

**OHIO CIVIL RIGHTS COMMISSION**

IN THE MATTER OF:

**TAMARA MORRIS**

Complainant

and

**COLUMBUS METROPOLITAN  
AREA COMMUNITY ACTION  
ORGANIZATION (CMACAO)**

Respondent

Complaint No. 9605  
(COL) B1012203 (30138) 022103  
22A – A3 – 01661

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

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**ALJ'S REPORT BY:**

Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
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## **INTRODUCTION AND PROCEDURAL HISTORY**

Tamara Morris (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on February 21, 2003.

The Commission investigated the charge and found probable cause that Columbus Metropolitan Area Community Action Organization (CMA CAO) (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 January 8, 2004.

The Complaint alleged that Respondent terminated Complainant, and otherwise failed and refused to reasonably accommodate her, because of her participation in a drug program.

Respondent filed an Answer to the Complaint on February 9, 2004. 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 at the Ohio Civil Rights Commission, Central Office, 1111 East Broad Street, Columbus, Ohio on August 19, 2004.

The record consists of the previously described pleadings, a transcript of the hearing (116 pages), exhibits admitted into evidence during the hearing, and the post-hearing briefs filed by the Commission on March 16, 2005, by Respondent on April 8, 2005, and the Commission's reply brief filed on April 14, 2005.

## **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 February 21, 2003.

2. The Commission determined on December 11, 2003 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 matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Complainant became affiliated with Respondent as a parent. Her son was in the Head Start Program. Complainant became an Assistant Teacher in August 1990.

5. Complainant held a number of other positions with Respondent. Her last position was Operations Manager, which she started on July 2, 2002.<sup>1</sup>

6. Complainant's duties as Operations Manager were: (1) to directly supervise the Family and Service Advocates or social workers, (2) be able to take charge of a district during the District Director's absence, (3)

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<sup>1</sup> Teacher (1995), Center Manager (1998).

oversee maintenance and supplies for the centers, and (4) ensure that the centers were filled with eligible children pursuant to federal guidelines.<sup>2</sup>

7. Complainant has been addicted to crack cocaine since the early 1990s.<sup>3</sup>

8. She describes herself as being able to abstain from drug use for two years, then relapsing one or two days after which she is able to abstain until the next relapse.

9. During her employment with Respondent Complainant relapsed and sought treatment for her addiction on three separate occasions.<sup>4</sup>

10. Complainant has never been disciplined for any performance-related reasons during her tenure of employment with Respondent.

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<sup>2</sup> Federal guidelines required that Head Start must have 85% or above attendance from children in order to stay federally funded. (Tr. 18)

<sup>3</sup> Complainant was unable to give an exact date but was able to approximate that it would have been when she was an Assistant Teacher for Respondent, sometime between 1990-1992. (Tr. 24)

<sup>4</sup> Maryhaven (once) and OSU East (twice). Both offer medically-supervised treatment programs. (Tr. 24)

11. Sometime during the weekend prior to Monday, January 6, 2003, Complainant was under the influence. She relapsed by smoking crack cocaine. She did not come to work on that Monday or call to say she would not be in that day; she also did not come to work or call on January 7 or January 8.

12. On January 9, 2003, Complainant voluntarily went to OSU East Hospital, Talbot Hall, a detoxification intensive patient program supervised by medical staff.

13. That same day Complainant called her supervisor, Maria Kee (Kee),<sup>5</sup> and left a message on her voicemail telling her that she was entering OSU East Hospital.<sup>6</sup> Complainant did not give an explanation as to why she had entered the hospital.

14. Kee attempted to call Complainant at OSU East. When she called she was told that Complainant was not a patient.

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<sup>5</sup> Complainant reported to Maria Kee, one of three District Directors for Respondent.

<sup>6</sup> Kee had attempted to contact Complainant prior to January 9, 2003.

15. When Complainant finally talked to Kee on January 9, 2003, she told Kee that she had relapsed and the reason that she could not be reached was the program does not divulge the name of patients unless the patient signs a waiver.

