

Memo

To: Desmon Martin, Chief of Enforcement and Compliance
From: Denise M. Johnson, Chief Administrative Law Judge
Date: July 15, 2010
Re: *Stephanie D. O'Neal v. M & M Paving*
(DAY) 76062904 (16956) 12102004
22A - 2005 - 01096C Complaint No. 9965

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT
ALJ RECOMMENDS CEASE & DESIST ORDER**

Report issued: July 9, 2010

Report mailed: July 9, 2010

**** Objections due: August 2, 2010**

DMJ:tg

INTRODUCTION AND PROCEDURAL HISTORY

Stephanie D. O'Neal (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on December 10, 2004.

The Commission investigated the charge and found probable cause that M & M Paving (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (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 17, 2005.¹

The Amended Complaint alleged the following: (1) that the Respondent subjected Complainant to unwanted and unwelcomed acts of a sexual nature, and in failing to take appropriate steps

¹ On October 6, 2006 the Commission filed a Motion to Amend the Complaint to include an allegation of retaliation. R.C. 4112.05.

necessary to eliminate sexual harassment from the workplace, had the purpose or effect of creating a sexually offensive, intimidating or hostile work environment, and (2) that Respondent terminated the Complainant's employment in retaliation for her complaining of sexual harassment in the workplace.

Respondent filed an Answer to the Amended Complaint on October 31, 2006.² 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 November 11, 2006 at the Municipal Building, 328 Maple Street, Eaton, Ohio.³

² Respondent filed an Answer to the Commission's Complaint on December 21, 2005.

³ Problems with the first transcriber involving length of time of transcription and quality led to more than a two-year period of time to obtain a transcript of the hearing. After securing the services of a new transcriber the transcript was received and briefing was underway on December 9, 2008.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 123 pages, exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on December 15, 2008; by Respondent on January 12, 2009; and a reply brief filed by the Commission on January 15, 2009.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the ALJ's 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 December 10, 2004.

2. The Commission determined on October 27, 2005 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 after conciliation failed. Thereafter, the Commission's complaint was amended to include a violation of R.C. 4112.02(I).

4. Complainant began her employment with Respondent in 2000 as a truck driver. She worked approximately eight (8) months out of the year. (Tr. 30, 33)

5. Respondent is owned by Marvin Mannings. His wife, Cheryl, assists with running the business. (Tr. 17-18, 20, 48, 102)

6. Amy Salyers, the Mannings' daughter, manages the office when her parents are out of town. (Tr. 20, 102)

7. Tom Montgomery (Montgomery) is Respondent's foreman and supervisor. Montgomery is Cheryl Mannings' brother. Complainant reported to Montgomery.

8. During Complainant's employment with Respondent, Respondent did not have a sexual harassment policy. (Tr. 70)

9. Complainant had attendance problems while she was employed with Respondent. (Tr. 20-21, 35, 65, 97)

10. Cheryl Mannings documented Complainant's attendance over the tenure of Complainant's employment with Respondent. (Tr. 70-71, Comm. Exs. 3, 5)

11. Marvin and Cheryl Mannings knew Complainant's parents. The Mannings were aware that Complainant had problems with drug abuse. They were tolerant toward her absenteeism because they had lost a son to drug abuse and did not want to see their friends go through the same thing. (Tr. 65)

12. The Mannings notified the employees that they would not be around in 2004 and Salyers and Montgomery would be in charge. (Tr. 38, 55-56)

13. On May 8, 2004, Complainant complained to Salyers that Montgomery had exposed his genitals to her on at least a dozen (12) occasions, in addition to groping her breast and buttocks. (Tr. 37-38, 87)

14. Additionally, Montgomery told Complainant to "suck his dick" and this made her feel uncomfortable. (Tr. 21-22)

15. Shortly after Complainant's complaint, Montgomery informed her that she was being placed on probation for missing

work without providing a doctor's statement. (Tr. 41-42, 102; Comm. Ex. 17)

16. Complainant had provided doctor's notes for her absences. (Tr. 42-44, Comm. Exs. 10, 13-14)

17. Montgomery made Complainant perform job duties that she had not been asked to perform before due to her back injuries. (Tr. 39)

18. On June 28, 2004, Montgomery put his hands up Complainant's shorts. (Tr. 40)

19. Complainant called the Mannings and Salyers, and left messages with all of them, specifically informing Salyers that she was filing sexual harassment charges. (Tr. 40-41, 54-55).

