OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

SHEILA HUMBERT

Complainant

v.

Complaint No. 9989
(DAY) 76102904 (17048) 02152005
22A-2005-02253C

CASE LEASING & RENTAL, INC.
DBA BREAKAWAY TIKI BAR & GRILL

Respondent

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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INTRODUCTION AND PROCEDURAL HISTORY

Shelia Humbert (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on February 15, 2005.

The Commission investigated the charge and found probable cause that Case Leasing & Rental, Inc. dba Breakaway Tiki Bar & Grill (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.[1] The Commission subsequently issued a Complaint on February 2, 2006.

The Complaint alleged Respondent subjected Complainant to disparate terms and conditions of employment for reasons not applied equally to all persons without regard to their sex.

[1] In Respondent's Answer it denied that the Commission attempted conciliation.

Respondent filed an Answer to the Complaint on March 2, 2006. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.[2]

A public hearing was held on May 15, 2007 at the Mercer County Commissioners Building, 220 West Livingston Street, Celina, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing, consisting of 165 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission and Complainant on August 20, 2008; and by Respondent on September 12, 2008; and reply briefs filed by the Commission and Complainant on September 22, 2008.

[2] Respondent filed an Amended Answer on March 14, 2006.

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.

JURISDICTION

1. Complainant filed a sworn charge affidavit with the Commission on February 15, 2005.

2. Respondent is an employer with four (4) or more employees pursuant to R.C. 4112.01(A)(2)

3. The Commission determined on February 2, 2006 it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

4. The Commission sent a conciliation letter to Respondent's owner, Tom Case (Case) while he and Sharon Kingry (Kingry) were in Florida. (Tr. 39, 133, 152)

5. Kingry is Respondent's Vice President, Secretary, and Treasurer. (Tr. 120)

6. The Commission and Respondent had two or three telephone conversations regarding the conciliation letter. (Tr. 133, 152)

7. The Commission sent Complainant a copy of the proposed Conciliation Agreement and Consent Order (CACO) and called her in an attempt to complete the conciliation process. (Tr. 157-158)

8. Case signed the CACO, but Complainant contacted the Commission to communicate she did not want to sign the CACO in its present form. (Tr. 157)

COMPLAINANT'S EMPLOYMENT

9. Complainant applied for a full-time position as a cook at Respondent's on August 20, 2004 and was hired by Case's manager, Mary Leas (Leas), in September of 2004.

10. On October 5, 2004, before the opening of the restaurant, Case held an initial meeting with all of the cooks, who were all females.

11. During this meeting Case showed his appreciation for the cooks' work by hugging and kissing some of them. Complainant was one of the employees Case hugged and kissed on the cheek.

12. After the meeting Complainant told Mescher, Respondent's manager from August 2004 until February 2005, that she did not want Case hugging or kissing her. (Tr. 48, 106)

13. Mescher told Complainant not to worry about it and that she would take care of it. (Tr. 49)

14. On October 21, 2004, Respondent's employees were performing a trial run for an invitational business open house.

15. Complainant was going to the pantry to get something for food preparation, and Case was standing in the doorway. Case grabbed her wrists, pulled her toward him, and hugged her and kissed her on the lips. (Tr. 51)

16. Complainant told Case she did not want him touching her.

17. Complainant told Mescher about the incident and said she did not want Case to touch her. (Tr. 52)

18. The restaurant officially opened on the weekend of October 29, 2004. Complainant was working along with other staff members including: Case, Kingry,[3] Leas, Rachael Humbert,[4] Michael Andrade, Ann Drosher, and Alicia Corner.

19. There were problems with the breakers tripping off. After Complainant returned from her break Case asked her if she knew what was making the breakers blow. Complainant suspected it was the use of the microwave ovens.

20. Complainant and Case went over to the microwaves. Case unplugged one of them and handed Complainant the cord from underneath, and asked: "Can you feel me?"

