Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: October 31, 2012

Re: Robert L. Jackson, Jr. v. North Shore Auto Sales, Inc. dba J.D. Byrider
CLE 74 (38438) 10222007; 22A-2008-01930C
Complaint No. 08-EMP-CLE-38438

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS CEASE & DESIST ORDER

Report issued: October 31, 2012

Report mailed: October 31, 2012

**** Objections due: November 23, 2012**

DMJ:ru

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
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October 31, 2012

Robert L. Jackson, Jr.
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North Shore Auto Sales, Inc.
dba J.D. Byrider
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Bedford, OH 44146-2059

Richard N. Selby, II, Esq.
Dworken & Bernstein
60 South Park Place
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Re: Robert L. Jackson, Jr. v. North Shore Auto Sales, Inc. dba J.D. Byrider
CLE 74 (38438) 10222007; 22A-2008-01930C
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Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Friday, November 23, 2012**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. *All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION

Desmon Martin / ru

Desmon Martin
Director of Enforcement and Compliance

DM:ru

Enclosures

cc: Lori A. Anthony, Chief – Civil Rights Section
Wayne D. Williams, Esq.
Denise M. Johnson, Chief Administrative Law Judge

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Robert L. Jackson, Jr.

Complainant

v.

Complaint No. 08-EMP-CLE-38438
(CLE) 74 (38438) 10222007
22A-2008-01930C

North Shore Auto Sales, Inc.
dba J. D. Byrider

Respondent

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

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ALJ'S REPORT BY:

Denise M. Johnson
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State Office Tower, 5th Floor
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INTRODUCTION AND PROCEDURAL HISTORY

Robert L. Jackson, Jr. (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 22, 2007.

The Commission investigated the charge and found probable cause that North Shore Auto Sales, Inc. dba J.D. Byrider (Respondent) 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 September 11, 2008.

The Complaint alleged that Complainant was terminated because of his race (African American).

Respondent filed an Answer to the Complaint on December 22, 2008. 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 July 27, 2010 and October 6, 2010 at the Lausche State Office Building in Cleveland, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (134 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on April 26, 2011, and by the Respondent on May 18, 2011.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) credibility assessment 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 October 22, 2007.

2. The Commission determined on July 10, 2008 that 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 and Notice of Hearing on September 11, 2008, after conciliation failed.

4. Respondent was a pre-owned vehicle sales and service dealership which operated under the name J.D. Byrider located in Bedford, Ohio. (Tr. I, 66-67)[1]

5. In September 2007, Complainant was employed by Respondent as a Sales and Marketing Director. (Tr. I, 10-11)

6. Complainant was responsible for increasing sales and improving Respondent's image. (Tr. I, 10)

7. Complainant's job duties included making telephone calls and traveling to various businesses with marketing plans to increase Respondent's sales. (Tr. I, 13)

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[1] The J.D Byrider Bedford location went out of business in November 2008. (Tr. I, 66)

8. David Nikolson (Nikolson) is the President of the Respondent. All employees were subordinate to Nikolson within the dealership. (Tr. I, 66)

9. To assist the business performance of the Bedford store, Nikolson created a special sales and marketing position which was also described as a Telemarketer. (Tr. I, 67)

10. Mike Thomas (Thomas), who worked as the managing partner/general manager of the Bedford location until his termination in November 2007, reported directly to Nikolson.
(Tr. I, 82-83; Tr. II, 10-11)

11. Robert "Bob" Dugar (Dugar) worked as the sales manager of the Bedford location and was supervised by Thomas.
(Tr. I, 14, 32)

12. Dugar hired Complainant to fill the sales and marketing position and Dugar directly supervised Complainant's work.
(Tr. II, 11, 14)

13. Nikolson regularly communicated with Thomas about dealership business. (Tr. II, 13)

14. On October 13, 2007, Dugar informed Complainant that he was being terminated for poor sales performance and poor attitude.
(Tr. I, 17-19).

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered[2]. 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.

1. The Commission alleged in the Complaint that Complainant was subject to different terms, conditions and privileges of employment and terminated by Respondent because of his race.

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 race, (...) 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,

[2] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

> or any other 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. 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).

5. Under Title VII, intentional discrimination claims can be proven by direct or circumstantial evidence. *Ondricko v. MGM Grand Detroit, LLC,* 2012 FED App. 0254P (6th Cir. 2012), **5, *quoting DiCarlo v. Potter,* 358 F.3d. 408, 414 (6th Cir. 2004). See *United States Postal Service Board of Governors v. Aikens,* 460 U.S. 711, 714 (1983).

> "Direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Ondricko, supra* at **6, *quoting Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.,* 176 F.3d. 921, 926 (6th Cir. 1999).

> "Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred." *Id., quoting Kline v. Tenn. Valley Auth.,* 128 F.3d. 337, 348 (6th Cir. 1997).