20. On June 29, 2004, Salyers called Complainant and informed her that Respondent "no longer needed" her. (Tr. 41)

CONCLUSIONS OF LAW AND DISCUSSION ⁴

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.

1. The Commission alleged in the Complaint that: (1) the Respondent subjected Complainant to unwanted and unwelcomed acts of a sexual nature, and in failing to take appropriate steps necessary to eliminate sexual harassment from the workplace,

⁴ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

had the purpose or effect of creating a sexually offensive, intimidating or hostile work environment, and (2) that Respondent terminated the Complainant's employment in retaliation for her complaining of sexual harassment in the workplace.

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; and
- (I) For any person to discriminate in any manner against another person because that person has opposed any unlawful 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.

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) and (I) 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 or retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

SEXUAL HARASSMENT

5. 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).

6. The Commission can establish a *prima facie* case of hostile environment sexual harassment by showing:

- (1) that the harassment was unwelcome;
- (2) that the harassment was based on sex;

- (3) that the harassing conduct was sufficiently severe or pervasive to affect the “terms, conditions, or privileges of employment”; and
- (4) that either (a) the harassment was committed by a supervisor, or (b) the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action.

Hampel v. Food Ingredients Specialties, (2000), 89 Ohio St. 3d 169, 176.

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.

9. 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 Oncale v. Sundowner Offshores Services, Inc., 523 U.S. 75 at 82 (1998).

10. Complainant made her objections to Montgomery’s behavior known to Montgomery and Sayler. Complainant told Sayler that Montgomery’s groping made her uncomfortable. (Tr. 22, 113-114)

11. Montgomery and Rex Larison (Larison), an asphalt roller for Respondent who had been employed with them for twenty (20) years, attempted to paint a picture of Complainant's engaging in sexual banter and exposing herself at the workplace. (Tr. 83, 86-88)

12. There is no explicit corroboration requirement in either R.C. Chapter 4112 or Title VII.

The credibility determinations are for the finder of fact. The finder of fact may credit either side's version of disputed facts whether or not there is corroboration if they find one witness's version more credible than the other witness's version.

Durham Life Insurance Co. v. Evans, 166 F. 3d 139, 147, n. 2 (3d Cir. 1999).

13. I did not find Montgomery's and Larison's testimony to be credible based on their demeanor and bias.

14. Additionally, evidence of Complainant engaging in sexual banter at the workplace is not, in and of itself, conclusive that the complained of conduct was consensual:

[I]t cannot be overemphasized that ... [an employee's] use of language or sexual innuendo in a consensual setting does not waive her legal protections against unwelcome harassment ... [The] use of vulgar language does not necessarily mean that she invited or welcomed what would otherwise be considered sexual harassment.

Nuri v. PRC, Inc., 13 F. Supp 2d 1296, 1301 (D. Ala. 1998) (citations and quotation marks omitted).

15. Montgomery admitted to exposing himself to Complainant on at least twelve (12) different occasions, in addition to touching her breast, buttocks, and vagina. (Tr. 86-89)

16. Montgomery subjected Complainant to sexual behavior because, as he testified: "(...) it was pretty exciting. I mean. I am a male." (Tr. 87)

17. Montgomery's behavior of a sexual nature was directed toward Complainant based on her sex.

18. Whether the discriminatory conduct unreasonably interfered with Complainant's work performance is one factor to be considered. The Commission, however, is not required to show that

Complainant's "tangible productivity ... declined as a result of the harassment." *Harris*, 63 FEP Cases at 229. (Justice Ginsburg's concurrence) *quoting Davis v. Monsanto Chemical Co.*, 47 FEP Cases 1825, 1828 (6th Cir. 1988). Instead, the Commission must demonstrate that a reasonable person subjected to the discriminatory conduct would find that the harassment so altered working conditions as to "ma[k]e it more difficult to do the job." *Id.*

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.

19. Complainant's credible testimony supports the conclusion Montgomery's conduct was unreasonable and interfered with the terms, conditions and privileges of her employment with Respondent:

Ms. Montgomery: Can you be more specific?

Ms. O'Neal: (Crying.) He opened the dump truck door and shoved his hand down my shorts.

Ms. Montgomery: And what did you do?

Ms. O'Neal: I told him that that was the last straw, that I wasn't going to put up with his doing that anymore and that um I would be contacting his boss. (Crying.)

