

INTRODUCTION AND PROCEDURAL HISTORY

Dena Barnett (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 31, 2001.

The Commission investigated the charge and found probable cause that the State of Ohio, Department of Transportation (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 18, 2001. The Complaint alleged that Respondent denied Complainant overtime because of her sex.

Respondent filed an Answer to the Complaint. 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 June 26, 2002 at the Tuscarawas County Courthouse in New Philadelphia, Ohio.

The record consists of the previously described pleadings, a 167-page transcript of the hearing, exhibits admitted into evidence during the hearing, a stipulated exhibit admitted after the hearing,¹ and post-hearing briefs filed by the Commission on August 19, 2002 and by Respondent on September 3, 2002.

FINDINGS OF FACT

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

¹ During the hearing, the ALJ left the record open for evidence on the overtime hours worked by other employees for snow removal. On August 1, 2002, the Commission and Respondent moved to admit the overtime hours for snow removal worked by Harry Fisher and Dan Yost from "1998 to Present (excluding winter 2001-2002)." (Ex. AA) The ALJ granted the Joint Motion on August 5, 2002.

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 January 31, 2001.

2. The Commission determined on September 13, 2001 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.

4. Respondent is a state agency and an employer. Respondent has a central office in Columbus, Ohio and 12 district headquarters throughout the state. The counties, within each district, operate at least one garage or outpost. These garages provide various transportation services, such as

snow and ice removal, on thoroughfares located within county lines. Each garage has a county manager.

5. Complainant is a female.

6. Respondent hired Complainant in January 1994 as a Clerk 2. Three years later, Respondent promoted Complainant to Office Assistant 1. Complainant was reclassified as an Office Assistant 2 in December 2001. Complainant has worked at the District 11 headquarters in New Philadelphia throughout her employment with Respondent.²

7. In 1996, Complainant obtained a Commercial Driver's License (CDL) and became qualified to drive vehicles used for snow and ice removal. Complainant, who resides in Carroll County, signed up each October to work overtime in that county during the winter. Complainant's name was placed on the second auxiliary roster (also known as the third callout list) for Carroll County from 1996-97 through 2000-01. Complainant was offered overtime for snow and ice removal in Carroll County once

² District 11 consists of seven counties: Belmont, Carroll, Columbiana, Harrison, Holmes, Jefferson, and Tuscarawas.

during that period; this offer, which Complainant accepted, occurred during the winter of 1996-97.³

8. In each county garage, all highway maintenance workers who possess a CDL are automatically placed on the primary overtime roster in their counties of employment. These workers are the first employees called to work overtime for snow and ice removal. These workers are expected to work such overtime and may be disciplined if they consistently refuse it.

9. Under the union contract, the county garages must equally offer overtime for snow and ice removal to highway maintenance workers on the primary roster. Toward this end, overtime for snow and ice removal is offered to employees on the primary roster based on whomever had the least amount of overtime worked or charged to them.⁴ Another consideration is whether an employee has already worked up to 16 hours

³ Complainant's name was also on the third call-out list for overtime in Columbiana County in 2000-01. Complainant was offered overtime for snow and ice removal in Columbiana County "two or three times" during that winter. (Tr. 74) The majority of the overtime that Complainant worked in Columbiana County was in the office.

⁴ If an employee refuses overtime, the number of hours offered are charged to the employee's accrued overtime as if the overtime was worked.

of snow and ice removal without resting; Respondent's employees are prohibited from working more than 16 hours of such overtime without 8 hours of rest.

10. Once all of the employees on the primary roster have been called, the county garages may recall those who were previously unavailable or attempt to contact those who were not called earlier because of the requisite 8-hour interlude between maximum overtime shifts. In the alternative, the county garages may offer overtime for snow and ice removal to Unit 6 employees, intermittent employees on 1,000-hour assignments, and other employees with CDLs who are currently working at the facility. (Tr. 86)

11. If additional persons are needed after calling the highway maintenance workers on the primary roster and other qualified employees who were already working at the facility, then the county garages may contact employees on the first auxiliary roster (also known as the second

call-out list). *Id.* The second call-out list consists of Unit 6 employees who possess a CDL and work in one of the other counties within the district. These employees work in positions that have snow and ice removal as part of the job duties. These employees are required to sign up each October to work overtime for snow and ice removal in a particular county.

