Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 12/5/2013

Re: *Kaloni M. Wheeler v. Damon's International, Inc dba Damon's Grill*
CLE74 (39772) 07282009 22A-2010-00436C
Complaint No. 10-EMP-CLE-39772

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS CEASE & DESIST ORDER

Report Issued: December 4, 2013

Report Mailed: December 5, 2013

*****Objections Due:*** December 30, 2013**

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Stephanie M. Mercado, Esq.
William W. Patmon, III
Tom Roberts
Lori Barreras

G. Michael Payton, Executive Director

December 5, 2013

Kaloni M. Wheeler
5350 Knollwood Dr., Apt. 5
Parma, Ohio 44129

Andrew Margolius
Margolius & Associates
55 Public Square, Suite 1100
Cleveland, Ohio 44113

K. Bradley Mellor, Esq.
Blumling & Gusky, LLP
1200 Koppers Building
436 Seventh Ave.,
Pittsburg, PA 15219

Re: *Kaloni Wheeler v. Damon's International, Inc. dba Damon's Grill*
CLE74 (39772) 07282009 22A-2010-00436C Complaint No. 10-EMP-CLE-39772

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) ALJ's Report). You may submit a Statement of Objections to the ALJ's Report within twenty three (23) days from the mailing date of this report. A request to appear before the Commission must also be submitted by this date.

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **December 30, 2013**. *No extension 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, Director 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 / apo

Desmon Martin
Director of Enforcement and Compliance

Enclosure

DM:*apo*
Cc: Lori A. Anthony – **Chief, Civil Rights Section**/Sharon D. Tassie, Senior AAG /K. Bradley Mellor, Esq. /Andrew Margolius, Esq. /Kaloni Wheeler, Complainant, / Michelle V. Pfeil, Complainant / Denise M. Johnson – **Chief Administrative Law Judge**

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Kaloni M. Wheeler

Complainant

Complaint No. 10-EMP-CLE-39772

v.

Damon's International, Inc. dba Damon's Grill

Respondent

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

MIKE DeWine
ATTORNEY GENERAL

Sharon D. Tassie, Esq.
Senior Assistant Attorney General
Civil Rights Section – 11th Floor
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Cleveland, Ohio 44113

Counsel for the Commission

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1200 Koppers Building
436 Seventh Ave.,
Pittsburg, PA 15219

Counsel for the Respondent

Kaloni M. Wheeler
5350 Knollwood Dr., Apt. 5
Parma OH 44129

Complainant

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

Michelle V. Pfeil and Kaloni M. Weaver (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on July 28, 2009.

The Commission investigated the charge and found probable cause that Damon's International, Inc. dba Damon's Grill (Respondent) engaged in unlawful employment practices in violation of Revised Code Section 4112.02 (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on June 3, 2010.

The Complaints alleged that Respondent discriminated against Complainants in the terms and conditions of their employment and retaliated against them for engaging in protected activity in violation of R.C. 4112.02 (I).

Respondent did not file Answers to the Complaints. On November 20, 2010 the Commission filed a Motion For Default Judgment and Hearing On The Evidence In Support of Complainants' Damages. O.A.C. 4112-3-06(F).

On December 6, 2010 the Respondent filed a Suggestion of Bankruptcy seeking to stay the resolution of the Complaints pursuant to the automatic stay provision of Section 362 of the United States Bankruptcy Code. On December 14, 2010 the Commission filed a Response To Respondent's Suggestion of Bankruptcy.

On January 14, 2011 the ALJ issued an order denying the Respondent's assertion that the automatic stay provision applied to the Commission's resolution of the Complainants. The Commission falls within the exception to the automatic stay provision because it is a governmental unit that has statutory authority to enforce Ohio's anti-discrimination laws. See *EEOC v. McLean Trucking Co.*, 834 F.2d 398, 401 (4th Cir. 1987). The ALJ also granted the Commission's Motion For Default Hearing.

