

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**TAMMY A. GREER**

Complainant

and

Complaint #9148  
(CLE) E4060100 (32481) 110600

**LAZLO TEMESI D/B/A  
VILLAGE SQUARE JEWELERS**

Respondent

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

**CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

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**Complainant**

**ALJ'S REPORT BY:**

Denise M. Johnson  
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## **INTRODUCTION AND PROCEDURAL HISTORY**

Tammy A. Greer (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on November 6, 2000.

The Commission investigated the charge and found probable cause that Lazlo Temesi d/b/a Village Square Jewelers (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on July 19, 2001.

The Complaint alleged that Respondent filed a suit against Complainant in retaliation for having engaged in protected activity by filing suit against Respondent for sexual harassment.

Respondent filed an Answer to the Complaint on February 14, 2002.

No public hearing was held based upon the Admissions of Respondent and by stipulations of the parties. Briefs were filed by the Commission on August 9, 2002 and by Respondent on September 3, 2002. The Commission's reply brief was filed on September 16, 2002.

### **FINDINGS OF FACT**

1. Complainant filed a sworn charge affidavit with the Commission on November 6, 2000.

2. The Commission determined on July 19, 2001 that it was probable that Respondent engaged in unlawful retaliation in violation of R.C. 4112.02(I).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

## CONCLUSIONS OF LAW AND DISCUSSION

The 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.

1. The Commission alleged in the Complaint, *inter alia*, that Respondent filed suit against Complainant, seeking \$70,000 in damages, in retaliation for her having engaged in protected activity by filing suit against Respondent for sexual harassment.

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

It shall be an unlawful discriminatory practice:

- (I) For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory 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(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 retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. 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.”

6. In the present case, where the adverse action complained of occurs after the employment relationship has ended, the Commission can establish a *prima facie* case of retaliation by demonstrating the following:

1. That the Complainant engaged in a protected activity by participating in a proceeding involving an alleged violation of R.C. 4112.02;
2. That the Complainant subsequently suffered an adverse action by the Respondent; and
3. That there is a causal connection between the protected activity and the adverse action.

*Hollins v. Atlantic Co., Inc.*, 188 F. 3d 652 (6<sup>th</sup> Cir. 1999); *Jackson v. Pepsi Cola*, 40 FEP Cases 222.

7. 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.<sup>1</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.

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, 62 FEP Cases at 100.

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<sup>1</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 [retaliation]; 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).

8. 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 filing a lawsuit against 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.

9. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because she engaged in protected activity. *Hicks*, *supra* at 511, 62 FEP Cases at 100.

10. The retaliation provision under R.C. 4112.02(I) contains an opposition clause and a participation clause. Since courts have analyzed

these clauses differently, it is important to focus on the nature of the alleged protected activity.

The distinction between employee activities protected by the participation clause and those protected by the opposition clause is important because federal courts have generally granted less protection for opposition than participation.

*Aldridge v. Tougaloo College*, 64 FEP Cases 708, 711 (S.D. Miss. 1994), *citing Brown v. Williamson Tobacco Co.*, 50 FEP Cases 365 (6<sup>th</sup> Cir. 1989).

Courts usually grant absolute protection for participation activities, such as filing a discrimination charge, testifying in civil rights proceedings, or otherwise participating in such proceedings. *Proulx v. CitiBank*, 44 FEP Cases 371 (S.D.N.Y. 1987).

11. In the present case Respondent asserts that the Commission's case fails to state a claim for which relief can be granted under R.C. 4112.02(I) based on the following defenses:

1. Complainant was not an employee of Respondent at the time that the alleged retaliatory conduct occurred; and
2. The filing of a lawsuit against a former employee who opposed alleged discriminatory conduct by filing a lawsuit against Respondent is not *per se* retaliatory conduct.

12. Respondent's position ignores the policy underlying Title VII and relevant case law.

13. Title VII was enacted to establish a federal right to equal opportunity in employment. [See Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 , (stating that "Title VII's goal is to further promote equal employment opportunities for American workers")], see also *Local 28 of the Sheet Metal Workers' Int'l. Ass'n. v. EEOC*, 478 U.S. 421, 423 (1986) (stating that Title VII guarantees equal employment opportunity).

