arm-raising restrictions had lapsed, and she needed to see her treating physician regarding renewal of the restrictions. (Tr. 115, 118, Resp. Ex. Y)

51. Complainant communicated to management that if she were made to perform the full array of truck repair duties during the interim period before she could obtain documents sufficient to substantiate the restrictions, in particular the "heavy duty" aspects of the job, she could suffer serious bodily injury or death. (Tr. 26-28, 223-224)

52. On January 9, 2006, the Medical Department issued temporary preventative medical restrictions in order to protect Complainant until she could obtain documentation regarding her continued need for restrictions. (Tr. 145, 160, Comm. Ex. 11)

53. On January 11, 2006, Dr. Gordon, a UAW representative, an ADAPT representative and Complainant's truck repair supervisor conducted a walkthrough of the truck repair job to determine which aspects of the job Complainant could and could not do within the restrictions issued on January 9, 2006. (Tr. 148)

54. Respondent's ADAPT program is a job placement program for employees with medical issues. The program is administered jointly by the UAW and Respondent's management and plant medical doctors. (Tr. 106, 158)

55. The walkthrough revealed Complainant could not perform approximately 75% of the essential functions of the job. (Tr. 148, Comm. Ex. 12)

56. Consequently, Anderson and the TRD determined Complainant was no longer qualified for the position of truck repairman and the TRD could no longer accommodate her. (Tr. 169, 197)

57. As a result of that determination, Butler approved removing Complainant from the skilled trade classification of repairman. (Tr. 232, 278-279)

58. Respondent offered two (2) long-term options to Complainant: (1) accept an offer of work that was in a non-skilled classification within her medical restrictions; or (2) be laid off at the skilled trades layoff pay rate. (Tr. 232)

59. Respondent could not place Complainant in another skilled trades position which would allow her to perform a more significant amount of work consistent with her restrictions because such placement not only would have been inconsistent with Complainant's prior training, but would have violated the Collective Bargaining Agreement (CBA) between Respondent and the UAW.

60. Skilled trades employees who are not certified in a specific skilled trade are prohibited from performing work in that classification. (Tr. 230-231)

61. On January 26, 2006, Complainant elected placement in a non-skilled trades job through the ADAPT program. (Tr. 169-170, 278)

62. During the time Complainant worked as a truck repairman her rate of pay was \$30.19 per hour, plus the \$1.61 COLA, with opportunities to work overtime every day.

63. When Complainant took a non-skilled line production position she made between \$24.00 or \$25.00 per hour, plus the COLA, but with limited opportunities for overtime.

## 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>2</sup>

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<sup>2</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 disparate terms and conditions of employment, and decreased her opportunity to work overtime hours, in retaliation for having engaged in activity protected by Revised Code 4112.02(I).

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:

- (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory 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(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. *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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. 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).

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>3</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.

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>3</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 removing the Complainant from the truck repair position; 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. 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).

8. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent's articulation of legitimate, nondiscriminatory reasons for Complainant's removal from a skilled trades position to an unskilled trades position 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.

9. Respondent met its burden of production with the introduction of evidence Complainant was moved to a non-skilled position in order to provide her with a job that could accommodate her medical restrictions.

10. 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 reasons for Complainant’s removal from a skilled trades position

were not the true reasons, 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.

11. Thus, even if the Commission proves that Respondent’s articulated reasons are 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 factfinder to infer that Complainant was, more likely than not, the victim of unlawful retaliation.

12. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent’s articulated

reasons for removing Complainant from the position of truck repairman, a skilled trades position.

13. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing the reasons had no basis *in fact* or were *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 factfinder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

14. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reasons 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.*

15. The Commission's production of additional evidence of pretext is unpersuasive.

16. The record is devoid of any evidence of conspiracy or subterfuge on the part of Anderson, Butler or Gordon that their actions were motivated by unlawful retaliation.

17. Complainant's medical condition, her restrictions, and the undisputed evidence that she could not perform 75% of the essential functions of the job of truck repairman were all credible reasons for Respondent's determination that she be placed in a job where she could perform, given the scope of her restrictions.

18. Respondent's legitimate non-discriminatory reasons are also supported by credible evidence that in 1999 Respondent had 24 truck repair employees in the Lordstown assembly plant and that number was reduced to 8-10 employees between 2006 to 2008.

There was a reduction in truck repair personnel even though the work force was at 5,000 employees and the TRD was responsible for the repair and maintenance of a large fleet of mobile equipment.  
(Tr. 197, 215)

19. With the reduced number of truck repairman evaluating how employee restrictions affected the efficiency of the truck repair operation was credible.

[A] plaintiff may not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

*Combs v. Meadowcraft, Inc.*, 73 FEP Cases 232, 249 (11<sup>th</sup> Cir. 1997).

20. The Commission failed to meet its burden of proof and persuasion that Respondent engaged in unlawful retaliation.

**RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 10084.

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

DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

September 29, 2011