Ohio Civil Rights Commission

Memo

To: Desmon Martin, Chief of Enforcement and Compliance

From: Denise M. Johnson, Chief Administrative Law Judge DMJ/tg

Date: June 23, 2008

Re: *Toni A. Muhammad v. Board of Cuyahoga County Commissioners, Cuyahoga Support Enforcement Agency*
[AKR] 73020102 [27068] 071202 22A – 2002 – 03616–C
Complaint No. 9491

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS DISMISSAL ORDER

Report issued: June 20, 2008

Report mailed: June 23, 2008

** **Objections due: July 16, 2008** **

DMJ:tg

Ohio Civil Rights Commission

Governor
Ted Strickland

Board of Commissioners
Leonard J. Hubert
Altagracia Ramos
Pastor Aaron Wheeler, Sr.
Rashmi N. Yainik

G. Michael Payton, Executive Director

June 23, 2008

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Re: *Toni A. Muhammad v. Board of Cuyahoga County Commissioners, Cuyahoga Support Enforcement Agency*
[AKR] 73020102 [27068] 071202 22A – 2002 – 03616 – C
Complaint No. 9491

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation (ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty (20) days from the mailing date of this report.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **Wednesday, July 16, 2008**. *No extensions of time will be granted.*

Any objections received after this date will be **untimely filed** and cannot be considered by the Ohio Civil Rights Commission.

Please send the original Statement of Objections to: **Desmon Martin, Chief of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414**. All parties and the Administrative Law Judge should receive copies of your Statement of Objections.

FOR THE COMMISSION

Desmon Martin / tg

Desmon Martin
Chief of Enforcement and Compliance

DM:tg

cc: Susan A. Choe, Esq., Chief – Civil Rights and Election Law – Stefan J. Schmidt, Esq.
Denise M. Johnson, Chief Administrative Law Judge

Enclosure

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

TONI A. MUHAMMAD

Complainant

v.

BOARD OF CUYAHOGA COUNTY COMMISSIONERS, CUYAHOGA SUPPORT ENFORCEMENT AGENCY

Respondent

Complaint No. 9491
(AKR) 73020102 (27068) 071202
22A – 2002 – 03616 – C

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

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ALJ'S REPORT BY:

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Chief Administrative Law Judge
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INTRODUCTION AND PROCEDURAL HISTORY

Toni A. Muhammad (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on July 12, 2002.

The Commission investigated the charge and found probable cause that Cuyahoga County Board of Commissioners, Cuyahoga Support Enforcement Agency (Respondent CSEA) 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 1, 2003.

The Complaint alleged that Respondent CSEA discharged Complainant for reasons not applied equally to all persons without regard to their race and religion.

Respondent CSEA filed an Answer to the Complaint on June 18, 2003. Respondent CSEA admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent CSEA also pled affirmative defenses.

A public hearing was held on June 22, 2005 at the Lausche State Office Building in Cleveland, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 318 pages;[1] exhibits admitted into evidence during the hearing; and the post-hearing briefs filed by the Commission on September 22, 2006;[2] by Respondent CSEA on December 15, 2006;[3] and a reply brief filed by the Commission on January 2, 2007.

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[1] Transcript was completed by the transcriber and sent to the Division of Hearings on May 11, 2006.

[2] The Commission requested a two-week extension to file its post-hearing brief.

[3] Respondent CSEA requested extensions to file its post-hearing brief on October 20 and November 24, 2006.

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 July 12, 2002.

2. The Commission determined on March 20, 2003 that it was probable that Respondent CSEA 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 was hired by Respondent CSEA on September 10, 2001 and entered an eight-week training program for a position as a Support Officer 1.

5. Upon successful completion of her training, Complainant was assigned to Enforcement Unit 2 on November 5, 2001.

6. Her duties as a Support Officer 1 required her to perform investigations using enforcement techniques learned during training and to make calculations for child support orders.

7. Complainant is African-American and a member of the Islamic religion.

8. As a practicing member of the Islamic religion Complainant wore the traditional headscarf to work, did not drink alcohol or eat pork or celebrate Christmas.

9. Upon assuming her responsibilities as a Support Officer 1 Complainant was assigned to work with Nadia Ahmetovic (Ahmetovic), Caucasian, a Support Officer 2 (Team Leader).

10. Ahmetovic monitored Complainant's work using training sheets during a 60-day probationary period.

11. After monitoring Complainant's work Ahmetovic was expected to report on Complainant's performance and turn in the training sheets to James Brown, Caucasian, Enforcement Unit 2 Supervisor.