(Tr. 115)

20. Based on the credible testimony in the record, a reasonable person would find the conduct of Montgomery toward Complainant was severe and pervasive, occurring on multiple occasions, which had the affect of creating a sexually hostile work environment.

RETALIATION

21. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission to 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. *Texas Dept. of Community Affairs v.*

Burdine, 450 U.S. 248, 254, 25 FEP Cases 113, 116, (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 n.8.

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* at 802, 5 FEP Cases 969, n.13. 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., 188 F. 3d 652 (6th Cir. 1999), *aff'd in part and rev'd in part*, 188 F. 3d 652 (N.D. Ohio 1997) (quotation marks omitted).

23. Complainant complained to Montgomery that she wanted him to stop the conduct of a sexual nature. When the conduct did not stop, she complained to Sayler about Montgomery.

24. Notes made by Cheryl Mannings indicate that she was informed on May 8, 2004 that Complainant reported to Salyers that Montgomery's behavior was causing Complainant "a lot of stress". (Comm. Ex. 5)

25. A reasonable inference can be drawn from Cheryl Mannings' notes that Salyers informed Cheryl Mannings about the sexual harassment complained of by Complainant.

26. In determining whether a causal connection exists, the proximity between the protected activity and the adverse employment action is often "telling." *Holland v. Jefferson Natl. Life Ins. Co.*, 88 F.2d 1307, 1315 (7th Cir. 1989), quoting *Reeder-Baker v. Lincoln Nat'l Corp.*, 649 F. Supp. 647, 657 (N.D. Ind. 1986). The closer the proximity between the protected activity and the adverse employment action, the stronger the inference of a causal

connection becomes. See *Johnson v. Sullivan*, 945 F. 2d 976 (7th Cir. 1991) (court held that plaintiff showed causal connection and established *prima facie* case of retaliation where plaintiff was discharged within days of filing a handicap and race discrimination lawsuit).

27. Within one (1) day after Complainant made the complaint to Salyers about Montgomery's unwelcomed conduct of a sexual nature, Manning instructed Salyers to terminate Complainant for attendance problems.

28. The Commission established a causal connection between Complainant's complaint about sexual harassment and her termination by Respondent.

29. 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* at 802, 5 FEP Cases at 969. 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.

30. Respondent met its burden of production with the introduction of evidence that Complainant was terminated due to attendance problems.

31. 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 reason for Complainant’s discharge was not its true reason, but was 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.

32. Thus, even if the Commission proves that Respondent’s articulated reason is 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.

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

33. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent’s articulated

reason for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *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 reason 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.⁵

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

34. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084.

⁵ 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.

This type of showing, which tends to prove that the reason 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.*

35. Respondent's articulated reason that Complainant was terminated for attendance lacks credibility.

36. The notes referred to by Cheryl Mannings purportedly documented attendance issues starting from 2003.

37. Complainant was never disciplined for attendance problems prior to her complaining about sexual harassment to Montgomery and Salyers.

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

39. The ALJ is convinced that Respondent terminated Complainant because she opposed 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. 9965 that:

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

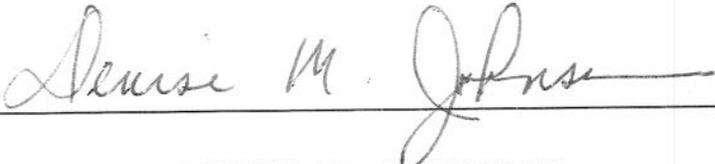
2. The Commission order Respondent to make an offer of employment to Complainant within ten (10) days of the Commission's Final Order for the position of truck driver. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a truck driver on June 28, 2004 and continued to be so employed up to the date of Respondent's offer of employment;

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within ten (10) days of its offer of employment a certified check payable to Complainant for the amount that Complainant would have earned had she been employed as a truck driver 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;⁶ and

4. The Commission order Respondent to receive sexual harassment training and submit to the Commission a copy of its sexual harassment policy within six (6) months of the date of the Commission's Final Order. As proof of participation in sexual harassment training, Respondent shall submit certification from the sexual harassment trainer or provider of services that Respondent has successfully completed sexual harassment training. The letter

⁶ Any ambiguity in the amount that Complainant would have earned during this period or benefits that he would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

of certification shall be submitted to the Commission's Office of Special Investigations within seven (7) months of the date of the Commission's Final Order.

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

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

July 9, 2010