12. Lastly, the county garages may contact employees on the third call-out list. *Id.* These employees also volunteer to work overtime for snow and ice removal in counties by signing up each October. These employees possess a CDL and work within the district in positions that do not have snow and ice removal as part of their job duties. Unlike the primary roster, the county garages are not required to equalize overtime on either of the auxiliary rosters.

13. In the winter of 2000-01, Barry McCarty was the County Manager of the Carroll County garage.⁵ Carl Palmer assisted him in managing the daily operations of the garage. Among other things, they were responsible for deciding whether to call employees to work overtime for snow and ice removal.

⁵ McCarty has been the County Manager in Carroll County since the early 1990s.

14. Eunice Thompson, a clerk, and Kenneth Beatty, a Highway Maintenance Worker 1, were the other employees in the office.⁶ They performed dispatching and other office work. If McCarty or Palmer did not call employees for overtime, they instructed Thompson, Beatty, or even a foreman to call employees on the primary roster or other employees as needed. The Carroll County garage followed Respondent's policy of offering overtime to employees on the primary roster with the lowest number of overtime hours worked or charged to them. Palmer updated the accrued overtime of these employees daily.

15. Respondent employed 18 highway maintenance workers (excluding Beatty) at the Carroll County garage in the winter of 2000-01 (Exs. J, K) All of these employees were expected to work overtime for snow and ice removal. Carol Zorger was the only female highway maintenance worker employed there.

16. In addition to the highway maintenance workers, Respondent employed Ronnie Haney and Harry Fisher at the Carroll County garage that winter. Both were intermittent employees who assisted in snow and

⁶ Beatty worked in the office during this time because he was unable to drive because of a physical impairment.

ice removal. Haney, a Highway Maintenance Worker 2, was placed at the Carroll County garage on a 1,000-hour assignment. Fisher also worked there temporarily as a Highway Maintenance Worker 2.

17. There were four employees on the auxiliary rosters for Carroll County in 2000-01: Dan Yost and Brian McIntire were on the second call-out list, while Complainant and Virginia Bonomo were on the third call-out list. (Exs. G, H) All of these employees possessed a CDL, except for Bonomo.

18. On Friday, January 26, 2001, Palmer decided to hold over the highway maintenance workers (whose shift ended at 3:30 p.m.) because of snowfall that afternoon. Complainant's husband, Fred Barnett, was one of the employees asked to work overtime. Barnett noticed that Palmer and Mark Manfull, a foreman, were having difficulty contacting employees to perform snow and ice removal that night. Barnett suggested that they call Complainant because she was available. Neither Palmer nor Manfull responded to this suggestion.

19. Yost arrived at the Carroll County garage before Barnett left on his route. Yost was asked to work overtime. Yost heard Barnett suggest that they call Complainant. Yost agreed with the suggestion and told Palmer that he “better” call her because discrimination is “against the law.” (Tr. 36) Barnett left to work his shift while Yost was talking to Palmer and Manfull about calling Complainant.

20. Barnett returned to the garage approximately an hour and a half later. It was still snowing. Barnett went into the office and checked the radar. Palmer and Manfull were still calling employees to work overtime. Barnett again suggested that they call Complainant; neither responded. Complainant was not offered work overtime that night, while Yost and McIntire worked more than 10 hours each. (Exs. J, K)

21. The following Monday, Barnett approached McCarty while McCarty was looking out the back window of the garage. Barnett told McCarty that his wife, Dena, would plow snow if last Friday’s shortage of drivers occurred again. McCarty, who was standing beside Barnett approximately two feet away, continued to look outside and only stated, “Look at that fuckin’ cat out there.” (Tr. 42)

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 denied Complainant overtime because of her sex.

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 . . . 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.