21. Complainant responded that she could feel the cord.

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[3] Kingry is Case's fiancée.
[4] Complainant's daughter

22. Case walked over to the area where Complainant was standing, touched Complainant on the buttocks and asked: "Can you feel me now?"

23. Complainant became upset and told Case "don't be touching my butt". (Tr. 54)

24. Complainant started shaking and crying and went to the bathroom and locked the door. (Tr. 54)

25. Case later apologized for upsetting Complainant, and she reluctantly accepted his apology.

26. During the rest of the time that Complainant has been employed by Respondent, she and Case have had little to no contact with one another. (Tr. 66)

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.[5]

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

PROCEDURAL ISSUE: CONCILIATION

1. Prior to the issuance of a complaint and notice of administrative hearing the Commission is required to engage in the process of conciliation with Respondent. R.C. 4112.05(4) and (5):

> (....) If the commission determines after a preliminary investigation other than the one described in division (B)(3) of this section that it is probable that an unlawful discriminatory practice has been or is being engaged in, it shall endeavor to eliminate the practice by informal methods of conference, conciliation, and persuasion.
>
> (...) If the commission fails to effect the elimination of an unlawful discriminatory practice by informal methods of conference, conciliation, and persuasion under this section and to obtain voluntary compliance with this chapter, the commission shall issue and cause to be served upon any person, including the respondent against whom a complainant has filed a charge pursuant to division (B)(1) of this section, a complaint stating the charges involved and containing a notice of an opportunity for a hearing (...)

2. The Commission's administrative process regarding the filing of charges and conciliation efforts are analogous to the process under Title VII.[6]

3. For the conciliation effort to be considered in good faith, the Commission need only make a "good faith effort" by providing the employer with an adequate opportunity to respond to all charges and negotiate possible settlements. The Commission is under no duty to attempt further conciliation if the employer rejects its offer. *See EEOC v. KECO Industries*, 748 F.2d at 1101-02.

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[6] Sec. 2000e-5. *[§ 706]*

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title *[§ 703 or § 704]*.

(b) (...) If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

4. The "form and substance" of conciliation lies within the discretion of the Commission and are beyond judicial review. *Id.* at 1102.

5. The evidence introduced by the Commission supports a determination that the Commission attempted conciliation and, therefore, has jurisdiction to resolve the complaint. R.C. 4112.05(5).

6. The Commission alleged in the Complaint that Respondent subjected Complainant to disparate terms and conditions of employment for reasons not applied equally to all persons without regard to their sex.

7. 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.

8. 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).

9. 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).

10. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Administrative 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.*

11. 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).

12. 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.

13. 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).

14. To establish Complainant was subjected to a hostile work environment the Commission must offer credible evidence that the incidents complained of were multiple and varied combinations and frequencies of offensive exposures. *Rose v. Figgie Internationa*l, 56 FEP Cases 42, 44 (8th cir. 1990), *citing Rabidue v. Osceola Refining Div.*, 42 FEP Cases 631 (6th Cir. 1986) (plaintiffs must show that a hostile work environment resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that occurred with some frequency).

15. If Complainant did not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation. *Harris, supra* at 21-22.

16. However, Complainant's perception is one factor in determining whether the conduct complained of created a hostile work environment.

17. A "reasonable person" standard is used to determine the existence of a hostile work environment. The reasonable person standard has been explained by the U.S. Supreme Court as a standard that "... takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris, supra* at 21.

