

## INTRODUCTION AND PROCEDURAL HISTORY

Sheila Buell-Crowe (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 23, 1998.

The Commission investigated the charge and found probable cause that Goodlife, Inc. (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 January 7, 1999.

The Complaint alleged that Respondent's president, Dr. Patrick Corp, sexually harassed Complainant and discharged her because of her disability.

Respondent filed an Answer to the Complaint on February 3, 1999. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on October 3, 2000 at the DiSalle Government Building in Toledo, Ohio. The Commission did not present any evidence on the issue of sexual harassment at the hearing.<sup>1</sup>

The record consists of the previously described pleadings, a transcript of the hearing consisting of 215 pages, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on December 18, 2000 and by Respondent on January 9, 2001.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the Hearing Examiner's assessment of the credibility of the witnesses who testified before him in this matter. The Hearing Examiner has applied the tests of worthiness of belief used in current Ohio practice. For example, he considered each witness's appearance and demeanor while testifying. He

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<sup>1</sup> The Commission's counsel previously informed the Hearing Examiner at a status conference that there was insufficient evidence to proceed on the sexual harassment allegation.

considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He 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 Hearing Examiner 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 23, 1998.

2. The Commission determined on October 29, 1998 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.

4. Respondent is a corporation and an employer doing business in Ohio. Respondent provides psychiatric and counseling services in Holland, Ohio and surrounding areas.<sup>2</sup> Respondent's president is Dr. Patrick Corp, a licensed physician.

5. Respondent hired Complainant in January 1994. Complainant worked as a psychotherapist. Complainant provided individual and group therapy to clients that she brought from her previous employment and others she developed while employed by Respondent.

6. On the night of February 13, 1997, Complainant was asleep in bed at her condominium. Around 3:35 a.m., Complainant felt a hand "running up" her body to her "groin area." (Tr. 31) Complainant grabbed the intruder's arm and told him to stop. The intruder, who was undressed, told Complainant that he was one of her clients. Complainant recognized Stephen Whitner as the intruder and told him that he was not her

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<sup>2</sup> Holland is located in Lucas County near Toledo.

client.<sup>3</sup> Complainant attempted to calm Whitner down, but he “bolted” when she let go of his arm. *Id.* Complainant then called 911.

7. Complainant called Robert Kahl later that day. Kahl was Complainant’s immediate supervisor and Respondent’s president at the time. Complainant informed Kahl about the incident and reported off work.

8. After the incident, Complainant had difficulty sleeping in her condominium. She was anxious about being alone there. She withdrew from her friends and family. While at home, Complainant was capable of caring for herself and performing manual tasks.

9. Complainant returned to work a “couple [of] days” after the incident. (Tr. 10) She was “visibly shaken” upon her return. (Tr. 133) Complainant told Kahl and Dr. Corp about the anxiety that she experienced at her condominium and her difficulty sleeping there.

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<sup>3</sup> Complainant knew Whitner because he had previously entered her condominium and masturbated in her daughters’ room while they were sleeping. Complainant was shocked by Whitner’s presence in February 1997 because she believed that he was in prison for attempted rape of another woman.

Dr. Corp provided Complainant Zanex to relieve her anxiety and Ambien to help her sleep.

10. Complainant did not have any difficulty returning to work; her ability to perform her job was unaffected by the incident. She felt safer at work than in her condominium.

11. Kahl left the practice in early May 1997. Dr. Corp replaced him as Respondent's president. Later that month, Dr. Corp informed Respondent's office manager, Dana Achinger, about his decision to discharge Complainant. Dr. Corp told Achinger that Complainant had become "a liability" to the practice after the sexual assault. (Tr. 92) Dr. Corp also told Achinger that Complainant had "lost it" and was "crazy". (Tr. 92, 110)

12. On May 27, 1997, Dr. Corp provided Complainant written notice that her employment contract would be terminated in 90 days. (Comm.Ex. A) This notice did not provide any reason for Complainant's discharge. Complainant was "doing better" with her anxiety and sleeping problems by this time. (Tr. 88)

13. Over the next few months, Complainant pressed Dr. Corp about his reasons for her discharge. Dr. Corp usually refused to talk with Complainant about the matter. On one occasion, Dr. Corp told Complainant that he discharged her “because of the political ramifications of the Steven Whitner case.” (Tr. 13, 81)

14. Meanwhile, Dr. Corp and Achinger had several discussions about Complainant’s discharge. Dr. Corp repeated his comment that Complainant was “crazy” and added that she appeared “worn out.” (Tr. 112) Dr. Corp also mentioned that the media coverage of the sexual assault was “bad publicity” for the practice. (Tr. 93, 96) Complainant’s anxiety and sleeping problems were “much better” during the summer months. (Tr. 88)

15. On August 15, 1997, Complainant submitted a physician’s statement to Dr. Corp from David Cislo, a clinical psychologist. (Comm.Ex. B) The statement indicated that Cislo had been treating Complainant for post-traumatic stress disorder since April 1997. The statement further indicated that Complainant’s condition stemmed from “the sexual assault[,] which occurred earlier this year.” *Id.*

16. Cislo informed Dr. Corp in the statement that Complainant was “becoming increasingly anxious” as the 90-day deadline approached. *Id.* Cislo asked Dr. Corp to “definitely confirm” whether Complainant’s employment would end on August 27, 1997 or continue thereafter. *Id.* Cislo indicated that such confirmation would decrease Complainant’s anxiety and “help her move forward.” *Id.*

17. Dr. Corp did not respond to Cislo’s letter. Complainant then approached Dr. Corp about extending her termination date. On August 26, 1997, Dr. Corp and Complainant agreed to extend her employment for another 30 days. (Comm.Ex. C) Complainant worked for Respondent until her discharge became effective on September 30, 1997.