14. Title VII relies on individual initiative and determination to bring to light an employer's unlawful behavior. To allow employers to file lawsuits against employees who oppose what they believe to be discriminatory conduct would have a chilling effect on employee initiative, thereby undermining the goal of the statute. See *EEOC v. Virginia Carolina Veneer Corp.*, 495 F. Supp. 775 (W.D. Va. 1980).

15. The gist of Respondent's argument lies on the assertion that the judgment against Complainant at trial supports a determination that

her lawsuit was frivolous. Respondent's position is hollow and lacks merit.

16. An action under Civil Rule 11 (Eleven) was at all times available to the Respondent to address the filing of a frivolous lawsuit by Complainant. O. R.C. 2323.51 defines "frivolous" conduct as conduct of a party or his counsel that "obviously serves to harass or maliciously injure another party to a civil action or appeal." "Malice and intent to injure or harass" were among the allegations contained in Respondent's complaint.

17. In *EEOC v. Outback Steakhouse of Florida, Inc.*, 75 F.Supp. 2d 756 (N.D. Ohio 1999), the court found that a counterclaim filed by the defendant in a sexual harassment suit constituted unlawful retaliation. Other circuits have also reached similar results: *Harmar v. United Airlines, Inc.*, 1996 U.S. Dist. Lexis 5346 (N.D. Ill.); *Shafer & Smith v. Dallas County Hospital District*, 1997 U.S. Dist. LEXIS 23451 (N.D. Texas); and *Berry v. Stevinson Chevrolet*, 74 F. 3d. 980 (10<sup>th</sup> Cir. 1996).

18. Respondent's other defense, that the Commission cannot establish a *prima facie* case of retaliation under 4112.02(I) because

Complainant was not an employee of Respondent's at the time the lawsuit was filed, has no merit.

19. In *Robinson v. Shell Oil*, 519 U.S. 337 (1997), the Court unanimously held that Title VII prohibits employers from retaliating against former employees as well as current employees. The court rejected the strict constructionist argument surrounding the statutory language that "employee" applies to current employees.

20. The action of Respondent in the instant case is retaliatory in violation of R.C. 4112.02(I), and Complainant is entitled to remedy as a matter of law.

## RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint #9148 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112; and
2. The record remain open for a period of ninety (90) days to enable the parties to introduce evidence into the record regarding damages.

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Denise M. Johnson  
Chief Administrative Law Judge

March 12, 2003

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**TAMMY A. GREER**

Complainant

and

Complaint #9148  
(CLE) E4060100 (32481) 110600

**LAZLO TEMESI D/B/A  
VILLAGE SQUARE JEWELERS**

Respondent

**ADMINISTRATIVE LAW JUDGE'S RECOMMENDATION**

**RE: DAMAGES**

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## **DAMAGES**

### **PROCEDURAL BACKGROUND**

On July 19, 2001, the Commission issued Complaint No. 9148 in the case captioned *Tammy Greer v. Laslo Temesi dba Village Square Jewelers*. Among other allegations, the Commission's Complaint alleged that Respondent violated R.C. 4112.02(I) by filing a lawsuit against Complainant in retaliation for her having filed a sexual harassment lawsuit against Respondent. Briefs were filed by the Commission and Respondent in lieu of a public hearing.

On March 12, 2003, the Administrative Law Judge issued a Report and Recommendations in Complaint No. 9148 making the following recommendations:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112; and
2. That the record remain open to enable the parties to introduce evidence into the record regarding damages.

A public hearing was held in Cleveland, Ohio on February 24, 2004. The transcript consisted of 34 pages. The Commission filed a brief on July 7, 2004; Respondent filed its brief on August 13, 2004; and the Commission's reply brief was filed August 23, 2004.

The ALJ makes the following recommendation as to damages Respondent should pay as a result of his violation of R.C. 4112.02(I):

1. Respondent pay to Complainant \$16,000.00 for attorney's fees, the amount that Complainant spent in defense of the lawsuit filed by Respondent.

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Denise M. Johnson  
Chief Administrative Law Judge

November 1, 2004