A public hearing was held on September 26, 2011. Complainant Wheeler attended the hearing and testified regarding her damages. The Commission moved to leave the record open for thirty (30) days after the hearing to attempt to get an affidavit from Complainant Pfiel regarding her damages. The record closed without the ALJ having received an affidavit from the Commission.[1]

The record consists of the previously described pleadings, a transcript of the hearing (22 pages) and a post hearing brief filed by the Commission on July 26, 2013

---

1 In order to resolve/close the Complaint No. 39774 the AG should submit the appropriate recommendation to the Commission based on Complainant Pfeil's failure to co-operate.

FINDINGS OF FACT[2]

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.

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2 Findings of Fact are on the basis of the Complaint No. 39772, Kaloni Wheeler.

1. Respondent is a restaurant known as Damon's Grill. (Tr. 8)
2. Complainant began employment as a waitress with Respondent on August 11. 2007. (Tr. 15)
3. Complainant worked six days a week on the closing shift.
4. A closing shift ends at 12:30-12:45 A.M., as opposed to a normal shift which would end whenever business slowed down, usually between 8:00 PM-10:00 PM. (Tr. 12)
5. In April of 2009 Complainant made an internal complaint to the general manager of the restaurant based on her belief that she had been a victim of sexual harassment. (Tr. 9,15)
6. Shortly after Complainant complained of sexual harassment, Respondent hired a new employee, Melissa Laska (Laska). (Tr. 19)
7. Complainant trained Laska and after she completed the training, Complainant's hours per-week began to reduce. (Tr. 14, 16, Exhibit B))

8. At the same time that Complainant's hours were being reduced Laska's hours were increased. (Tr. 16)

9. Complainant's employment was terminated on August 18, 2009. (Tr. 14)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent 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 the testimony of various witnesses is not in accord with the findings therein, it is not credited.[3]

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

1. The Commission alleged that Respondent retaliated against the Complainant for engaging in protected activity in violation of R.C. 4112.02(I).

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:

   > (I) For any person to discriminate in any manner against another person because that person has opposed any unlawful practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

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 (I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. To establish a case of retaliation, the Commission must prove that:

(1) Complainant engaged in a protected activity,
(2) Respondent was aware that the Complainant had engaged in that activity,
(3) Respondent took an adverse employment action against the Complainant, and
(4) There is a causal connection between the protected activity and adverse action.

Greer-Burger v. Temesi, 116, 116 Ohio Sty.3d 324 at para. 13 citing Canitia v. Yellow Freight Sys., Inc. (C.A. 6, 1990), 903 F.2d 1064, 1066 4

Except where R.C. Chapter 4112 defines the statutory terms differently, the Ohio Supreme Court holds that federal case law interpreting and applying Title VII is generally applicable to R.C. 4112.02 claims. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St. 3d. The Court's recent decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ (2013) is inapplicable to alleged violations of R.C. 4112.02(I).

The Court's rationale is premised on the amendments to the Civil Rights Act of 1991(1991 Act), 105 Stat. 1071 which overruled, in part, *Price Waterhouse v. Hopkins*, 490 U.S. 228 at 259 (1989). The amendments changed the causation standard for status-based discrimination but did not change the causation language of the anti-retaliation provision. The Court reasoned that since the legislature only amended Title VII's status provision, there was no intent to eliminate the "but for causation" standard for the retaliation provision. Ohio law has not undergone similar changes. The language of section 2000e-2(m) is substantially different from R.C. 4112.02 (A). The causation standard announced in *Nassar* is narrow based not only on a strict construction of the statutory language but also on the following policy analysis:

> "[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment." *Id.* Slip. Op. at 18.

