

**Ohio Civil
Rights Commission**

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 8/14/2013

Re: *Candy Robinson v. Frog Town, USA*

(CIN) 75 (32468) 01062007 22A-2007-01968-C

Complaint No. 07-EMP-CIN-32468

**CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT**

ALJ RECOMMENDS DISMISSAL ORDER

Report Issued: August 14, 2013

Report Mailed: August 14, 2013

*****Objections Due:*** September 6, 2013**

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Candy Robinson

Complainant

Complaint No. 07-EMP-CIN-32468

v.

Frog Town USA

Respondent

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

**MIKE DeWine
ATTORNEY GENERAL**

Patrick M. Dull, Esq.
Principal Assistant Attorney General
Civil Rights Section
Rhodes Office Tower
30 East Broad, 15th Floor
Columbus, Ohio 43215

Counsel for the Commission

Candy Robinson
304 7th Street
Huntington, WV 25705

Complainant

Richard F. Bentley, Esq.
WOLFE & BENTLEY, LLP
425 Center Street
Ironton, Ohio 45638

Counsel for the Respondent

ALJ'S REPORT BY:

Denise M. Johnson
Chief Administrative Law Judge
Ohio Civil Rights Commission
State Office Tower, 5th Floor
30 East Broad Street
Columbus, OH 43215-3414
Ph. (614) 466-6684
Fax: (614) 644-8776

INTRODUCTION AND PROCEDURAL HISTORY

Candy Robinson (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on January 3, 2007.

The Commission found probable cause that Respondent (Frog Town USA) engaged in unlawful discriminatory practices on October 25, 2007. The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued Complaint and Notice of Hearing on December 13, 2007.

The complaint alleged that Respondent reduced the Complainant's work hours and ultimately terminated Complainant's employment due to the race of Complainant's boyfriend in violation of Revised Code Section 4112.02(A).

A public hearing was held on October 13-14, 2009 at the Ironton City Center, City Council Chambers, 2nd Floor, 301 South Third Street, Ironton, Ohio 45638.

The record consists of the transcript of the hearing consisting of 261 pages; exhibits admitted into evidence during the hearing; and the post-hearing briefs: Post-hearing Brief of Commission filed on June 18, 2010, Post-hearing Brief of Respondent filed July 12, 2010 and Reply Brief of the Ohio Civil Rights Commission July 15, 2010.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the ALJ's 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 January 3, 2007.
2. The Commission determined that it was probable that Respondent engaged in unlawful discriminatory practices in violation of Revised Code Section 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 is Frog Town USA, Inc.
5. Respondent is an employer and transacts business in Ironton, Lawrence County, Ohio.
6. Respondent is a bar and restaurant. Tr. 17
7. Respondent's president and owner is Mark Rutledge (Rutledge).
8. Rutledge's step-daughter, Tanya Barber (Barber) is the manager. Tr. 21.

9. Complainant was hired by Barber on April 4, 2006 to be a waitress. Tr. 19, 70.
10. Barber is responsible for payroll, taxes, and supervising the waitresses. Tr. 30.
11. Barber makes the schedule for the servers and she is also in charge of hiring, firing, and disciplining wait staff. Tr. 22 ,Tr. 216
12. James Orasco (Orasco) is the chef manager and had worked there for seven years in the same position. Tr. 153
13. Orasco managed the kitchen staff including cooks and dishwashers and would fill in for Barber when she was out. Tr.20
14. Karen Kirk (Kirk) is a waitress for Respondent and worked with Complainant. Tr. 184-187
15. Kirk was promoted to shift manager in order to help Barber. Tr. 230
16. Complainant is Caucasian.

17. Complainant's boyfriend is African-American.
18. Complainant started dating her boyfriend after she had been working for Respondent about two or three months. (Tr. 81-82).
19. The Complainant started off working on weekends but then asked to be switched to weekdays because she had problems obtaining a babysitter on the weekends. Tr. 119
20. Barber was Complainant's supervisor when she worked weekdays. Tr. 219
21. Barber and Complainant would leave during Complainant's shift and Complainant would not clock out. Tr. 160, 220.
22. One day Rutledge came in to check on things and he noticed Barber and Complainant were both not there, though they were scheduled.
23. The next day Rutledge called Barber to complain about Complainant not being present at the restaurant and not clocking out.