18. Complainant's testimony regarding incidents of inappropriate comments and conduct of a sexual nature can be summarized as follows:

- On October 5 Case hugged and kissed her on the cheek after a staff meeting. He kissed and hugged other females who were at the meeting. (Tr. 21)

- On October 21 Case grabbed Complainant by the wrists, pulled her toward him, hugged and kissed her on the lips at an invitational open house in the restaurant. He kissed and hugged other staff members who were at the meeting. (Tr. 23)

- On October 29 Case touched her on the buttocks during the time she was helping him determine the cause of a microwave oven outage in the kitchen. There were other employees who were in close proximity when the incident occurred. (Tr. 54)

19. Actual physical contact is not a touchstone triggering the applicability of Title VII. *See Ebert v. Lamar Truck Plaza*, 878 F.2d 338 [59 FEP Cases 1681] (10th Cir. 1989) (affirming district court finding that alleged unwelcome touching was sparse and not pervasive); *Scott v. Sears, Roebuck Co.*, 798 F.2d 210 [41 FEP Cases 805] (7th Cir. 1986) (plaintiff's working environment was held not to be sufficiently hostile, even though she had been slapped on the buttocks). In cases where courts have found physical contact to constitute harassment, the conduct has usually been much more egregious. *Gillum v. Federal Home Loan Bank*, 74 FEP Cases 787, 794 (D.C. Kan. 1997)(citations omitted).

20. Complainant testified that when she walked through the parking lot to enter the restaurant she observed Case sitting in his office in his underwear. (Tr. 59)

21. Complainant's daughter, Rachel Humbert, testified that she observed Case sitting at his desk in his underwear. She testified she believed Complainant had also observed Case sitting at his desk in his underwear on one occasion. (Tr. 83)

22. In examining all the circumstances, I find the conduct complained of by Complainant did not involve multiple and varied combinations and frequencies of offensive exposures.

23. A reasonable inference can be drawn from the credible evidence in the record that Case is a very emotional individual who likes to express his appreciation by having physical contact with a person:

> Mr. Schmidt: And could you tell Judge Johnson what happened at that information meeting [Oct. 5]?
>
> Ms. Humbert: Yes, we were asked to come in. All of the cooks and the kitchen help were asked to come in. It was all ladies in there and we sat at a table like this and then Mr. Case come in and he wanted to meet everybody and told us his vision that this restaurant meant to him was a vision that you know like something about his father. And uh, he got very emotional and started to cry. Um, and we all had to go around and tell him who we were, introduce ourself, if we were married or if we were single.

How many children did we have and stuff like that so that's what the meeting was about.

(Tr. 47)

Ms. Humbert: If you look on the side where it says serves, this is a big stainless steel type table and I was standing there and uh another cook in the kitchen was standing there. Mr. Case came up, put his arm around my shoulder, kissed me on the cheek and thanked me for the job that I was doing. I talked to Louie about this, my manager, I talked to her. I don't like anybody just walking up to me, hugging me, kissing me or any-I think there's other forms of appreciation. Don't touch me, don't kiss me. If you want to shake my hand that's fine. If you want to give me a little card of thank you-that's fine. But I did not want anyone, any man or him touching me period.

(Tr. 48)

24. I also found Case's testimony about his changing clothes in his office to be credible. Prior to the time he would start working at the Tiki Bar, Case worked at the Case Leasing Company in a uniform. Before going into the Tiki Bar he would change his clothes in his office. He testified that he would change his shirt at his desk and go into the back room to change his pants. (Tr. 134-136)

25. Even though Complainant may have subjectively been uncomfortable with Case's touching, in the social context of the Tiki Bar, Case expressed his appreciation to his employees in an emotional manner. I do not find that a reasonable person in the same situation would have found Case's conduct to be offensive.

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory "conditions of employment."
>
> *Oncale, supra* at 1003.

> Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. These standards are sufficiently demanding to ensure that Title VII does not become a general civility code. Properly applied, they will filter out complaints attaching the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing. We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Court of Appeals have heeded this view.
>
> *Faragher, supra* at 2283-2284 (citations and quotation marks omitted).

26. When Complainant let Case know that she did not appreciate being touched by him he honored her request.

27. The Commission failed to meet its burden of proof and persuasion that the conduct complained of by Complainant was hostile environment sexual harassment.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9989.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 24, 2010