

INTRODUCTION AND PROCEDURAL HISTORY

Valencia Jones (Complainant) filed sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 7, 2000.

The Commission investigated the charge and found probable cause that Morgan's Foods, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code (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 October 26, 2000. The Complaint alleged that Respondent discharged Complainant because of her race and age.

Respondent filed an Answer on November 24, 2000. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also denied that the Commission attempted and failed to conciliate this matter prior to issuing the Complaint.

A public hearing was held on June 14 and August 2, 2001 at a Mahoning County Courtroom in Canfield, Ohio.

The record consists of the previously described pleadings, a 285-page transcript of the hearing, exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on January 9, 2002 and by Respondent on March 15, 2002.

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 considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. He 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 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 7, 2000.

2. The Commission determined on August 31, 2000 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 case by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.¹

4. Respondent is a corporation and an employer doing business in northeast Ohio. Respondent owns and operates a number of fast food restaurants in the area. Jim Valerio is the Market Manager who oversees

¹ Respondent stipulated at the hearing that the Commission attempted to conciliate this matter without success. (Tr. 1-2)

these restaurants. The general managers from each restaurant report directly to him.

5. Complainant was born on September 3, 1956. She is a black person.

6. Respondent hired Complainant in late September 1998. She worked as a Taco Bell person at the Taco Bell/Kentucky Fried Chicken on South Avenue in Youngstown, Ohio.² Her primary duty was to prepare the various food items offered by Taco Bell. Wade Hartzell, a white person, was the general manager of the store at the time.

7. In late August 1999, Jennifer Focht, a white person, replaced Hartzell as general manager. Complainant, who had a good working relationship with Hartzell, had difficulty working with Focht from the outset. (Tr. 188-89, 218) Most of their problems stemmed from Complainant's failure to follow procedures. For example, Complainant did not adhere to Respondent's weight limitations on certain food items. Complainant disagreed with Focht's instruction to put less food in each order.

² These restaurants were located in the same building.

Complainant often expressed her displeasure with Focht to coworkers and Lyndel Washington, the assistant manager.³

8. On Friday, November 12, 1999, Complainant reported to work the afternoon shift from 4 p.m. to 12 a.m. Shortly after her arrival, Focht and Washington heard Complainant making negative remarks about a coworker. They decided to call Complainant into the back office to discuss the matter.

9. Washington began talking to Complainant about making negative remarks about coworkers. At some point, Complainant expressed her dislike for Focht. Focht told Complainant that she did not have to like her, but she had to follow the company's rules. Focht told Complainant that if she did not want to follow the rules, then she could leave. Complainant became extremely upset. (Tr. 12) Complainant gathered her belongings and left the premises.

³ Washington is a black person.

10. Approximately 20 minutes later, Complainant's daughter, Nicole Jones, came to the restaurant. She was "very upset." (Tr. 183) She demanded access to the security door. She demanded that Focht come out of the office so she could "kick her ass." (Tr. 184) Washington prevented Jones from going behind the counter and attempted to calm her down.

11. Meanwhile, Focht was in the office and heard Complainant "ranting". (Tr. 224) Focht locked the office door and stayed inside. Focht called the police shortly after Jones left.

12. Focht made a statement to the police when they arrived at the restaurant. Focht then called Valerio and told him about the incident. Focht was "still upset" and afraid for her safety at that time. (Tr. 229, 259) Valerio attempted to allay Focht's fear. Valerio also instructed Focht to prepare a Personnel Action Form (PAF) and send it to him when she had the chance. Focht made arrangements for another employee to cover for Complainant that night.

13. Focht also began making arrangements for other employees to cover for Complainant for the following week.⁴ Complainant called the restaurant on Saturday and talked with a coworker. The coworker informed Complainant that her name had been “scratched off” the schedule. (Tr. 15)

14. Complainant then called her second cousin, Lynelle McIntosh, at another restaurant owned by Respondent.⁵ Complainant told McIntosh that she had been removed from the schedule. Washington “happened” to be at the restaurant at the time of the call. (Tr. 98) Washington advised Complainant that Respondent considered her to have quit her employment.

15. Focht prepared a PAF on November 15, 1999. (Comm.Ex. 2) The PAF indicated that Complainant resigned. Valerio approved the PAF on November 19, 1999.

⁴ Focht and Washington usually prepared work schedules on Wednesday for the following week. The work schedules were posted on a bulletin board at the restaurant.

⁵ McIntosh was an assistant manager for Respondent. She worked at three different locations, including the South Avenue restaurant, from June to December 1999. Respondent discharged McIntosh because of poor work performance. (R.Ex. C)

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 Complainant because of her race.⁶

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

⁶ The Complaint also alleged that Respondent discharged Complainant because of her age. The Commission did not present any evidence or argument on this allegation. Since the Commission has abandoned this allegation, the Hearing Examiner will not address it.

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, 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. Under Title VII case law, the Commission is usually required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792 (1973). The proof required to establish a *prima facie* case may vary on a case-by-

case basis. *Id.*, at 802, n.13. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action. *McDonnell Douglas*, *supra* at 802. 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.⁷

St. Mary’s Honor Center v. Hicks, 509 U.S. 502, 507 (1993), quoting *Burdine*, *supra* at 254-55, n.8.

⁷ 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.

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 reasoning was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations and footnote omitted).

The presumption 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.

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of legitimate, nondiscriminatory reason for the end of Complainant’s employment removes any need to determine whether the Commission proved a *prima facie* case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 713 (1983), *quoting Burdine, supra* at 255.