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 burden of persuasion rests with the Commission under the evidentiary framework established in *McDonnell Douglas Co. v. Greene* (1973), 411 U.S. 792. However, if the Commission proves by a preponderance of the evidence that an impermissible factor “played a motivating part” in the employment decision, this burden shifts to

the employer to show that, more likely than not, the same action would have been taken without considering that factor. *Price Waterhouse v. Hopkins* (1989), 490 U.S. 228, 258 (plurality).

6. To invoke *Price Waterhouse* and shift the burden of persuasion to Respondent, the Commission may rely on either direct evidence or circumstantial evidence “sufficient to prove, without benefit of the *McDonnell Douglas* presumption, that the defendant’s decision was more probably than not based on illegal discrimination.” *Hoffman v. Sebro Plastics, Inc.* (E.D. Mich., 2000), 108 F.Supp.2d 757, 768. The dictionary definition of direct evidence is “[e]vidence which, if believed, proves the fact in issue without inference or presumption.” *Black’s Law Dictionary*, Sixth Ed., p. 460. True direct evidence takes the form of admissions—actual statements from the decision-makers that they relied on an illegal criterion or documentary evidence that proves such reliance. *Hoffman, supra* at 767. Such evidence requires no inference or presumption of discrimination. Circumstantial evidence is sufficient to shift the burden of persuasion when it requires the conclusion that unlawful discrimination was at least a motivating factor in the employer’s actions. *Price Waterhouse, supra* at 258.

7. The Commission argues that Barry McCarty, the county manager of the Carroll County garage, made a statement that is direct evidence of sex discrimination. Patrick Wright, a former highway maintenance worker in Carroll County, testified that he overheard McCarty state, in reference to Complainant, that “the bitch or that bitch” will never work in Carroll County as long as he was the county manager. (Tr. 12, 16) Wright testified that McCarty made this statement at the Carroll County garage in the presence of Palmer and Mark Manfull, a foreman. Although Wright was unable to recall exactly when McCarty made the statement, Wright testified that Complainant was qualified to perform ice and snow removal at the time. (Tr. 16)

8. McCarty testified at the hearing; he denied making the statement. (Tr. 120) Respondent also called Palmer and Manfull as witnesses. They denied that McCarty made such a statement in their presence. (Tr. 144, 156)

9. In assessing credibility, the ALJ considered that Wright’s testimony about the alleged statement was outnumbered by McCarty’s and two other witnesses’ denials about the same. This fact alone does not require the

ALJ to discredit Wright's testimony. Upon viewing the testimony on this issue and reviewing the record as a whole, the ALJ found Wright's testimony that McCarty made the statement more credible than the collective denials that it never occurred. The ALJ was not persuaded by Respondent's attempt to portray Wright's testimony as part of a personal vendetta against McCarty.

10. Having resolved this factual dispute in the Commission's favor, the question becomes whether this statement, by itself, was sufficient to shift the burden of persuasion to Respondent. This statement is not direct evidence of sex discrimination; it requires the ALJ to infer that McCarty's reference to Complainant as "the bitch or that bitch" meant that he would never offer her overtime because of her sex. Although the word "bitch" is a derogatory term and usually associated with the female gender, the use of the word does not create an automatic presumption that its use was motivated by gender animus rather than personal dislike unrelated to gender. *Galloway v. General Motors Service Parts Operations* (C.A. 7, 1996), 78 F.3d 1164, 1168. Without the support of other circumstantial evidence, this statement fails to establish that Complainant's sex was a

motivating factor in her denial of overtime. Therefore, this case must be analyzed under the *McDonnell Douglas* evidentiary framework.

11. The first stage of the *McDonnell Douglas* analysis requires the Commission to establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. The burden of proving a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 253. It is simply part of an evidentiary framework “intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.” *Id.*, at 254, n.8.

12. 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, n.13. In this case, the Commission may establish a *prima facie* case of sex discrimination by proving that:

- (1) Complainant is a member of a protected class;
- (2) Complainant was qualified to perform snow and ice removal in Carroll County;
- (3) Respondent took an adverse employment action against Complainant; and

(4) Respondent took an adverse employment action against Complainant “under circumstances giving rise to an inference of [sex] discrimination.”

Gregory v. Daly (C.A. 2, 2001), 243 F.3d 687, 695 (citations omitted); *Burdine, supra* at 253.