24. Rutledge wanted Barber to insure that Complainant was working when she was clocked in and if she wasn't going to manage the problem that he wanted to change Complainant back to the weekend shift.
25. Rutledge also was aware of other employees complaining about Complainant not doing her waitressing duties and customers complaining about Complainant's service. Tr. 119,158, 171 ,220
26. Orasco would tell Barber about the complaints but she ignored them.
Tr.158
27. After speaking with Barber, Rutledge called Kirk and had her change Complainant's schedule from weekdays to weekends in December 2006. Complainant's weekend schedule was to work Thursday through Sunday.
Tr. 119, Tr. 220
28. Kirk changed the days Complainant was scheduled to work . (Tr. 56).
29. Respondent requires all employees to work holidays.
30. Respondent's policy about not calling to say you are not coming to work, No Call No Show, is the same as quitting. (Tr. 122).

31. Complainant did not show up on New Year's Eve.

32. Complainant was terminated from 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.

1. The Commission alleged in the Complaint that Complainant was terminated due to her association with people of a different race.
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. Discrimination based on an individual's association with a person of a different race is likewise prohibited in the context of employment. *See Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick and GMC Trucks, Inc.* (6th Cir. 1999), 173 F.3d 988,994 (holding that a Caucasian employee may sue for race discrimination under Title VII where he alleges he was fired for having a biracial child) and *Williams v. Wal-Mart Stores, Inc.* (5th Cir. 1999), 182 F.3d 333, 13 ("Title VII prohibits discrimination in employment premised on an interracial relationship").
4. 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).

5. 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. Thus, 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).
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 v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973).
7. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802, 5 FEP Cases 969, n.13.
8. 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).
9. 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.¹ *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969.

10. 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.

11. 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.

12. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of legitimate,

¹ 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 (terminating) 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).

nondiscriminatory reasons for Complainant 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 is no longer relevant.

Aikens, *supra* at 713, 31 FEP Cases at 611.

13. Respondent met its burden of production with the introduction of evidence that Complainant quit by not showing up to work on New Year’s Eve as all employees are required to work on holidays.
14. 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 reasons for failure to hire Complainant were not the true reasons, but were “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.

15. Thus, even if the Commission proves that Respondent’s articulated reasons are 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 ... [sex] is correct. That remains a question for the fact finder to answer

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

16. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of race discrimination.

17. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent’s articulated reasons for terminating the Complainant.

18. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing that they had no basis *in fact* or were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).
19. Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons 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.²

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

20. The Commission may indirectly challenge the credibility of Respondent's reasons by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove the reasons did not actually motivate the employment decision, requires the Commission to produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id*

² 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.

21. In the instant case the Commission challenged the credibility of Respondent's reasons with the introduction of evidence that Rutledge terminated Complainant because her boyfriend is African American.
22. The Commission's arguments are not persuasive.
23. Rutledge had no knowledge that Complainant's boyfriend was African American. (Tr. 231).
24. Complainant never introduced her boyfriend to Respondent nor was her boyfriend at Respondents when she was working. (Tr. 87).
25. I found that Barber and Complainant lacked credibility.
26. Although Barber was the manager, she let Complainant come to her house and clean and go to Walmart during the hours that she was clocked in at work. Tr. 54, 220
27. A reasonable inference can be made from Barber's conduct that as a manager she was not doing much to support Respondent's business and

that she and Complainant's relationship went beyond the scope of employee and supervisor.

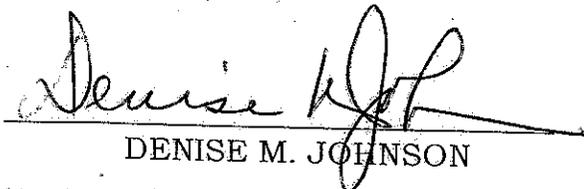
28. I found Kirk to be credible. She testified that she changed the days Complainant was scheduled to work but it was still the same amount of hours. (Tr. 56).

29. I found Orasco to be credible. He testified that he and other employees did not complain to Barber about Complainant because of the close relationship between them. (Tr. 158-161 and 216).