6. The Commission may establish a *prima facie* case of unlawful discrimination by a preponderance of [circumstantial] evidence. *McDonnell Douglas v. Greene,* 411 U.S. 792, 5 FEP Cases 965 (1973).

7. The proof to establish a prima facie case may vary on a case-by-case basis. *Id.,* at 802, 5 FEP Cases 969, n. 13.

8. The Commission can establish a prima facie case of race discrimination by proving that:

(1) Complainant is a member of a protected class;
(2) Complainant was discharged;
(3) Complainant was qualified for the position; and
(4) Respondent replaced Complainant with a person outside of the protected class.

Kohmescher v. Kroger Co. (1991), 61 Ohio St.3d. 501, 503; *McDonnell Douglas, supra* at 802, 5 FEP Cases 969.

9. There is no dispute that Complainant is African American and that he was discharged. The Commission also established that Complainant was replaced by a Caucasian male. (Tr. I, 23)

10. For purposes of establishing the third element of a prima facie case, the Commission is only required to prove that Complainant met Respondent's objective qualifications for the position in question. *Sempier v. Johnson & Higgins*, 66 FEP Cases 1214 (3d. Cir. 1995).

> Also See *White v. Columbus Metro. Hous. Auth..*, 429 F. 3d 232, 243 (6th Cir. 2005), *referencing Vessels v. Atlanta Indep. Sch. Sys.*, 408 F. 3d 763, 769 (11th Cir. 2005) (a plaintiff need only show that [he] satisfied the employer's objective qualifications to meet [his] *prima facie* burden, and that any consideration of the employer's subjective criteria is not relevant until the later stages of the *McDonnell Douglas* framework, because [a] contrary rule, under which the employer's subjective evaluation could defeat the plaintiff's initial *prima facie case*, cannot be squared with the structure and purpose of the *McDonnell Douglas* framework).

11. This requirement, which was never intended to be burdensome, purports with a primary function of a *prima facie* case—the elimination of the "most common nondiscriminatory reasons" for employment actions. *Burdine, supra* at 253, 25 FEP Cases at 116.

12. The Commission provided testimony that Complainant met the minimum qualifications to do his job.
(Tr. I, 19-20; Tr. II, 12-13)

13. Once the Commission establishes a prima facie case, a presumption of unlawful discrimination is created. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 25 FEP Cases 113 (1981).

14. The burden of production then shifts to the Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action.[3] *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969.

15. 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),

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[3] 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 reason was applied in a nondiscriminatory fashion. *EEOC v. Flasher Co.,* 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

quoting Burdine, supra at 254-55, 25 FEP Cases at 116, n.8.

16. The presumption of discrimination created by the establishment of the 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.

17. Nikolson articulated that Complainant was terminated as a result of poor attitude and poor work quality. (Tr. I, 74)

18. Respondent having met its burden of production, the Commission must prove the Respondent unlawfully discriminated against Complainant because of his race. *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 discharging Complainant were not the true reasons, but were "a pretext for discrimination." *Id.,* at 515, 62 FEP Cases at 102, *quoting Burdine, supra* at 253, 25 FEP Cases 115.

> [A] reason cannot be a "pretext for discrimination" unless it is shown both that the reason [is] false, and that discrimination [is] the real reason. *Hicks, supra* at 515, 62 FEP Cases at 102.

19. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing 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 race is correct. That remains a question for the factfinder to answer... *Id.,* at 524, 62 FEP Cases at 106.

20. The Commission must ultimately provide sufficient evidence to allow the factfinder to infer that Complainant was, more likely than not, the victim of racial discrimination. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d. 578, 586-87.

21. To show pretext, the Commission can directly or indirectly challenge the credibility of Respondent's reasons for terminating Complainant. The Commission can *directly challenge* the credibility of the articulated reasons by showing that the reasons had no basis *in fact* or [were] *insufficient* to motivate [the] discharge. *Manzer v. Diamond Shamrock Chemicals Co.,* 29 F.3d 1078, 1084 (6th Cir. 1994) (emphasis added). Direct attacks permit the factfinder to infer illegal discrimination from the disbelief of the articulated reasons without requiring any evidence in addition to the prima facie case. *Id.,* at 1084.

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

22. The Commission may also challenge the credibility of Respondent's reasons indirectly by showing that the *sheer weight of circumstantial evidence* makes it "more likely than not" that the reasons articulated are a pretext for unlawful discrimination. *Manzer, supra* at 1084 (emphasis added). Indirect attacks tend to prove that the reasons did not *actually* motivate the employment decision. The Commission is required to produce evidence in addition to a prima facie case to show unlawful discrimination occurred. *Id.*

23. The Commission established that Respondent's articulated reasons for terminating Complainant were pretextual and the proffered explanations of "poor attitude and poor work quality" were unworthy of credence. *Burdine, supra* at 256.