16. Kee instructed Complainant to fill out FMLA paperwork. One of Complainant's friends picked up the papers and delivered them to the hospital.

17. Complainant was released on Tuesday, January 14, 2003 and returned to work on, Wednesday, January 15, 2003.

18. On, Tuesday, January 21, 2003, Kee told Complainant that Sharon Harrison, H.R. professional, said that Complainant had violated Respondent's substance abuse policy.

19. On Wednesday, January 22, 2003, Complainant was given notice of Respondent's recommendation to terminate her. Although she was asked to clean out her personal belongings from her work area and leave the work premises, she was not formally discharged until

February 18, 2003, when Respondent's Policy Council voted to approve the termination recommendation.

20. In the letter from Kee to Complainant, she emphasized that "employees who first violate this Substance-Free Workplace Program and then seek voluntary assistance will not avoid corrective action, up to and including termination." (Comm.Ex. 5)

## 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>7</sup>

1. The Commission alleged in the Complaint that Respondent terminated Complainant, and otherwise failed and refused to reasonably accommodate her, because of her participation in a drug program.

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<sup>7</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. These allegations, if proven, would constitute violations of R.C. Chapter 4112 and the Commission's rules embodied in the Ohio Administrative Code (O.A.C.). R.C. 4112.02 provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

- (A) For any employer, because of the . . . disability, . . . 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's rules require an employer to reasonably accommodate an employee's disability unless the employer demonstrates that such accommodation would impose an undue hardship on the employer's business. O.A.C. 4112-5-08(E)(1).

4. Under Ohio law, drug addiction is a recognized disability. R.C. 4112.01(A)(16)(iii). However, employees who are current users are not protected. R.C. 4112.02 (Q)(1)(a).

5. Although current users are not protected, employees with addictions to drugs and alcohol who are past users are protected from adverse employment decisions under what is referred to as the “safe harbor” provision:

- (i) The employee, . . . has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of a controlled substance, . . .
- (ii) The employee, . . . is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of a controlled substance.
- (iii) The employee, . . . is erroneously regarded as engaging in the illegal use of a controlled substance, . . . .

R.C. 4112.02(Q)(b).

6. 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).

7. 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 the

Americans with Disabilities Act of 1990 (ADA) or the Rehabilitation Act of 1973.

8. The order of proof in a disability discrimination case requires the Commission to first establish a *prima facie* case. The Commission has the burden of proving:

- (1) Complainant was disabled under R.C. 4112.01(A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant's disability.

*McGlone, supra* at 571 (citation omitted).

9. The Commission, however, asserts that Complainant was not a current drug user at the time of her termination and, therefore, entitled to protection under the safe harbor provision within R.C. 4112.

10. The evidence supports the conclusion that Complainant had successfully completed a supervised drug rehabilitation program and was

no longer engaging in the illegal use of a controlled substance at the time of her termination.

11. Respondent is seeking to create a new category of users who are “technically still using”. However, this effort is an unsuccessful attempt to navigate around the prohibition against regarding an employee as engaging in the illegal use of a controlled substance. R.C. 4112.02 (Q)(b)(iii).

12. Respondent, therefore, engaged in discriminatory conduct when Complainant was terminated from her position.

### **RECOMMENDATIONS**

For all of the foregoing reasons, it is recommended in Complaint No. 9605 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to pay Complainant at the same wage she would have been paid had she been employed as an Operations Manager on February 18, 2003 and continued to be so employed up to the date of closure due to bankruptcy; and

3. Respondent shall submit to the Commission within 10 days of the date of the Commission's Final Order a certified check payable to Complainant for the amount that she would have earned had she been employed as an Operations Manager on February 18, 2003 and continued to be so employed up to the date that Respondent ceased doing business, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.<sup>8</sup>

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DENISE M. JOHNSON  
CHIEF ADMINISTRATIVE LAW JUDGE

September 28, 2005

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<sup>8</sup> Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.