12. During the probationary period Ahmetovic reported to Brown that Complainant was having problems applying the enforcement techniques and that her work reflected an unacceptably high error rate.

13. After six weeks Complainant's progress was evaluated by Brown, who made the decision to extend Complainant's probationary period for an additional 45 days.

14. Brown communicated his decision to Complainant on December 12, 2001, to continue her probation, effective January 8, 2002.

15. Brown communicated to Complainant that her error rate on the training sheets was too high and that she needed to make improvements by the end of January 2002.

16. On February 1, 2002, Complainant was advised that she had failed to successfully complete the extended probationary period and her employment was terminated.

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.[4]

1. The Commission alleged in the Complaint that Respondent CSEA discharged Complainant for reasons not applied equally to all persons without regard to their race and religion.

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[4] 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 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, ... religion, ... 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 Respondent CSEA to "articulate some legitimate, nondiscriminatory reason" for the employment action. *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969. To meet this burden of production, Respondent CSEA 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.

7. Although the burden of production shifts to Respondent CSEA at this point, *the Commission retains the burden of persuasion throughout the proceeding. Burdine, supra* at 254, 25 FEP Cases at 116. (Emphasis added.)

> 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).

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.

8. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent CSEA'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.

9. Respondent CSEA met its burden of production by introducing evidence that Complainant's termination was based upon her failure to improve her error rate during her extended probationary period.

10. Respondent CSEA having met its burden of production, the Commission must prove that Respondent CSEA unlawfully discriminated against Complainant because of her race and religion. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent CSEA's articulated reason for Complainant's discharge 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 CSEA'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 [and religion] 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 that the fact-finder could reasonably either (1) disbelieve the employer's articulated legitimate reason; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. *Keller v. Orix Credit Alliance, Inc.*, 130 F.3d 1101, 1108 (3rd Cir. 1997).

12. The Commission may directly challenge the credibility of Respondent CSEA'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). This type of challenge is based on the assertion that the reason forwarded is a pretext for illegal discrimination. 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.[5]
>
> *Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

[5] Even though rejection of a respondent's articulated reason is "enough at law to *sustain* a finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 511, 62 FEP Cases at 100, n.4.

13. The Commission may indirectly challenge the credibility of Respondent CSEA's reasons 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.*

14. Specifically, the Commission alleged that Complainant's error rate was comparable to James Sweeney (Sweeney), who is Caucasian and non-Muslim, who was in the same training class with Complainant, but was not discharged.

15. 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 (6th Cir. 1992) (citations omitted).

16. 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).

17. Respondent CSEA argues that the Commission failed to prove that Complainant was treated differently than similarly

situated employees who were not in the protected classes. This argument is well taken.

18. Complainant and Sweeney attended the same training academy class and started working in Enforcement Unit 2 on the same day. Complainant and Sweeney were assigned to different Team Leaders, Nadia Ahmetovic and Karen Beeble (Beeble), respectively. Ahmetovic and Beeble reported to James Brown, Enforcement Unit 2 Supervisor.

19. The Commission offered the testimony of Sweeney to assert that Complainant's performance was very similar to his own performance during the probationary period. Respondent CSEA provided credible documentary evidence to show that Complainant's error rate was higher than Sweeney's. Sweeney's performance (error rate) was, therefore, not comparable to Complainant's.

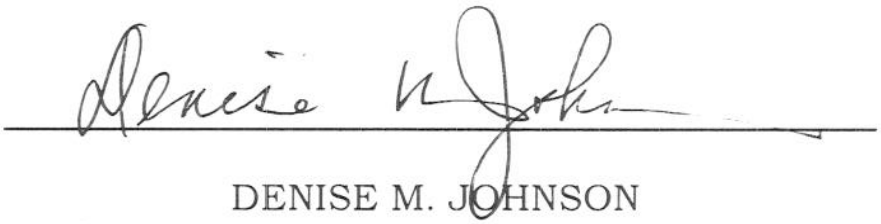
20. The Commission cannot prove pretext through disparate treatment without evidence that a similarly situated comparative was treated more favorably than Complainant.

21. Additionally, Complainant never heard a comment directed toward her that was anti-Muslim or racist. (Tr. 110-111) Nor was there credible evidence introduced by the Commission that directly linked the decision-makers to anti-Muslim or racist comments.

22. Therefore, there is no credible evidence in the record to believe that an invidious discriminatory reason was more likely than not the motivating or determinative cause behind Respondent CSEA's termination of Complainant's employment.

RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 9491.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

June 20, 2008