24. When the Commission (Williams) questioned Thomas about Complainant's work quality, Thomas provided the following testimony:

> Williams: As a managing partner at the Bedford store did you have an opportunity to observe Mr. Jackson performing his job duties?
>
> Thomas: Yes sometimes.
>
> Williams: And how would you rate his effectiveness in performing his duties?
>
> Thomas: Good, he was pretty aggressive.
>
> Williams: Were there any issues with his employment that came to your attention?
>
> Thomas: Not in my eyes.
>
> Williams: Was it your observation – was Mr. Jackson able to get along with uh his co-workers?
>
> Thomas: Yes.
>
> (Tr. II, 12-13)

25. Nikolson also admitted that the Bedford location generated roughly 45 car sales per month in 2007.
(Tr. I, 85)

26. During Complainant's first month of work, Complainant generated fifteen sales in September 2007 which was "close to a third" of all Respondent's sales. (Tr. I, 86-87, Ex. D)

27. Respondent's argument that Complainant was terminated due to poor attitude and poor work quality is unpersuasive.

28. Nikolson instructed his management staff to terminate Black Sales Representatives:

> Williams: ...What did Mr. Nikolson tell you?
>
> Thomas: ...Mr. Nikolson had told us multiple times that he wanted the ghetto element removed from J.D. Byrider stores.
>
> Williams: Did he explain what he meant by ghetto element?
>
> Thomas: He wanted us to fire all of the Black Sales Representatives.
>
> ***
>
> Williams: (...) Did Mr. Nikolson specifically identify Mr. Jackson as an employee he wanted to uh fired (sic) as one of the ghetto elements?
>
> Thomas: Yes. There were several people he had named that he wanted out of there.
>
> (Tr. II, 15-16).

29. Thomas specifically noted, that during an office conference call, Nikolson told Thomas, Dugar, and a third manager, "to get rid of the ghetto element." (Tr. II, 24):

> Jackett: That was your interpretation of what he said, correct?
>
> Thomas: It wasn't my only interpretation – it was the three of our managers' interpretations that that is how he wanted us to do it. [Nikolson] wanted us to get rid of the Black employees and we called him back and that's when he verified that that's what he wanted us to do – to get rid of all of the Black employees....He wanted us to go into lower class White neighborhoods and put signs up...he wanted me to start hiring White sales people.
>
> Jackett: But that was just your interpretation correct?
>
> Thomas: It wasn't just an interpretation.
>
> (Tr. II, 25).

30. A corporate decision maker's express statement of desire to remove employees in the protected group is direct evidence of discriminatory intent. *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985).

31. Although Nikolson did not personally select or hire Complainant he visited the Bedford location on several occasions. (Tr. II, 26).

32. A reasonable inference can be made that Nikolson was aware of the race of Complainant as well as the race of other non-management employees.

33. The Commission also established that Dugar was compelled to terminate Complainant to avoid the loss of his own job:

> Williams: And did...you have any conversation with Mr. Dugart where he in fact told you that he was being instructed to terminate Mr. Jackson?
>
> ***
>
> Thomas: I told him – after the conversation with Dave Nikolson I told him there was no way we were going to proceed with what they had said. Uh, Bob Dugart instructed me that he was going to lose his job if he didn't proceed and that he had started to terminate several of the people that Dave had instructed he wanted...fired.
>
> (Tr. II 36-37)

34. The Commission presented both direct and circumstantial evidence to show that Respondent's proffered reasons for terminating Complainant were pretextual and actually based upon racial animus. *Manzer, supra* at 1084.

35. After a careful review of the entire record, the ALJ is convinced that Respondent's action was motivated by an illegal discriminatory animus.

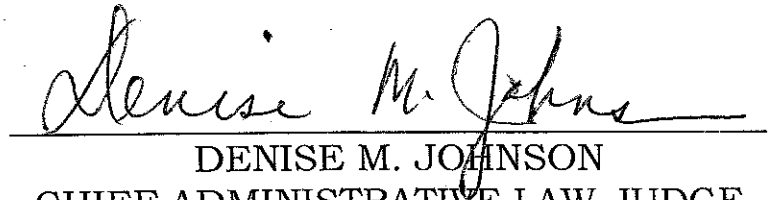
36. Complainant is therefore entitled to relief as a matter of law.

RECOMMENDATION

For all the foregoing reasons, it is recommended in Complaint No. 08-EMP-CLE-38438 that:

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

2. The Commission order Respondent within 10 days of the Commission's Final Order to pay Complainant back pay, including raises, benefits, and overtime pay based on the wages Complainant would have been paid had he not been terminated from employment from October 13, 2007 up until November 2008.[4]



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

October 31, 2012

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[4] Complainant worked six days a week and worked over 40 hours per week. He was paid at the rate of $11.00 per hour plus commission. His commission was based on a scale of $10 for each appointment; $15 for each car sold at the appointment; and $100 for each vehicle sold based solely on his own efforts (independently). (Tr. I, 11, 12, 24)