

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**ALBERT STEVENS**

Complainant

and

**MICHELIN NORTH AMERICA, INC.**

Respondent

Complaint No. 8953

(AKR) 73030400 (24608) 030900

22A – A0 – 5390

**CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,**

**CONCLUSIONS OF LAW, AND RECOMMENDATION**

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**ALJ'S REPORT BY:**

Denise M. Johnson  
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## INTRODUCTION AND PROCEDURAL HISTORY

Albert Stevens (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 9, 2000.

The Commission investigated the charge and found probable cause that Michelin North America, 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 4, 2001.

The Complaint alleged that Respondent denied Complainant hire because of his race.

Respondent filed an Amended Answer to the Complaint on April 26, 2001. 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 5-6, 2002 at the Akron Government Building in Akron, Ohio.

The record consists of the previously-described pleadings, a transcript of the hearing (254 pages), exhibits admitted into evidence during the hearing, and post-hearing briefs filed by the Commission on January 14, 2003, and by Respondent on February 18, 2003, and a reply brief filed by the Commission on February 24, 2003.<sup>1</sup>

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<sup>1</sup> On January 31, 2003, Respondent filed a Motion for Extension of Time to file their reply brief. Due to the elimination of Judge Todd Evans' position, the motion was not discovered until well after Respondent's reply brief was filed. On February 24, 2003, Counsel for the Commission filed a Motion to Strike Brief and Motion to Strike Exhibits and Reply Brief. On March 4, 2003, Counsel for Respondent filed a Response and Cross Motion to Strike.

The Commission's Motion to Strike Respondent's post-hearing brief is **denied**; Respondent's Cross Motion to Strike is **denied**. The Commission's Motion to Strike Exhibit B is **granted**.

## **FINDINGS OF FACT**

The following findings of fact are based, in part, upon the assessment of the Administrative Law Judge (ALJ) of the credibility of the witnesses who testified before the ALJ in this matter. 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 March 9, 2000.

2. The Commission determined on November 16, 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 matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a corporation doing business in Ohio and an employer.

5. Complainant is an African-American.

6. During the latter part of 1999 to early 2000 Respondent initiated a hiring campaign anticipating hiring between six (6) to eight (8) people.

7. Respondent faxed information to the Ohio Bureau of Employment Services (OBES) regarding its campaign to recruit production operators.

8. OBES sent Respondent all completed applications, which included Complainant's application.

9. The applications were reviewed separately by Terry Pelton, plant manager; Bob Mooney, supervisor for shipping and receiving and testing; David Gray, acting plant manager at Respondent's Magadore Facility, and Wayne Conmony, an industrial engineer.

10. The applications were then reviewed by Mooney, Conmony, and Gray as a group to check work history and attendance, in addition to other things. The applications were then separated into testing and non-testing piles.

11. The test was conducted at OBES and someone from Respondent's Personnel Department graded the test.

12. Only those candidates whose applications had been reviewed by the group and achieved a certain score were selected for interviews.

13. Complainant's application was placed in the group of applications where candidates were given interviews.

14. Conmony, Mooney, Gray, and Herb Harris, a representative from Respondent's Personnel Department, interviewed the candidates.

15. Each candidate interviewed with each interviewer separately.
  
16. After each interview session, the interviewers met as a group to discuss the candidates.
  
17. The group of interviewers had a concern about Complainant's reasons for his separation from his last place of employment.
  
18. For this hiring campaign between forty (40) to sixty (60) people were interviewed.
  
19. As a result of the hiring campaign, Respondent hired nine (9) candidates between the dates of March 27 – April 3, 2000. Of the new hires, eight (8) are Caucasian and one (1) is African-American.
  
20. Complainant was not offered a position.

## 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.<sup>2</sup>

1. The Commission alleged in the Complaint that Respondent denied Complainant hire because of his race.

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

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<sup>2</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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 normally 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, 5 FEP Cases 965 (1973). The proof required to establish a

*prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases at 969, 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, 25 FEP Cases 113 (1981).

6. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for its employment action.<sup>3</sup> *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.

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<sup>3</sup> 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 . . . [denial of hire]; 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.*, 60 FEP Cases 814, 817 (10<sup>th</sup> 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 its employment action. *Hicks, supra* at 511, 62 FEP Cases at 100.

7. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of a legitimate, nondiscriminatory reason for refusing to hire Complainant 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, 31 FEP Cases 609, 611 (1983), *quoting Burdine, supra* at 255, 25 FEP Cases at 116.

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, 31 FEP Cases at 611.

8. Respondent met its burden of production by articulating that the reason Complainant was not hired was due to his involuntary termination from his previous place of employment during his probationary period. Complainant's termination was based on his attendance.

9. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant. *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 refusing to hire Complainant was not the true reason, but was "a pretext for discrimination." *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine, supra* at 253, 25 FEP Cases at 115.

[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, 62 FEP Cases at 102.

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, 62 FEP Cases at 106.

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 refusing to hire Complainant.

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.<sup>4</sup>

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

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<sup>4</sup> 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, 62 FEP Cases at 100, n.4.

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 attempted to attack the credibility of Respondent's articulated reason in addition to showing that a non-minority comparable was treated differently.

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 . . . 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*, 59 FEP Cases 76, 81 (6<sup>th</sup> 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.*, 73 FEP Cases 109, 115 (6<sup>th</sup> Cir. 1996) (quotations omitted).

16. Respondent argues that the Commission failed to prove that Complainant was treated differently than similarly-situated white employees. This argument is well taken. The record is void of any evidence that white candidates who were hired had comparable work records to Complainant’s work record (terminated for attendance).

17. While the ALJ agrees that there was conflicting testimony about the facts surrounding Respondent’s reference check regarding Complainant’s termination from his previous employment, this case lacks

the “suspicion of mendacity” that is mentioned in the *Hicks* case. *Hicks, supra* at 511, 62 FEP Cases at 100. In other words, the ALJ does not believe that Respondent’s articulated reason was a cover-up for race discrimination.

18. Complainant invited Respondent to check with his previous employer regarding the reasons for his termination. Even though Respondent’s employees chose to contact individuals who they had a personal relationship with at Complainant’s previous place of employment, there was nothing in the record to suggest that it was done because of Complainant’s race.

19. One of Respondent’s objective criteria for successful candidates was that they have a good attendance record.

[A] plaintiff may not establish that an employer’s proffered reason is pretextual merely by questioning the wisdom of the employer’s reason, at least not where, as here, the reason is one that might motivate a reasonable employer.

*Combs v. Meadowcraft, Inc.*, 73 FEP Cases 232, 249 (11<sup>th</sup> Cir. 1997).

## **RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 8953.

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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

June 30, 2004