OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

OHIO CIVIL RIGHTS COMMISSION
[RICHARD A. HAHN]

Complainant

v.

Complaint No. 10017
(DAY) A6060705 (17412) 09192005
22A – 2006 – 00123

GUARDSMARK LLC

Respondent

ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATIONS

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INTRODUCTION AND PROCEDURAL HISTORY

Richard Hahn filed a charge affidavit in accordance with R.C. 4112.05(B)(1) on September 19, 2005, alleging that Guardsmark, LLC (Respondent) terminated his employment (laid him off) due to his age.

The Commission investigated the charge and found no probable cause regarding Mr. Hahn's charge of discrimination. However, the Commission's investigation, conducted in accordance with R.C. 4112.05(B)(2), resulted in a probable cause finding that Respondent's application for employment form (AEF) elicits or attempts to elicit information in violation of R.C. 4112.02(E).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint and Notice of Hearing No. 10017 on May 11, 2006.

The Complaint alleged that Respondent utilizes an AEF which elicits or attempts to elicit information including, but not limited to, an applicant's race, date of birth, and place of birth.

Respondent filed an Answer to the Complaint on June 13, 2006. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.

The public hearing in this matter was waived in lieu of Stipulations of Fact agreed to by the Commission and Respondent. All stipulated facts were considered by the Administrative Law Judge (ALJ) but only those facts relevant for purposes of the legal conclusions recommended herein are included in this Report.

The record consists of the previously described pleadings; Joint Stipulations, filed March 20, 2007; and the post-hearing briefs filed by the Commission on April 19, 2007; by Respondent on May 10, 2007; and a reply brief filed by the Commission on May 30, 2007.

FINDINGS OF FACT

1. Robert Hahn filed a charge of discrimination on September 19, 2005, alleging that Respondent terminated his employment (laid him off) due to his age.

2. The Commission conducted a preliminary investigation and found no probable cause as to Mr. Hahn's charge of age discrimination.

3. During its investigation the Commission determined it was probable that Respondent's AEF elicited or attempted to illicit information prohibited by R.C. 4112.02(E).

4. The Commission attempted to conciliate this matter with Respondent but was unsuccessful.

5. Respondent is a licensed private security services provider subject to the rules and regulations of the Division of Ohio Homeland Security.

6. Respondent is headquartered in New York, New York, with administrative offices in Memphis, Tennessee. Respondent has approximately 155 branch offices, including branches in Columbus and Dayton, Ohio.

7. Respondent's official AEF contains a request for the applicant's date of birth, place of birth, and race.

8. Respondent's official AEF is its standard form and is utilized by Respondent throughout the United States.

9. Before Respondent employs an individual as a security officer and registers him or her with the Division of Ohio Homeland Security, a copy of the individual's arrest and conviction record from the files of the Ohio Bureau of Criminal Investigation must be obtained and sent to the Department of Public Safety, which requires the submission by Respondent of the Ohio Civilian Background Check Fingerprint Card.

CONCLUSIONS OF LAW

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.

1. The Commission alleged in the Complaint that Respondent utilizes an application for employment form that elicits or attempts to elicit information including, but not limited to, an applicant's race, date of birth, and place of birth.

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:
>
> (E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, military status, national origin, disability, age, or ancestry of an applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, military status, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use photographic or fingerprint identification for security purposes.

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(E) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G), 4112.06(E).

4. Respondent's AEF does seek to elicit the following information:

a. Race: White, Black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native

b. Date of Birth, Age

(Jt. Stips, Ex. 1)

5. The information elicited by Respondent on its AEF is a direct violation of R.C. 4112.02(E)(1) and (3).

6. R.C. 4112.02(E) gives the employer the means to seek certification from the Commission in advance of eliciting the prohibited information from a job applicant:

> The BFOQ defense to a facially discriminatory employment policy requires the employer to initially demonstrate that the hiring criteria utilized involve the "essence" of its business.
>
> *Dothard v. Rawlinson*, 433 U.S. 321 at 333, 97 S.Ct. 2720 at 2729, 53 L. Ed. 2d 786 at 800 (1977).

7. The "essence of the business" requirement is not satisfied merely because the facially discriminatory criteria further some peripheral function of the employer. *Little Forest Medical Center v. Ohio Civil Rights Com.*, 61 Ohio St. 3d 607 at 612.

8. Ohio law requires all security officers employed in the state be registered with the Division of Ohio Homeland Security. O.R.C. Sec. 4749.06(A).

9. The registration is of "security guard employees" and the registration form is titled "Employee Registration Application". (Ex. 3)

10. The Employee Registration Application requires disclosure of the applicant's date of birth and city and state of birth, and includes a photograph of the applicant.

11. The employer is required to file an application to register a new employee no sooner than three (3) days nor later than seven (7) calendar days after the date on which the employee is hired.

12. Respondent did not apply for a BFOQ from the Ohio Civil Rights Commission prior to including the prohibited inquiries in its standardized application form. *See, O.A.C. 4112-3-15.*

13. Even if Respondent applied for a BFOQ from the Commission, using/considering race as a criteria when hiring individuals for employment is illegal. *See, Knight v. Nassau County Civil Serv. Comm'm.*, 649 F.2d 157, 162 (2d Cir. 1981) (noting that

"Congress specifically excluded race from the list of permissible bona fide occupational qualifications".)

14. Respondent's blurring of the distinction between "applicant" and "employee" in regard to the legal requirements imposed by state and federal law on employers that hire security guards does not provide legal justification of inclusion in its employment application of information prohibited by R.C. 4112.02(E)(1) and (3).

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 10017 that:

1. Respondent Cease and Desist from using an employment application form that elicits information prohibited by R.C. 4112.02(E), *et.seq.*;

2. That Respondent, within one hundred and twenty (120) days after receipt of the Commission's Final Order, provide a copy of its employment application form which complies with R.C. 4112.02(E) to the Commission's Office of Special Investigations (OSI); and

3. That Respondent receive training within ninety (90) days from an agency certified to provide training to employers on Ohio's anti-discrimination law;[1] and

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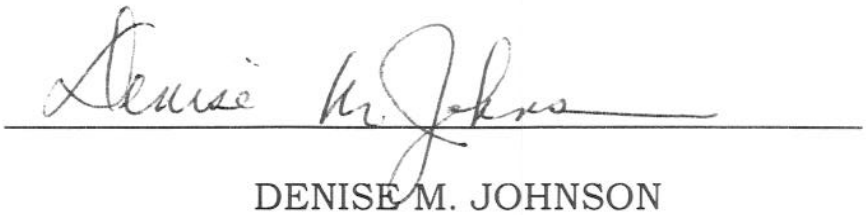
[1] The Ohio Civil Rights Commission provides training to employers on Ohio's laws against discrimination, especially regarding employment and housing issues. There is no cost for this service. The Commission's Compliance Department oversees these trainings.

4. The Commission order Respondent, within ninety (90) days of receipt of the Commission's Final Order, to provide to OSI documentation of completion of the employer training received on Ohio's anti-discrimination law.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 13, 2009