13. The Commission easily proved the first two elements of a *prima facie* case. R.C. 4112.02(A) protects both sexes “from all forms of sex discrimination in the workplace.” *Hampel v. Food Ingredients Specialists, Inc., et al.* (Ohio, 2000), 89 Ohio St. 3d 169, 178. Complainant possessed a CDL, and she properly registered for the third call-out list for Carroll County in the winter of 2000-01. Thus, Complainant was qualified to perform snow and ice removal in Carroll County during that time.

14. Respondent argues that the Commission failed to prove that it took an adverse employment action against Complainant. Respondent contends that Complainant had “no right to overtime” for snow and ice removal under the union contract because employees on the auxiliary rosters are called for snow and ice removal as needed without any requirement to equalize their overtime hours. (R.Br. 15)

15. While the ALJ agrees that employees on the auxiliary rosters were not entitled to overtime, the evidence shows that Danny Yost, a male employee on the second call-out list, worked 67 hours of overtime for snow and ice removal in Carroll County during the winter of 2000-01.⁷ (Ex. AA) This evidence demonstrates that overtime opportunities for snow and ice removal were available that winter for employees on the auxiliary rosters in Carroll County. Despite this fact, Complainant, the only qualified employee on the third call-out list, was not offered any overtime for snow and ice removal during that time. Even though Respondent was supposed to offer Yost and Brian McIntire, the other employee on the second call-out list, overtime for snow and ice removal before Complainant and was not required to equalize their overtime opportunities, Respondent's complete refusal to offer Complainant any of the available overtime caused her direct economic harm.⁸ Such harm constitutes an adverse employment action for purposes of proving the third element of a *prima facie* case. See *Burlington Industries, Inc. v. Ellerth* (1998), 524 U.S. 742, 762 ("tangible employment action in most cases inflicts direct economic harm"); *Kause v. The Alberto-*

⁷ Ex. AA provides the number of overtime hours for snow and ice removal that Yost *worked* during that winter. This document does not show how many overtime hours that Respondent *offered* Yost for snow and ice removal during that time.

⁸ There is no evidence in the record regarding how many hours McIntire was offered or worked in Carroll County for snow and ice removal during the winter of 2000-01.

Culver Company (June 27, 2000), N.D.Ill. No. 97 C 3085, 2000 U.S. Dist. LEXIS 10986 (denial of overtime was an adverse employment action under Title VII).

16. The Commission also proved the fourth element of a *prima facie* case with circumstantial evidence, which created an inference that Respondent refused to offer Complainant overtime because of her sex. McCarty's statement about Complainant, i.e., "the bitch or that bitch" will never work in Carroll County as long as he was the county manager, is consistent with Respondent's refusal to offer Complainant available overtime for snow and ice removal in the winter of 2000-01, and for that matter, the three preceding winters.⁹ This statement, along with evidence that overtime for snow and ice removal was available to employees on the auxiliary rosters and Respondent's complete refusal to offer Complainant such overtime, is sufficient to create an inference that Complainant's sex played a role in her denial of overtime at least for purposes of proving a *prima facie* case.

⁹ This was the fourth consecutive winter that Complainant was on the third call-out list for Carroll County without being called for overtime. In a five-year span, Complainant was only offered overtime once in Carroll County. This opportunity occurred during the winter of 1996-97—one day after Complainant complained to her supervisor at district headquarters about her lack of overtime in Carroll County. (Tr. 55)

17. Once the Commission 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. 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 (1993), 509 U.S. 502, 507, quoting *Burdine, supra* at 254-55, n.8.

18. Respondent met its burden of production with McCarty’s testimony. McCarty testified that Complainant was not offered overtime in Carroll County in the winter of 2000-01 and previous winters because Respondent “very seldom” used additional workers for snow and ice removal beyond those employed at the garage. (Tr. 129) McCarty testified that Respondent was able to “get by” with these employees in light the amount of snowfall in recent years. *Id.*

19. Respondent having met its burden of production, the inquiry moves to the ultimate issue of whether Respondent refused to offer Complainant overtime because of her sex. The Commission must show by

a preponderance of the evidence that Respondent's articulated reason for its refusal to offer Complainant overtime 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.

