

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**LARRY J. FRAZIER**

Complainant

and

**CITY OF CINCINNATI AND  
JOHN CRANLEY**

Respondent

Complaint No. 9498  
(CIN) 75120101 (29688) 051302  
22A – A2 – 02850

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

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## **INTRODUCTION AND PROCEDURAL HISTORY**

Larry J. Frazier (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on May 13, 2002.

The Commission investigated the charge and found probable cause that the City of Cincinnati and John Cranley (Respondents) 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 May 9, 2003.

The Complaint alleged that Respondent City of Cincinnati discharged Complainant at the request of Respondent Cranley for reasons not applied equally to all persons without regard to their race.

Respondents filed an Answer to the Complaint on June 5, 2003. Respondents admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondents also pled affirmative defenses.

A public hearing was held November 19, 2003 at the Commission's Cincinnati Regional Office.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 321 pages, exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on June 18, 2004, by Respondents on July 9, 2004, and the reply brief filed by the Commission on July 15, 2004.

## **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 May 13, 2002.

2. The Commission determined on April 10, 2003 that it was probable that Respondents 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 City of Cincinnati is a corporation [or an agency of a political subdivision] doing business in Ohio and an employer. Respondent Cranley is an agent of Respondent City of Cincinnati and an employer.

5. Complainant is a black person.

6. Respondents first hired Complainant in November 2000 after Respondent Cranley was appointed to the Cincinnati City Council.

7. Complainant had previously been an aide to Todd Portune, a City Council member who was elected to the County Commission.

Respondent Cranley was appointed to fill Commissioner Portune's seat on the Council.

8. Although Respondent Cranley and Commissioner Portune are members of the Democratic Party, Commissioner Portune disliked Respondent Cranley. Commissioner Portune attempted to change the appointment process in order to allow a Republican to fill the vacant seat.

9. When Respondent Cranley hired Complainant he stressed the importance of loyalty and said that he would evaluate Complainant's employment after the next election.

10. Under the City Code, Council Members are only allowed to appoint three full-time staff members and have a limited budget for staff.

11. After Respondent Cranley's election to City Council in 2001, he terminated Complainant's employment.

## 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>1</sup>

1. The Commission alleged in the Complaint that Respondent City of Cincinnati discharged Complainant at the request of Respondent Cranley for reasons not applied equally to all persons without regard to their race.

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<sup>1</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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 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 Respondents to “articulate some legitimate, nondiscriminatory reason” for their employment action.<sup>2</sup> *McDonnell Douglas, supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent must:

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<sup>2</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 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 (10<sup>th</sup> 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. Respondents’ 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. Respondents met their burden of production by articulating that Complainant was terminated because Respondent Cranley could only have three full-time staff members. Elliot Ruther (Ruther) has been a very close friend of Respondent Cranley's since high school and also ran his Congressional campaign. Ruther has a degree from St. Louis University and a great deal of political experience. Respondent Cranley's decision to hire Ruther as Chief of Staff was not only based on their long-time friendship, but the determination that Ruther possessed writing, communication, and political skills that were better suited to Respondent Cranley's needs than those possessed by Complainant.

9. Respondents having met their burden of production, the Commission must prove that Respondents unlawfully discriminated against Complainant. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondents' articulated reason for discharging 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 Cranley’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 Cranley’s articulated reason for discharging Complainant. The Commission may directly challenge the credibility of Respondent Cranley’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 (6<sup>th</sup> Cir. 1994). Such direct attacks, if successful, permit the fact-finder 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.<sup>3</sup>

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

12. The Commission may also indirectly challenge the credibility of Respondent Cranley'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.*

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<sup>3</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.

13. The Commission attempted to show pretext in this case by alleging disparate treatment. Specifically, the Commission alleged that Respondent Cranley required Complainant to perform duties, such as “pass cookies out a council meetings” and “get lunch” for Respondent Cranley, that the other white employees were not asked to do.

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 . . . her 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. 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. Respondents argue that the Commission failed to prove that Complainant was treated differently than similarly situated white employees. This argument is well taken. The credible evidence in the record is that Complainant was asked to perform duties that other white employees were also asked to perform.

17. In disparate treatment cases, R.C. Chapter 4112 only prohibits discharges motivated by unlawful discrimination. Thus, the statute does not cover employees whose terminations are unfair or unjust but nondiscriminatory.

18. The inquiry here is necessarily limited to whether Respondent Cranley treated Complainant differently because of his race.

The law does not require employers to make perfect decisions, nor forbid them from making decisions that others may disagree with. Rather, employers may not hire, fire, or promote for impermissible, discriminatory reasons.

*Hartsel v. Keys*, 72 FEP Cases 951, 955 (6<sup>th</sup> Cir. 1996).

In general, neither the ALJ nor the Commission is in a position to second-guess an employer's business judgment, "except to the extent that those judgments involve intentional discrimination."

*Krumwiede v. Mercer Co. Ambulance Service*, 74 FEP Cases 188, 191 (8<sup>th</sup> Cir. 1997) (citations omitted).

[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).

19. The Commission failed to show that Complainant's discharge was based on intentional discrimination.

## **RECOMMENDATION**

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9498.

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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

March 31, 2005