R.C. 4112.08 mandates that "this chapter [4112] shall be construed liberally for the accomplishment of its purposes which is to eliminate discrimination in the state of Ohio. *Genaro v. Cent. Transp.*, 84 Ohio St. 3d *293 Helmick v. Cincinnati Word Processing, Inc. (1989), 45 Ohio St. 3d 131, 133, 543 N.E.2d*

5. The Commission's Complaint and credible evidence introduced at the hearing supports a determination that the Complainant's reduction in hours and termination was because she opposed a discriminatory practice prohibited by R.C. 4112.02 (A).

6. Complainant was paid at a rate of $3.65 per hour. (Tr. 15)

7. Based on the reduction in the number of shifts Complainant worked she lost $262.80 in regular pay and a loss in tip salary of $1800.00. (Tr. 14,16, Exhibit B)

1212, 1215, Kerans v. Porter Paint Co. (1991), 61 Ohio St. 3d 486, 575 N.E.2d 428, Collins v. Rizkana (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653,

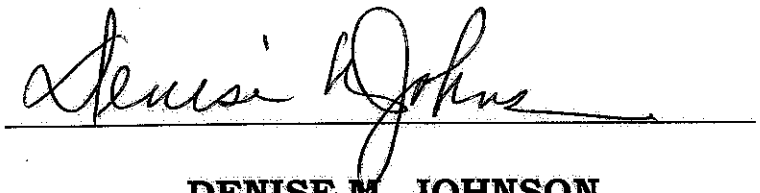
To apply the *Nassar* analysis to R.C. 4112.02 (I) would result in an interpretation inconsistent with the legislative history of the law. It is a cardinal rule of statutory construction that a statute should not be interpreted to yield a absurd result. *Mishr v. Bd. of Zoning Appeals* (1996), 76 Ohio St.3d 238, 240, 1996 Ohio 400, 667 N.E.2d 365

RECOMMENDATION

For all of the foregoing reasons, it is recommended in Complaint No. 39772 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 back pay of $2062.80 with interest to the date of the filing of the bankruptcy petition.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

December 4, 2013

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Stephanie M. Mercado, Esq.
William W. Patmon, III
Tom Roberts
Lori Barreras

Hearings Division

G. Michael Payton, Executive Director

An Errata on the ALJ's Report in the ***Kaloni M. Wheeler*** Case
CLE74(39772) 07282009 22A-2010-00436C

Complaint No. 10-EMP-CLE-39772

The inadvertent typographical error in paragraph 1 on page 1 with regard to the second Complainant's name is hereby being corrected. The original Report read "Kaloni M. Weaver" instead of "Kaloni M. Wheeler." Also being corrected is the defective footnote in the first paragraph, last sentence on page 3 and the missing period at the end of the sentence on page 3.

Further, the footnote on page 9 was sent without a numerical designation. It should read footnote "No. 4." Finally, the remainder of the footnote on page 10 should read "that a statute should not be interpreted to yield **an** absurd result," and not "**a**" absurd result.

The corrected pages are attached herewith. The **December 30, 2013** date for the parties' Statement of Objections to the ALJ's Report & Recommendation remains unchanged. Note however that this is a default case.

Thank you for your cooperation.

Tony Osuobeni

TONY OSUOBENI
ADMINISTRATIVE ASSISTANT TO THE ALJ

Ohio Civil Rights Commission
Rhodes Office Tower, 5th Floor
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Columbus Ohio 43215-3414
Tel: (614) 466-6684; Fax: (614) 466-2785
Tony.Osuobeni@civ.ohio.gov

December 9, 2013

INTRODUCTION AND PROCEDURAL HISTORY

Michelle V. Pfeil and Kaloni M. Wheeler (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on July 28, 2009.

The Commission investigated the charge and found probable cause that Damon's International, Inc. dba Damon's Grill (Respondent) engaged in unlawful employment practices in violation of Revised Code Section 4112.02 (I).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on June 3, 2010.