20. 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 . . . [sex] is correct. That remains a question for the factfinder to answer

Id., at 524.

In other words, even though rejection of Respondent's articulated reason is "enough at law to *sustain* finding of discrimination, *there must be a finding of discrimination.*" *Id.*, at 511, n.4. Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of unlawful sex discrimination.

21. It is undisputed that Complainant was on the last list of persons to be called for overtime for snow and ice removal in Carroll County in the winter of 2000-01. However, the documentary evidence contradicts Respondent's contention that the Carroll County garage "very seldom" used extra workers for snow and ice removal beyond those employed there. (Exs. K, AA) This evidence shows Dan Yost and Brian McIntire, both employees on the second call-out list, were offered overtime for snow and ice removal that winter. In fact, Yost worked 67 hours of such overtime. It is difficult to believe that the Carroll County garage always fulfilled its overtime needs with these two employees and *never* needed Complainant's services not only for the winter in question, but also the three preceding winters.

22. Further, the evidence tends to support Patrick Wright's testimony on this issue. Wright testified that Complainant "could have been called a lot of nights" because he and the other highway maintenance workers in Carroll County were "overworked" that winter. (Tr. 20) The ALJ found this testimony credible.

23. The Commission argues that McCarty's statement about Complainant, i.e., "the bitch or that bitch" will never work in Carroll County as long as he was the county manager, provides sufficient evidence to infer that Respondent's articulated reason for its refusal to offer Complainant overtime was a pretext for unlawful sex discrimination. (Comm.Br. 18) This argument is well taken. The word "bitch" is a derogatory term usually directed toward females. The use of the word by a male decision-maker to describe a female employee may reflect an animus toward women and create an inference that subsequent employment actions against her or other female employees were motivated by such animus. See *Pothier-Ward v. Runyon* (June 5, 1998), N.D.Ill. No. 67 C 3321, 1998 U.S. Dist. LEXIS 9115 (the word "bitch" may create an inference of sex discrimination when male decision-maker uses it when speaking to another male employee about female employees).

24. In this case, McCarty used the word "bitch" to describe Complainant in a conversation with other male employees about her work prospects in Carroll County. Complainant and McCarty have never had a working relationship with each other because they work in different counties. McCarty testified that he did not know Complainant

very well and rarely had the occasion to speak with her. (Tr. 113) In light of this testimony and the record in its entirety, there is no reason to believe that McCarty called Complainant “the bitch or that bitch” for any other reason besides her sex.¹⁰

25. Respondent argues that Carol Zorger, the only female highway maintenance worker in Carroll County, was “frequently” offered overtime for snow and ice removal in the winter of 2000-01. (R.Br. 17) Respondent contends that Zorger was treated equally in this regard to her male counterparts. The ALJ considered that Zorger appeared to receive equal treatment; however, Zorger and Complainant were not similarly situated for comparison purposes. Respondent was required under the contract to equalize overtime opportunities for all highway maintenance workers on the primary roster. There was no similar requirement for employees on the auxiliary rosters.

¹⁰ Similarly, there is no reason to believe that McCarty’s actions toward Complainant were motivated by a personal dislike for her husband. Complainant’s husband, Fred, has worked at the Carroll County garage for several years. McCarty testified that he did not have “any problems” with Fred Barnett or personal animus toward him. (Tr. 130-31)

26. Respondent obviously has the discretion to offer overtime for snow and ice removal to employees on the auxiliary rosters. This does not mean that Respondent's use of such discretion is beyond reproach. Respondent and other employers must exercise such discretion without regard to employees' sex and other unlawful criteria under R.C. Chapter 4112.

CONCLUSION

27. After a careful review of the entire record, the ALJ disbelieves Respondent's articulated reason for its refusal to offer Complainant overtime and concludes that, more likely than not, the reason was a pretext or cover-up for unlawful sex discrimination. The Commission presented sufficient evidence to meet its burden of persuasion:

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*.

