

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

RHONDA J. ROE-HICKMAN

Complainant

v.

**AFFORDABLE AUTO SALES
AND WILLIAM COCKERELL**

Respondents

Complaint No. 08-EMP-DAY-19798
(DAY) E6 (19798) 01282008
22A-2008-01488F

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

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ALJ'S REPORT BY:

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

Rhonda J. Roe-Hickman (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on January 22, 2008.

The Commission investigated the charge and found probable cause that William Cockerell and Affordable Auto Sales, Inc. (Respondents) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on November 13, 2008.

The Complaint alleged Respondents subjected Complainant to different terms, conditions, and privileges of employment, based on her sex, including but not limited to, acts of sexual harassment in violation of R.C. 4112.02(A).

Respondents did not file an Answer.¹ The Commission filed a Motion for Default on July 27, 2009.

A public hearing was held on August 12, 2009 at the Bureau of Workers' Compensation in Lima, Ohio. The Commission's Motions were granted at the hearing.²

The record consists of the previously described pleadings, a transcript of the hearing consisting of 22 pages, exhibits admitted into evidence during the hearing, and a post-hearing brief filed by the Commission on May 26, 2010. Respondents did not attend the hearing.

¹ On July 23, 2009, Respondent William Cockerell (Respondent Cockerell) participated in a telephone pre-hearing status conference and said he was not going to file an Answer. Respondents filed for bankruptcy in October 2008. (Adm. No. 6)

² On August 11, 2009, the Commission filed a Motion to Deem the Commission's Request for Admissions as Admitted.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on January 22, 2008.

2. The Commission determined it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint on November 13, 2008 after conciliation failed.

4. Respondent Affordable Auto Sales, Inc. (Respondent AAS) is involved in the sale of used cars and trucks.

5. Complainant started working for Respondent AAS as an Office Manager in May 2007. (Tr. 8)

6. Respondent Cockerell is the owner of Respondent AAS. (Adm. No. 9)

7. Respondent Cockerell offered Complainant money and drugs in exchange for sex. (Adm. Nos. 11, 12)

8. Complainant's work station was moved from the center of the office to the back of the office. (Adm. No. 14)

9. When Complainant was at the copy machine in the office Respondent Cockerell walked up behind her and tried to put his hands down her shirt. (Adm. No. 15)

10. Respondent Cockerell touched Complainant on the butt. (Adm. No. 16)

11. Respondent Cockerell also asked another female employee, Verona Riley (Riley), to "suck his dick" and to go home with him after work, in addition to telling her that he would pay her for oral sex. (Adm. Nos. 19, 20, 21)

12. Respondent Cockerell called Complainant and other employees into a small office area and started screaming and yelling. (Tr. 10)

13. Complainant did not return to work the next day. She decided the conditions were so intolerable that she could not continue to work there.

14. Complainant's last day of work was August 31, 2007.
(Tr. 10)

15. During the time that Complainant was employed by Respondents she earned \$500.00 per week, or \$26,000.00 per year.

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.³

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

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

2. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the ... 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.

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone*, (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. 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.*

6. 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).

7. 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.

8. 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).

9. 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 (8th Cir. 1990).

10. I find Respondent Cockerell’s conduct toward Complainant to have been unwelcome verbal and physical contact of a sexual nature that was severe and pervasive. Respondent Cockerell’s conduct unreasonably interfered with Complainant’s

work performance and created an intimidating, hostile and offensive work environment.

11. Although Complainant was the victim of unlawful discrimination, Respondents are not liable for back pay unless she was constructively discharged. Normally, employees who are subjected to unlawful discrimination must remain on the job while they seek legal redress. *Brooms v. Regal Tube Co.*, 50 FEP Cases 1499 (7th Cir. 1989). However, an employee may be compelled to resign when confronted with an “aggravated situation beyond ordinary discrimination.” *Id.*, at 1506 (citation omitted); *See also Yates v. AVCO Corp.*, 43 FEP Cases 1595, 1600 (6th Cir. 1987) (“proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors”) (citation omitted). This is known as a constructive discharge.

12. When there is an allegation of constructive discharge, the fact-finder must examine “the objective feelings of [the] employee and the intent of the employer.” *Wheeler v. Southland*

Corp., 50 FEP Cases 86, 88 (6th Cir. 1989), *quoting Yates, supra* at 1600. To meet the objective standard, the Commission must show that the “working conditions ... [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.” *Yates, supra* at 1600, *quoting Held v. Gulf Oil Co.*, 29 FEP Cases 837, 841 (6th Cir. 1982).

13. To meet the intent requirement, the Commission must show that a “reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged.” *Wheeler, supra* at 89. In other words, an employer “must necessarily be held to intend the reasonably foreseeable consequences of its actions.” *Hukkanen v. International Union of Operating Engineers*, 62 FEP Cases 1125 (8th Cir. 1993).

14. The actions of Respondent Cockerell were so egregious that any reasonable person would have been able to foresee the environment was intolerable to the point Complainant would not want to return to work.

15. I find that Complainant was the victim of illegal sexual harassment which created a hostile work environment and she was constructively discharged. Complainant is entitled to relief as a matter of law.

RECOMMENDATIONS

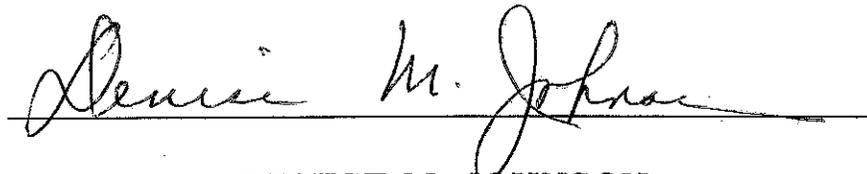
For all of the foregoing reasons, it is recommended in Complaint No. 08-EMP-DAY-19798 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. On the date of the hearing Complainant testified about her interim earnings, and the Commission calculated her back pay damages at \$29,707.06; and

3. The Commission order Respondent within 10 days of the Commission's Final Order to issue a certified check payable to Complainant for the amount she would have earned had she been

employed as an Office Manager on August 31, 2007 and continued to be so employed up to the date of the Commission's Final Order, including any raises and benefits she would have received, less interim earnings, plus interest at the maximum rate allowed by law.⁴

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

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 11, 2012

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.