Where the defendant has done everything that would be required of him if the plaintiff has properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

Aikens, supra at 713.

8. Respondent met its burden of production with testimony and documentary evidence showing that Complainant resigned her employment. Focht, the general manager, testified that Respondent considered Complainant to have resigned because she walked off the job during her shift and never contacted management afterwards. The

Personnel Action Form, prepared by Focht on November 15, 1999, indicated that Complainant resigned her employment. (Comm.Ex. 2)

9. Respondent having met its burden of production, the inquiry moves to the ultimate issue of the case, i.e., whether Respondent discharge Complainant because of her race. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for the end of Complainant's employment was not its true reason, but was "a pretext for discrimination." *Hicks, supra* at 515, quoting *Burdine, supra* at 253.

[A] reason cannot be proved to 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.

10. 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 race is correct. That remains a question for the factfinder to answer

Id., at 524.

In other words, “[i]t is not enough . . . to *disbelieve* the employer, the factfinder must *believe* the . . . [Commission’s] explanation of intentional discrimination.” *Id.*, at 519. Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of race discrimination.

11. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent’s articulated reason for the end of Complainant’s employment. The Commission may directly challenge the credibility of Respondent’s articulated reason by showing that the reason had no basis *in fact* or were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994); *See also Dews v. A.B. Dick Co.*, 231 F.3d 1016, 1021, (6th Cir. 2000). Such direct attacks, if successful, permit the factfinder 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.

Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of discrimination, and . . . no additional proof of discrimination is *required*.⁸

Hicks, supra at 511, (bracket removed); *See also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2108 (2000).

12. 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" that the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084. 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.*

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged that Nicole Gettings, a white person, walked off the job during her shift, and Respondent did not treat her as having resigned her employment.

⁸ 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* 511, n.4.

14. Proof of disparate treatment requires similarly situated comparatives. The Commission must show that the comparatives were “similarly situated in all respects”:

Thus to be deemed “similarly situated”, the individuals with whom . . . [Complainant] seeks to compare . . . her treatment must have dealt with the same supervisor, and have been subject to the same standards, and have engaged in the same conduct without such differentiating and mitigating circumstances that would distinguish their conduct or the employer’s treatment of them for it.

Mitchell v. Toledo Hospital, 964 F.2d 577, 583 (6th Cir. 1992) (citations omitted).

15. To be deemed similarly situated, “a precise equivalence in culpability” is not required; misconduct of “comparable seriousness” may suffice. *Harrison v. Metro. Gov’t. of Nashville and Davidson Cty.*, 80 F.3d 1107, 1115 (6th Cir. 1996) (citations omitted). Likewise, similarly situated employees “need not hold the exact same jobs; however, their duties[,] responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.” *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993) *citing Mitchell* at 583, n. 5.

16. Although Complainant and Gettings engaged in similar conduct by walking off the job, the Commission failed to show that they were similarly situated in all respects.⁹ For example, when Gettings walked off the job in August 1999, Wade Hartzell was the general manager of the restaurant rather than Jennifer Focht. Unlike Complainant, Gettings was training to be supervisor and rated as “a star employee” at the time. (Tr. 96)

17. The evidence also shows that Gettings contacted management after she walked off her shift. (Tr. 94-95) In comparison, the Hearing Examiner credited Focht’s and Valerio’s testimony that Complainant never contacted them about returning to work. Valerio’s secretary, Josephine Bigley, provided an affidavit stating that she never received a voice message from Complainant in November 1999. (R.Ex. G) Complainant acknowledged that she did not return to the restaurant to talk with Focht or Valerio in person even though she lives within close proximity. (Tr. 89, 230)

⁹ The Hearing Examiner credited McIntosh’s testimony that Gettings walked off the job after a dispute with her in August 1999. McIntosh’s testimony on this issue and others was candid. (See Conclusions of Law, paragraphs 19, 20)

18. Other circumstances explain why Respondent considered Complainant to have resigned. Complainant walked off the job immediately after Focht told her that if she did not want to follow the rules, then she could leave. Approximately 20 minutes later, Complainant's daughter arrived at the restaurant threatening Focht with bodily harm. Under the circumstances, Focht reasonably concluded that Complainant resigned her employment. As discussed, Complainant never took any actions to dispel this conclusion.

19. The Hearing Examiner also considered testimony that casts doubt on whether Complainant wanted to return to the restaurant after the incident. McIntosh, a relative of Complainant, testified that Complainant told Washington during their conversation on November 13, 1999 that "she didn't want to go back there, she just want to be done with" (Tr. 98)

20. Lastly, there is no evidence that Focht, or Valerio for that matter, harbored a discriminatory animus toward Complainant because of her race or black persons in general. In November 1999, most of Respondent's employees at the South Avenue restaurant were black persons. Kimberly

West and Lyndell Washington, both black persons, testified that they had a good working relationship with Focht. McIntosh, who is also black, testified that Valerio is “an upstanding person” who grew up with her in Campbell on the east side of Youngstown. (Tr. 110) McIntosh described Campbell as a “melting pot” where people are raised to “get along with other races.” *Id.*

CONCLUSION

21. After a careful review of the entire record, the Hearing Examiner is not convinced that Complainant was a victim of race discrimination. The Commission failed to prove that Respondent’s articulated reason for the end of Complainant’s employment was a pretext or cover up for race discrimination. Respondent reasonably believed that Complainant quit her employment under the circumstances.

RECOMMENDATION

For all of the foregoing reasons, the Hearing Examiner recommends that the Commission issue a Dismissal Order in Complaint #8896.

TODD W. EVANS
HEARING EXAMINER

March 26, 2002