## **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.

1. The Commission alleged in the Complaint that Respondent discharged her because of her disability.

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 . . . disability, . . . 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 the Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

5. The order of proof in a disability discrimination case requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

- (1) Complainant is disabled under R.C. 4112.01(A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant's disability.

*McGlone, supra* at 571 (citation omitted).

6. R.C. 4112.01(A)(13) defines "Disability" as:

. . . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.<sup>4</sup>

7. It is undisputed in this case that David Cislo, a clinical psychologist, diagnosed Complainant as having post-traumatic stress disorder in April 1997. Although this condition is a mental impairment, the first part of R.C. 4112.01(A)(13) requires the Commission to show that

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<sup>4</sup> The ADA's definition of disability under 42 U.S.C. § 12102(2) is substantially the same as R.C. 4112.01(A)(13).

Complainant has an actual disability.<sup>5</sup> The Commission must prove that

Complainant's condition substantially limits one or more major activities:

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual.

*Interpretive Guidance of Title I of the Americans with Disabilities Act (EEOC Interpretive Guidance)*, 29 C.F.R. pt. 1630 App., § 1630.2(j).

8. Major life activities are “those basic activities that the average person in the general population can perform with little or no difficulty.” *EEOC Interpretive Guidance*, at § 1630.2(i). Such activities include, but are not limited to, “caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working, . . . sitting, standing, lifting, and reaching.” *Id.* (legislative citations omitted).

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<sup>5</sup> The Commission does not argue that Complainant had a record of a substantially limiting impairment. Nor does the Commission argue that Respondent perceived Complainant to have such an impairment.

9. Three factors should be considered when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) The nature and severity of the impairment;
- (2) The duration or expected duration of the impairment; and
- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j)(2).

This determination, which must be made on a case-by-case basis, requires comparison with the abilities of the average person.

An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the . . . [three factors], does not amount to a significant restriction when compared with the abilities of the average person.

*EEOC Interpretive Guidance*, at § 1630.2(j).

10. Other than Complainant's testimony, the Commission relies on Cislo's diagnosis that Complainant suffered from post-traumatic stress disorder. The only letter that Cislo sent to Respondent about Complainant's condition refers to her anxiety about the uncertainty of her future employment with Respondent. This letter, which was sent approximately two weeks before Complainant's employment was supposed

to end, merely informed Dr. Corp that Cislo had been treating Complainant for post-traumatic stress disorder since April 1997. It does not mention anything about the nature, severity, or the expected duration of Complainant's condition. There is no evidence in the record to conclude that Complainant's condition had a permanent or long-term impact, or was expected to have such an impact, on her ability to perform one or more major life activities.

11. The evidence suggests that if Complainant's condition substantially limited her ability to sleep or perform other major life activities, it was only temporary.<sup>6</sup> Complainant acknowledged that she was "doing better" by the time she received her initial discharge notice in late May 1997. (Tr. 88) In fact, Complainant's condition continued to improve throughout the summer of 1997. Complainant testified that her condition was "much better" during that time. (Tr. 83)

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<sup>6</sup> The Commission does not argue that Complainant's condition substantially limits the major life activity of working. Complainant's testimony demonstrates that her condition did not affect her ability to perform her job. Complainant's problems related to the anxiety that she felt at home and her difficulty sleeping there.

12. Federal courts and the EEOC do not consider persons with temporary impairments to be disabled. See 29 C.F.R. Pt. 1630, App. § 1630.2(j) (“temporary, non-chronic impairments of short duration, with little or no long-term or permanent impact, are usually not disabilities”); *Sanders v. Arneson Products, Inc.*, 91 F.3d 1351 (temporary psychological impairment lasting less than four months was not a disability under the ADA).

Applying the protections of the ADA to temporary impairments . . . would work a significant expansion of the Act. The ADA simply was not designed to protect the public from all adverse effects of ill-health and misfortune. Rather, the ADA was designed to assure that truly disabled, but genuinely capable, individuals will not face discrimination in employment because of stereotypes about the insurmountability of their handicaps . . . .

*Halperin v. Abacus Technology Corp.*, 128 F.3d 191, 200 (4<sup>th</sup> Cir. 1997) (citation omitted).

13. Ohio courts have reached the same conclusion in interpreting R.C. 4112.01(A)(13)—temporary impairments with no or minimal residual effects are not disabilities under the state’s anti-discrimination laws. *Markham v. Earle M. Jorgensen & Co.*, 741 N.E.2d 618 (Ohio App., 8<sup>th</sup> Dist., 2000); *Mahoney v. Barberton Citizens Hosp.*, 672 N.E.2d 223 (Ohio App., 9<sup>th</sup> Dist., 1996). Like the employee in *Mahoney*, the Commission

does not claim that Complainant's condition "had or will have any long term effect." *Id.*, at 226. A diagnosis of post-traumatic stress disorder, without more, is insufficient to establish that Complainant has an actual disability as defined by R.C. 4112.01(A)(13). See *Hamilton v. Southwestern Bell Telephone Co.*, 136 F.3d 1047 (5<sup>th</sup> Cir. 1998) (temporary episode of post-traumatic stress disorder did not rise to disability under the ADA).

14. After a careful review of the entire record, there is insufficient evidence to conclude that Complainant has an impairment that substantially limits a major life activity. Since the Commission failed to prove that Complainant has a disability under the statute, the Complaint must be dismissed.

## RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint #8457.

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TODD W. EVANS  
HEARING EXAMINER

April 9, 2001