Hicks, supra at 511, (bracket removed); See also *Reeves v. Sanderson Plumbing Products, Inc.* (2000), 530 U.S. 133, 147.

RELIEF

28. When the Commission makes a finding of unlawful discrimination, the victims of such behavior are entitled to relief. R.C. 4112.05(G)(1). Title VII standards apply in determining the appropriate relief under the statute. *Ohio Civ. Rights Comm. v. David Richard Ingram, D.C., Inc.* (1994), 69 Ohio St.3d 89.

29. Like Title VII, one of the purposes of R.C. Chapter 4112 is to make “persons whole for injuries suffered through past discrimination.” *Albemarle Paper Co. v. Moody* (1975), 422 U.S. 405, 421. The attainment of this objective requires that:

. . . persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.

Franks v. Bowman Transportation Co. (1976), 424 U.S. 747, 763 (footnotes omitted).

30. In providing a “make whole” remedy, there is a strong presumption in favor of awarding back pay:

Given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes eradicating discrimination throughout the economy and making persons whole for injuries suffered for past discrimination.

Albemarle Paper Co., supra at 421.

This presumption “can seldom be overcome.” *Los Angeles Dept. of Water and Power v. Manhart* (1978), 435 U.S. 702, 719. There must be “exceptional circumstances” to deny an award of back pay. *Rasimas v. Michigan Dept. of Mental Health* (C.A. 6, 1983), 714 F.2d 614, 626.

31. The difficulty in calculating lost overtime and other forms of back pay does not constitute an exceptional circumstance. The Commission should award back pay “even where the precise amount of the award cannot be determined.” *Id.*, at 628. In other words, the calculation of back pay does not require “unrealistic exactitude”; only a reasonable calculation is required. *Salinas v. Roadway Express, Inc.* (C.A. 5, 1984), 735 F.2d 1574, 1578. The Commission should resolve any ambiguity in the amount of back pay against the discriminating employer. *Rasimas, supra* at 628; *Ingram, supra* at 94.

32. The evidence in this case shows that Dan Yost, one of the two employees on the second call-out list for Carroll County, worked 67 hours of overtime for snow and ice removal in that county during the winter of 2000-01. (Ex. AA) Since Complainant was on the third call-out list for Carroll County during that winter, it is reasonable to conclude that she would have worked less overtime hours than Yost.

33. In calculating Complainant's lost overtime, the ALJ also considered her testimony that she worked overtime for snow and ice removal "two or three times" in Columbiana County that winter.¹¹ (Tr. 74) Complainant was also on the third call-out list for Columbiana County, which is contiguous with Carroll County.

34. Based on the foregoing, the ALJ concludes that Complainant is entitled to 33.5 hours of lost overtime for the winter of 2000-01. These hours represent lost overtime opportunities for snow and ice removal in Carroll County. Complainant may elect to receive payment for these hours

¹¹ Complainant testified that the majority of the overtime she performed in Columbiana County was office work. (Tr. 74) It is unlikely that overtime for office work was available in Carroll County because its garage had an additional employee who performed those duties besides the clerk. (See *Findings of Fact*, ¶14)

at one and half (1½) times her hourly rate of pay during that winter or credit for 50.25 hours of compensatory time, which is also earned at a ratio of one and half (1½). (Tr. 59-60)

RECOMMENDATIONS

For all of the foregoing reasons, the Administrative Law Judge recommends in Complaint #9178 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112; and
2. The Commission order Respondent to offer Complainant in writing the option of receiving a certified check payable to her for 33.5 hours of overtime at one and half (1½) times her hourly rate of pay during the winter of 2000-01, plus interest at the maximum rate allowable by law, or credit for 50.25 hours in compensatory time.¹² Respondent must submit this written offer to Complainant within 10 days of receipt of the Commission's Final

¹² When there is a back pay award, victims are entitled to prejudgment interest. *Ingram, supra* at 93.

Order. Complainant must respond in writing to this offer within 10 days of its receipt. Whatever option Complainant selects, Respondent must provide Complainant the elected relief within 10 days of its receipt of her election.

TODD W. EVANS
ADMINISTRATIVE LAW JUDGE

December 11, 2002