

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

PAULETTE R. NEER

Complainant

v.

FEET FIRST, INC.

Respondent

Complaint No. 06-EMP-DAY-17651
(DAY) 36022106 (17651) 030206
22A-2006-19657-F

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

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ALJ'S REPORT BY:

Denise M. Johnson
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INTRODUCTION AND PROCEDURAL HISTORY

Paulette Neer (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 2, 2006.

The Commission investigated the charge and found probable cause that First Feet, 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 October 26, 2006.

The Complaint alleged that the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(I).

Respondent filed an Answer to the Complaint on November 22, 2006. 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 June 17, 2008 at the Ohio Civil Rights Commission's Dayton Regional Office, 40 West 4th Centre, 40 West 4th Street, Suite 1900, Dayton, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 219 pages; exhibits admitted into evidence during the hearing; and a post-hearing brief filed by the Commission on June 1, 2009. Respondent was not represented by counsel. Respondent did not file a post-hearing brief.

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/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 March 2, 2006.

2. The Commission determined on September 14, 2006 it was probable 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 podiatry medical office.

5. Daniel Keane, D.P.M. (Dr. Keane) is the only podiatrist in the office.

6. Complainant started working for Respondent as a receptionist on August 2, 2004.

7. Complainant's job duties included receiving patients and visitors, answering telephones, making appointments, receiving payments and issuing receipts.

8. Complainant worked between 32-33 hours per week making \$10.00 per hour.

9. On January 17, 2006, Complainant found out she was pregnant. Complainant and her husband already had three (3) children.

10. That day Complainant told coworker Shante Collins (Collins) and Office Manager, Lee Ann Kelly (Kelly). Later that same day other coworkers, Dina Spencer (Spencer) and Pam Talmadge (Talmadge), and Dr. Keane, found out.

11. Dr. Keane and Kelly had a meeting with Complainant on February 2, 2006 in Dr. Keane's office.

12. During the meeting Dr. Keane informed Complainant that after she had the baby her position could not be held open for her.

13. Complainant consulted with Attorney Jason Matthews.

14. Kelly and Talmadge met with Complainant on February 14, 2006, and among other things, inquired why Complainant was being so quiet. Complainant informed them she was upset because she understood she would be losing her job after she gave birth to her baby. (Tr. 33)

15. During the meeting Complainant also stated she had contacted an attorney who would be sending a letter to Dr. Keane explaining what her rights were. (Tr. 32, Comm. Ex. 6)

16. Later that day, Kelly and Tallmadge met with Dr. Keane to discuss the meeting they had with Complainant. (Tr. 107-108)

17. The next day, on February 15, 2006, Kelly called Complainant and told her she did not have to come into work. This was not unusual if the weather was bad. There were a lot of elderly patients who would cancel because of the weather.

18. Complainant then called her attorney and requested he send a letter to Respondent's office via facsimile. (Tr. 34)

19. The letter set forth Complainant's rights as a pregnant employee.

20. On February 16, 2006, Complainant's attorney received a letter, dated that same date, from Respondent indicating Complainant had been terminated. (Tr. 39, Comm. Ex. 12)

CONCLUSIONS OF LAW AND DISCUSSION ¹

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 the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(A) and (I).

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. 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 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.
- (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.

Sex/Pregnancy Discrimination

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. *McFee v. Nursing Care Management of America, Inc.*, (2010) 126 Ohio St. 3d 183. 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).

6. As further guidance, the Commission has adopted regulations on written and unwritten employment policies relating

to pregnancy and childbirth. Ohio Administrative Code (O.A.C.) 4112-5-05(G). One of the central purposes of these regulations is to ensure that female employees are not “penalized in their employment because they require time from work on account of childbearing.” O.A.C. 4112-5-05(G)(5).

7. The Commission’s pregnancy regulations in O.A.C. 4112-5-05(G) provide, in pertinent part, that:

Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer’s leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer’s leave of absence policy (...)

8. 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.

9. 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. 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 her 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 (6th Cir. 1996).

10. The Commission failed to establish a *prima facie* case of pregnancy discrimination. There was no evidence that Respondent treated non-pregnant employees, similar to Complainant in ability or inability to work, more favorably than her.

11. Employers are not required to give pregnant employees preferential treatment:

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. (...)

McFee, supra at 186, citing *Tysinger v. Zanesville Police Dept.*, (C.A. 6, 2006), 463 F.3d 569, 575; *Accord. Mullet v. Wayne-Dalton Corp.*, (N.D. Ohio 4004), 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. In Respondent’s staff compensation package the only leave granted by Respondent to its employees is vacation leave. (Resp. Ex. C) Respondent does not have a sick leave policy, a maternity leave policy, or a leave of absence policy.

