

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

JOSIAH JOHNSON

Complainant

and

THE CINCINNATIAN HOTEL

Respondent

Complaint No. 9180
(CIN) 75092900 (28680) 102700
22A – A1 – 1537

**ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDATION**

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INTRODUCTION AND PROCEDURAL HISTORY

Josiah Johnson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 27, 2000.

The Commission investigated the charge and found probable cause that The Cincinnati Hotel (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 October 18, 2001.

The Complaint alleged that Respondent subjected Complainant to close scrutiny and discharged him in retaliation for filing a previous charge against Respondent.

Respondent filed an Answer to the Complaint on November 14, 2001. Respondent admitted certain procedural allegations, but denied that it

engaged in any unlawful retaliatory practices. Respondent also pled affirmative defenses.

A public hearing was held on August 14, 2003 at the Ohio Civil Rights Commission's Cincinnati Regional Office.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 273 pages, exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on November 7, 2003, by Respondent on November 28, 2003, and a reply brief filed by the Commission on December 8, 2003.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the Administrative Law Judge's (ALJ) assessment of the credibility of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. 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 October 27, 2000.

2. The Commission determined on September 27, 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.

4. Complainant was first employed by Respondent as a houseman in the housekeeping department on July 26, 1999. Shortly thereafter he was promoted to the position of bellman in the “front of the house.”

5. As a bellman, Complainant’s job duties involved direct guest contact by assisting them in regard to their rooms after they checked in and being available to guests for anything they might need during their stay at the hotel.

6. Complainant was upset because he had not been put on the work schedule after he had taken time off due to his father’s death.

7. Complainant attempted to talk to Teresa Mumford, his direct supervisor, regarding why he was not placed on the work schedule. He submitted a letter of resignation but later stated that he wanted to retract the letter because all he wanted to do was talk to management regarding his complaint about his hours.

8. Respondent refused to let Complainant rescind his resignation.

9. On April 5, 2000, Complainant was terminated from his employment.

10. On April 13, 2000, Complainant filed a race discrimination charge with the Commission against Respondent.

11. Respondent rehired Complainant on May 6, 2000 because he was a good employee who was excellent with the guests.

12. As a bellman, Complainant was one of several tipped employees on the front drive. Respondent had a policy, or a “gentlemen’s agreement”, regarding how tips were to be split amongst front-drive employees.

13. Drew Hyder and Phillip Bottom, both tipped employees, complained to management that Complainant was not properly splitting his tips.

14. Respondent terminated Complainant on September 29, 2000, after an investigation revealed that he did not split his tips properly on two separate occasions.

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

1. The Commission alleged in the Complaint that Respondent subjected Complainant to close scrutiny and discharged him in retaliation for filing a previous charge against Respondent.

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

¹ 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:

- (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 proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 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 the employment action.² *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

² 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 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., 60 FEP Cases 814, 817 (10th Cir. 1992) (citations and footnote omitted).

. . . “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.

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 Complainant’s discharge 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 with the introduction of evidence to support that Complainant was terminated because he violated the tipping policy which was a breach of trust and dishonesty.

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

10. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for Complainant's discharge was not the true reason, but was "a pretext for . . . [unlawful retaliation]." *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 [unlawful retaliation]" unless it is shown *both* that the reason is false, *and* that . . . [unlawful retaliation] is the real reason.

Hicks, supra at 515, 62 FEP Cases at 102.

11. 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 . . . [unlawful retaliation] is correct. That remains a question for the factfinder to answer

Id., at 524, 62 FEP Cases at 106.

12. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer that Complainant was, more likely than not, the victim of unlawful retaliation.

Close timing between an employee's protected activity and an adverse action against him may provide the "causal connection" required to make out a *prima facie* case of retaliation. However, once the employer offers a legitimate, nondiscriminatory reason that explains both the adverse action and the timing, the plaintiff must offer some evidence from which the jury may infer that retaliation was the real motive.

Swanson v. GSA, 75 FEP Cases 483, 490 (5th Cir. 1997) (citations and quotation within a quotation omitted).

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged that Duane Bryson, a doorman and front-drive employee who had not engaged in protected activity, did not properly split tips and was neither terminated nor disciplined.

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 (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.*, 73 FEP Cases 109, 115 (6th Cir. 1996) (quotations omitted). Likewise, similarly situated employees “need not hold the exact same jobs; however, the duties, responsibilities and applicable standards of conduct must be sufficiently similar in all relevant aspects so as to render them comparable.” *Hollins v. Atlantic Co., Inc.*, 76 FEP Cases 553, 557 (N.D. Ohio 1997), quoting *Jurrus v. Frank*, 932 F.Supp. 988, 995 (N.D. Ohio 1993).

16. Respondent stated that Duane Bryson was not terminated because he was honest regarding his withholding of tips. He believed that the tip sharing agreement was a violation of the wage and hour laws and communicated that to management when confronted. Additionally, he offered to pay back tips that he withheld. Complainant, on the other hand, denied that he had withheld tips.

17. Denise Vandersall, Respondent's general manager, stated that the reason that Complainant was terminated was that honesty and trust is paramount when there is a gentlemen's agreement to share tips with coworkers.

18. The ALJ credited this testimony by Respondent and the Commission failed to prove that the articulated reason was a pretext for unlawful retaliation.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9180.

**DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE**

March 31, 2005