

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

WANDA MAE BRAZILE

Complainant

and

GENNY'S HOME HEALTH CARE

Respondent

Complaint No. 9280

(AKR) 73043001 (25727) 050201

22A – A1 – 5422

CHIEF ADMINISTRATIVE LAW JUDGE'S FINDINGS OF FACT,

CONCLUSIONS OF LAW, AND RECOMMENDATION

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ALJ'S REPORT BY:

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INTRODUCTION AND PROCEDURAL HISTORY

Wanda Mae Brazile (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on May 2, 2001.

The Commission investigated the charge and found probable cause that Genny's Home Health Care (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 March 14, 2002.

The Complaint alleged that Respondent subjected Complainant to disparate terms and conditions of employment including, but not limited to, a racially offensive and hostile work environment, and a refusal to assign her full-time health care positions, because of her race and the race of her husband [race by association].

Respondent is not represented by counsel. Respondent filed an Answer to the Complaint by leave of the Administrative Law Judge (ALJ) on October 30, 2002. Respondent denied that it engaged in any unlawful discriminatory practices.

A public hearing was held on November 13, 2002 at the Akron Government Building in Akron, Ohio.

The record consists of the previously-described pleadings, a transcript of the hearing (122 pages); exhibits admitted into evidence at the hearing, and a post-hearing brief filed by the Commission on January 9, 2003. Respondent did not file a brief.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the assessment of the credibility of the witnesses who testified before the ALJ who presided at the hearing in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. 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 May 2, 2001.

2. The Commission determined on January 10, 2002 that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A).

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

4. Respondent is a personnel placement agency doing business in Ohio and an employer.

5. Respondent takes applications from individuals who have home health care or nursing experience and is a placement service for clients who contract with Respondent. The placements can be permanent/temporary or permanent. (Tr. 9) Respondent receives a placement fee for its services.

6. Complainant is a Caucasian who is married to an African-American.

7. Complainant has been certified as a nursing assistant since 1979.¹

8. Complainant began her association with Respondent in 1992.

9. In 1996 Complainant was placed with Mr. Ingram and provided him with home health care services until his death in December of 2000, one week before Christmas.

¹ Complainant worked for the Red Riding Hood Agency from 1979 until it was bought by Respondent in 1992. (Tr. 16)

10. Complainant contacted Respondent and requested a new assignment. Complainant was placed with Mrs. Zofchak on December 26, 2000.

11. Complainant was not comfortable working for Mrs. Zofchak because Mrs. Zofchak was “very racial and she kept making racial (sic) and religious statements all of the time”. (Tr. 18)

12. Complainant asked for a replacement and a new full-time position.

13. After two weeks Complainant was replaced.

14. Complainant worked for Ms. Jennings for four or five weeks from March to mid-April 2001.

15. The position started out as an eight-hour position, then went to six hours, four hours, until it finally dropped to two hours.

16. Respondent's husband called Complainant at home and told her he would find someone in Wadsworth to do the job and that it was not worth Complainant's time to go to Wadsworth for just two hours.²

17. After the Jennings' job, Complainant received another assignment from June 1-26, 2001.

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

² Complainant lives in Cuyahoga Falls which is half an hour's drive to Wadsworth.

various witnesses is not in accord with the findings therein, it is not credited.³

1. The Commission alleged in the Complaint that Respondent has subjected Complainant to disparate terms and conditions of employment including, but not limited to, a racially offensive and hostile work environment, and a refusal to assign her full-time health care positions.

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

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, . . . of any person, 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).

³ Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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. Title VII has been construed broadly by federal courts to protect individuals who are victims of discriminatory animus toward third persons with whom the individuals associate. *Tetro v. Elliot Popham Pontiac*, 173 F. 3d 988, 1999 U.S. App. LEXIS 6098 (6th Cir.), citing, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 890 (11th Cir. 1986) (ruling that both Title VII and section 1981 prohibit hiring discrimination based on an individual's association with African-Americans, or based on interracial marriage); *Chacon v. Ochs*, 780 F. Supp. 680, 680-81 (C.D. Cal. 1991) (holding that it is unlawful under Title VII to discriminate against a white woman married to a Hispanic man); *Whitney v. Greater N.Y. Corp. of Seventh-Day Adventists*, 401 F. Supp. 1363, 1366 (S.D. N.Y. 1975) (ruling that Title VII provides a cause of action for a white plaintiff who is discriminated against because of the plaintiff's relationship with African-Americans).

6. 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 burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). 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, 25 FEP Cases at 116, n.8.

7. 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, 5 FEP Cases at 969, n.13. In this case, the Commission may establish a *prima facie* case of race discrimination by proving that:

- (1) Complainant is a member of a protected class;
- (2) Complainant was qualified for the position;
- (3) Respondent subjected Complainant to different terms and conditions of employment than employees not within the protected class; and

- (4) Respondent failed to give Complainant permanent work assignments under circumstances which give rise to an inference of discrimination.

Burdine, supra at 253, 25 FEP Cases at 115, *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).

8. If the Commission succeeds in establishing a *prima facie* case of race discrimination, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for the employment action.⁴ *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.

⁴ 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 failure to give Complainant a permanent assignment. 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).

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.

9. Respondent met its burden of production by asserting that it does not guarantee its home health care providers that they will receive permanent/temporary or permanent assignments. Respondent also denied she made any racially derogatory statements to Complainant.

10. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her association with an African-American. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent’s articulated reason 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.

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 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.

12. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reason for not giving her a permanent/temporary or permanent placement. The Commission may directly challenge the credibility of Respondent's articulated reason by showing that the reason had no basis *in fact* or it was *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). 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 . . . [n]o additional proof is required.⁵

13. The Commission failed to prove that Respondent's articulated reason for not giving Complainant a permanent placement was a pretext for unlawful discrimination.

14. There was no credible evidence introduced by the Commission that other home health care providers not in the protected class were given preferential treatment in terms of being placed in permanent work assignments.

15. When asked whether Complainant knew of anyone who received permanent placement in a new home health care job by Respondent, Complainant answered, "Not specific knowledge, no." (Tr. 46)

⁵ 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* at 511, 62 FEP Cases at 100, n.4.

16. Respondent introduced credible evidence that other employees – an African-American married to a Caucasian, a Caucasian married to a Hispanic, and a Caucasian married to an African-American (like Complainant) - had no problems getting assignments.

17. Additionally, the Commission failed to prove that Respondent subjected Complainant to a hostile and offensive work environment. To establish a racially hostile work environment, Complainant must show conduct:

. . . severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive.

Jackson v. Quanex Corp., 191 F.3d 6, 658 (6th Cir. 1999).

It is well established in the Sixth Circuit that isolated and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial, to support a finding of . . . discrimination.

Grant v. Harcourt Brace, 77 FEP Cases 1068, 1076 (D.C. S. Ohio 1998) (citations and quotations omitted).

18. Complainant's testimony regarding alleged statements made by Respondent about coming to a Halloween party and bringing her husband were, at best, abstract and, therefore, insufficient to establish a hostile work environment.

19. Additionally, when Complainant complained to Respondent about Mrs. Zofchak making racial and religious derogatory comments, Complainant was reassigned within two weeks to another placement.

20. In conclusion, the Commission has failed to meet its evidentiary burden to show that Complainant was subjected to different terms and conditions of employment and a hostile work environment because of her association with an African-American.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9280.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 4, 2004