13. Employees are eligible for one week of paid vacation during the second year of employment, two weeks during the third year and thereafter. Vacation time cannot be accrued.

14. Talmadge's job was terminated due to her need to take time off due a medically-related (non-pregnancy) condition. She was later rehired by Respondent.

15. Complainant was told Respondent did not have a leave of absence policy; and if there was a position available, she could be considered for rehire.

16. Respondent's leave policy provided the same leave to pregnant and non-pregnant employees. Respondent's leave policy, therefore, does not discriminate against women based on their sex/pregnancy.

Retaliation

17. The Commission alleged in the Complaint on or about February 15, 2006, an attorney for Complainant contacted Respondent to inquire about matters relating to perceived discrimination on the basis of Complainant's pregnancy. Thereafter, on or about February 16, 2006, Respondent informed Complainant and her attorney that she was terminated.

18. 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.

19. 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).

20. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *McFee, supra*. 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).

21. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas, supra*, for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Burdine, supra*. It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*

22. 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*. 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 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

23. Complainant engaged in a protected activity by opposing what she believed to be discriminatory conduct.

An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.

EEOC v. Wilson Metal Casket Co., 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

24. The Commission is not required to prove the underlying discrimination claim in cases of retaliation. *Little, supra* at 1563; *Drey v. Colt Const. & Development Co.*, 65 FEP Cases 523, 531 (7th Cir. 1994).

25. Respondent knew about Complainant's opposition to what she believed to be a discriminatory employment practice based on the meetings she had with staff on February 14, 2006 and the letter from Complainant's attorney dated February 15, 2006. (Comm. Ex. 10)

26. Respondent terminated Complainant's employment, pursuant to letter dated February 16, 2006. (Comm. Ex. 12)

27. There was a causal connection between Complainant's opposition to what she believed was discriminatory conduct and Respondent terminating Complainant from employment.

28. On February 15, 2006, (the day after Complainant's meeting on February 14, 2006 with Talmadge and Kelley in which

Complainant communicated she believed Respondent's policy regarding no maternity leave was discriminatory and she had contacted an attorney), Kelly called Complainant and told her not to come to work. On that same day Complainant contacted her attorney and asked him to send a letter to Respondent.

29. On February 16, 2006, Respondent sent a letter to Complainant's attorney stating she was fired on February 14, 2006. In the letter there was no performance-based reason for Complainant's termination. However, Respondent did write the following:

(...) I have never received a complaint such as yours which in my opinion contain slanderous, libelous and defamatory written evidence which at my discretion may necessitate legal action against the party whom you represent in your letter and also against your legal association under O.R.C. 2739.

(Comm. Ex. 12)

30. Respondent's actions after he received the letter from Complainant's attorney were swift and decisive. A reasonable inference can be drawn that Respondent's motive for terminating Complainant's employment was retaliatory.

Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

31. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action. *McDonnell Douglas, supra*. 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 of unlawful retaliation 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.

32. Respondent met its burden of production with the introduction of evidence that Complainant was terminated because she was uncooperative and dishonest.

33. Respondent having met its burden of production, the Commission must prove 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 discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine*, 450 U.S. 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 was false, *and* that ... [unlawful retaliation] was the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

34. Thus, even if the Commission proves 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 for the factfinder to answer

Id., at 524, 62 FEP Cases at 106.

35. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of unlawful retaliation.

36. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing they had no basis *in fact* or were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons 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.²

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

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

38. There is not a scintilla of credible evidence in the record to support Respondent's reasons for Complainant's termination.

² 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.

39. After a careful review of the entire record, the ALJ disbelieves the underlying reasons Respondent articulated for Complainant's discharge and concludes that, more likely than not, they were a pretext or a cover-up for unlawful retaliation.

[t]he 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 a *prima facie* case, suffice to show intentional discrimination.

Hicks, supra at 511, 62 FEP Cases at 100.

40. The ALJ is convinced the Respondent terminated the Complainant in retaliation for opposing what she believed to be a discriminatory practice. Such action constitutes unlawful retaliation and entitles Complainant to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 06-EMP-DAY-17651 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;
2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of receptionist. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment. The Commission has calculated damages in the amount of \$24,868.21. This calculation is based on Complainant's hourly wage, plus raises offset by interim earnings;³

³ Interest accrues on a back pay award under R.C. 4112.05(G) from the time the party was discriminated against, in order to restore victims to the economic position they would have been in had no discrimination occurred. *Ohio Civil Rights Commission v. David Richard Ingram, D.C.*, (1994), 69 Ohio St. 3d 89, 93.

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount she would have earned had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.⁴

4. The Commission order Respondent to receive training regarding the anti-discrimination laws of the State of Ohio. As proof of its participation in anti-discrimination training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the training. The Letter of Certification shall be submitted to the

⁴ Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 21, 2011