30. The Commission failed to show that Complainant's termination from employment with Respondent was due to an illegal discriminatory animus.

RECOMMENDATIONS

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 07-EMP-CIN-32468.

A handwritten signature in black ink, appearing to read "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON

CHIEF ADMINISTRATIVE LAW JUDGE

August 14, 2013



Governor
John Kasich

Ohio Civil Rights Commission

Board of Commissioners

Leonard J. Hubert, Chairman
William Patmon, III
Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

November 4, 2013

Candy Robinson
304 7th Street
Huntington, WV 25705

RE: Candy Robinson v. Frog Town USA
CIN75(32468)01052006
22A-2007-01968C
Complaint No. 07-EMP-CIN-32468

The enclosed Order dismissing Complaint No. 13-EMP-AKR-36353 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting October 17, 2013.

This case is closed.

FOR THE COMMISSION

Desmon Martin/tms

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/tms
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614-466-2785 • TOLL FREE: 1-888-278-7101 • TTY: 614-466-9353 • FAX: 614-644-8776

REGIONAL OFFICES

AKRON • CINCINNATI • CLEVELAND • COLUMBUS • DAYTON • TOLEDO

www.crc.ohio.gov



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Leonard J. Hubert, Chairman
William Patmon, III
Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

November 4, 2013

Richard F. Bentley, Esq.
WOLFE & BENTLEY, LLP
425 Center Street
Ironton, Ohio 45538

RE: Candy Robinson v. Frog Town USA.
CIN75(32468)01052006
22A-2007-01968C
Complaint No. 07-EMP-CIN-32468

The enclosed Order dismissing Complaint No. 13-EMP-AKR-36353 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting October 17, 2013.

This case is closed.

FOR THE COMMISSION

Desmon Martin/tms

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/tms
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section



Governor
John Kasich

Ohio Civil Rights Commission

Board of Commissioners

Leonard J. Hubert, Chairman
William Patmon, III
Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

November 4, 2013

Patrick Dull, Esq.
Ohio Attorney General's Office
Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215

RE: Candy Robinson v. Frog Town USA
CIN75(32468)01052006
22A-2007-01968C
Complaint No. 07-EMP-CIN-32468

The enclosed Order dismissing Complaint No. 13-EMP-AKR-36353 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting October 17, 2013.

This case is closed.

FOR THE COMMISSION

Desmon Martin/tms

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/tms
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section



John Kasich, Governor

IN THE MATTER OF:)	
)	
CANDY ROBINSON,)	
)	
Complainant,)	
)	Complaint No. 07-EMP-CIN-32468
vs.)	
)	
FROG TOWN USA)	
)	
Respondent.)	

FINAL ORDER

This matter comes before the Commission upon Complaint and Notice of Hearing No. 07-EMP-CIN-32468; the official record of the public hearing held before Denise Johnson, Esq., a duly appointed Administrative Law Judge; the post-hearing briefs filed by the parties; and the Administrative Law Judge's report and recommendation dated August 14, 2013.

After the public hearing on the matter, the Administrative Law Judge issued a report and recommendation to the Commissioners, finding that no unlawful discrimination had occurred, and recommending that Complaint No. 07-EMP-CIN-32468 be dismissed. The Commission considered the entire record and adopted the Administrative Law Judge's report and recommendation at its September 26, 2013 public meeting.

Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations contained in the Administrative Law Judge's August 14, 2013 report and recommendation as if fully rewritten herein. The Commission hereby dismisses Complaint No. 07-EMP-CIN-32468 against Respondent.

This ORDER issued by the Ohio Civil Rights Commission this 17th day of October, 2013.

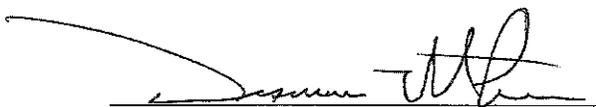

Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

Notice is hereby given to all parties herein that Revised Code Section 4112.06 sets forth the right to obtain judicial review of this Order and the mode and procedure thereof.

CERTIFICATE

I, Desmon Martin, Director of Enforcement and Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Final Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.



Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission

DATE: _____

11/4/2013