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A public hearing was held on September 26, 2011. Complainant Wheeler attended the trial and testified regarding her damages. The Commission moved to leave the record open for thirty (30) days after the hearing to attempt to get an affidavit from Complainant Pfiel regarding her damages. The record closed without the ALJ having received an affidavit from the Commission.[1]

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Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Lori Barreras
William Patmon, III
Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

March 13, 2014

Kaloni M. Wheeler
6802 Memphis Ave.
Cleveland, Ohio 44144

RE: Kaloni M. Wheeler v. Damon's International, dba Damon's Grill
CLE74(39772)07282009
22A-2010-00436C
Complaint No. 10-EMP-CLE-39772

The enclosed Order dismissing Complaint No. 10-EMP-CLE-39772 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting March 13, 2014.

This case is closed.

FOR THE COMMISSION

Desmon Martin/pjw

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

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

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Lori Barreras
William Patmon, III
Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

March 13, 2014

K. Bradley Mellor, Esq.
Bluming & Gusky LLP
1200 Koppers Bldg.
436 Seventh Avenue
Pittsburg, PA 15219

RE: Kaloni Wheeler v. Damon's International, dba Damon's Grill
CLE74(39772)07282009
22A-2010-00436C
Complaint No. 10-EMP-CLE-39772

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This case is closed.

FOR THE COMMISSION

Desmon Martin/pjw

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

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

Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners
Leonard J. Hubert, Chairman
Lori Barreras
William Patmon, III
Stephanie M. Mercado, Esq.
Tom Roberts

G. Michael Payton, Executive Director

March 13, 2014

Sharon D. Tassie, Esq.
Principal Assistant Attorney General
Civil Rights Section
615 West Superior, 11th floor
Cleveland, OH 44113-1899

RE: Kaloni Wheeler v. Damon's International, dba Damon's Grill
CLE74(39772)07282009
22A-2010-00436C
Complaint No. 10-EMP-CLE-39772

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This case is closed.

FOR THE COMMISSION

Desmon Martin/pjw

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

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

John Kasich, Governor

IN THE MATTER OF:	)	
	)	
Kaloni M. Wheeler,	)	COMPLAINT NO. 10-EMP-CLE-39772
	)	
Complainant,	)	
	)	
vs.	)	
	)	
Damon's International, dba Damon's Grill,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This matter comes before the Commission upon the Complaint and Notice of Hearing No. 10-EMP-CLE-39772; the official record of the public hearing held on October 26, 2011, before Chief Administrative law Judge Denise M. Johnson, a duly appointed administrative law judge; the post-hearing brief filed by the Commission; and the Chief Administrative Law Judge's Report and Recommendation dated December 4, 2013. At its March 13, 2014 meeting, the Commission considered the Administrative Law Judge's report and Recommendation.

The complaint alleges that Respondent retaliated against Ms. Wheeler after she complained of sexual harassment by reducing her work hours in violation of R.C. 4112.02(I).

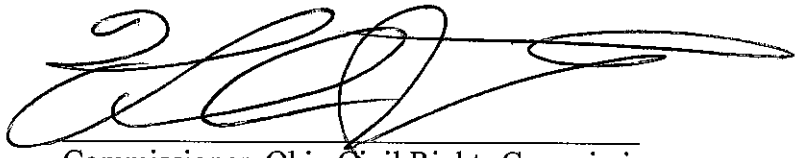
After a public hearing, the Chief Administrative Law Judge recommended that the Commission order Respondent to Cease and Desist from all discriminatory practices in violation of R.C. Chapter 4112.

After careful consideration of the entire record, the Commission hereby adopts all of the Administrative Law Judge's Recommendations. Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations for relief contained in the Administrative law Judge's report as if fully rewritten herein.

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

The Commission finds as a result of the unlawful conduct Ms. Wheeler lost pay and tips in the amount of $2062.80 plus interest from August 18, 2009 to the date Respondent filed its petition in bankruptcy, which may be paid in the manner and amount as determined by the Bankruptcy Trustee.

This ORDER issued by the Ohio Civil Rights Commission this 13th day of March, 2014.



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 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: 3/13/2014