

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 10/16/2013

Re: *Rolanda D Scott v. Wills, Inc. dba Servpro*

TOL72 (32955) 04032009 22A-2009-02178C
Complaint No. 10-EMP-TOL-32955

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

ALJ RECOMMENDS DISMISSAL ORDER

Report Issued: October 16, 2013

Report Mailed: October 16, 2013

*****Objections Due:*** November 8, 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
Rashmi N. Yajnik

G. Michael Payton, Executive Director

October 16, 2013

Rolanda D. Scott
1420 Avondale
Toledo, Ohio 43607

Fan Zhang, Esq.
WAGONER & STEINGBERG
7445 Airport Highway,
Holland, Ohio 43528

Re: **Rolanda D. Scott v. Will, Inc. dba Serupro**

TOL72(32955)04032009 22A-2009-02178C Complaint No 10-EMP-TOL-32955

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 **November 8, 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**/Susan K. Sharkey, **Associate AAG**/ Fan Zhang, Esq, / R. Kevin Greenfield, Esq. / Rolanda D. Scott, **Complainant** /Denise M. Johnson - **Chief Administrative Law Judge**

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OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Rolanda D. Scott

Complainant

Complaint No. 10-EMP-TOL-32955

v.

Wills, Inc. dba Serupro

Respondent

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

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Counsel for the Respondent

ALJ'S REPORT BY:

Chief Administrative Law Judge

Denise M. Johnson,
Ohio Civil Rights Commission
Rhodes Office Tower, 5th Floor
30 East Broad Street,
Columbus, OH 43215-3414
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INTRODUCTION AND PROCEDURAL HISTORY

Rolanda Scott (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on April 3, 2009.

The Commission investigated the charge and found probable cause that Wills, Inc. d/b/a Servpro (Respondent) engaged in unlawful employment practices in violation of R.C. 4112.02(A).

The Commission attempted, but failed to resolve the matter by informal methods of conciliation. The Commission subsequently issued a Complaint on January 28, 2010.

The Complaint alleged that Complainant was terminated because of her race (African American) and sex (female).

Respondent filed an Answer to the Complaint on March 23, 2010. 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 on November 15, 2011 at One Government Center, Room 12-C, 640 Jackson Street in Toledo, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (302 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on June 6, 2012 and Respondent on July 3, 2012, and a reply brief filed by the Commission on July 16, 2012.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) credibility assessment 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 Commission on April 3, 2009.

2. The Commission determined on January 7, 2010 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 and the Notice of Hearing on January 28, 2010, after conciliation failed. (Commission Exh. 2)

4. Respondent offers a full range of cleaning and restoration services including residential cleaning such as carpet, upholstery, and janitorial services; restoration services such as fire damage restorations, water damage restorations, and deodorization.

5. Complainant was hired as an Administrative Assistant on January 5, 2009. (Tr. 13-14, 16-17)

6. Due to the sudden departure of Office Manager Karen Apodaca (Apodaca), Complainant was offered and accepted the position of Office Manager on her first day of work. (Tr. 14, 171, 231-232).

7. The Office Manager position was a promotion and paid Complainant at least \$2.00 more per hour than the Administrative Assistant position. (Tr. 171).

8. Complainant's duties included managing financial documents, supervising administrative staff, and assisting the production manager and crew; verifying the phone rolling¹ process; maintaining possession of filing cabinet and office door keys; and verifying that the company credit card had sufficient funds to refuel Respondent's company vehicles. (Tr. 17-18; 34-35, 118-119, 167-169; 85-87, 267-270; 88-89, 272).

9. During Complainant's tenure as Office Manager she received three employee warning notices. (Tr. 91) (Exhibit D).

¹ Phone rolling is the process where Respondent's phone calls are transferred to a third party answering service outside of the company's normal operating hours. (Tr. 34-35, 167)

10. On February 16, 2009, Complainant received her first warning notice for her failure to make a payment on the company credit card. The credit card was declined when the production crew attempted to refuel its vehicles. (Tr. 20-22, 146-147, 164, 272-275) (Exhibit 3).

11. On February 23, 2009, Complainant received her second and third warning notices due to an incident where Respondent's phones were not rolled to the after-hours answering service by Administrative Assistant Laura Tracy (Tracy). (Tr. 34-35, 84-85, 119).

12. In the second and third warning notices Respondent cited Complainant for her "failure to check the work of subordinate employees", "failure to roll the phones" and "poor work quality." (Tr. 119, 167-170). (Exhibit D).

13. During the week of March 1, 2009, Respondent transferred Complainant from the Office Manager position after approximately

two months of employment to the position of Marketing Manager. (Tr. 57, 214).

14. The Marketing Manager position paid the Complainant the same compensation and benefits that she received as the Office Manager. (Tr. 81, 172- 173).

15. On March 18, 2009, Complainant, Production Manager Dave Hubbard (Hubbard), Nora Wallace (Wallace) and Jaime Burgy (Burgy) were participating in an office work-in-progress (WIP) meeting. Wallace was newly hired as the Office Manager and Burgy was a new Administrative Assistant. (Tr. 151, 214, 37, 71, 174).

16. During the WIP meeting, Complainant informed Wallace and Burgy that she did not receive adequate training on how to input job estimates into the company computer. Complainant also advised the new employees that Wills would yell at them if they failed to perform a task correctly. (Tr. 59-62, 174-175, 226) (Exhibits E and N).

17. Wallace reported Complainant's statements to Wills. (Tr. 175-177) (Exhibit E).

18. Wills met with Complainant to discuss the WIP meeting and she admitted to making the alleged statements. Shortly thereafter, on March 18, 2009, Wills terminated Complainant's employment. (Tr. 60-62, 175-177).

CONCLUSIONS OF LAW AND DISCUSSION²

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.

² 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 in the Complaint that Complainant was subject to different terms, conditions and privileges of employment and termination, based on her race and sex in violation of R.C. 4112.02(A).

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, (...) sex,... 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 other 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. 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).

5. Under Title VII, 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 (1973). The proof required to establish a *prima facie* case may vary on a case-by-case basis. *Id.*, at 802.

6. 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 (1981).

7. 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.³ *McDonnell Douglas, supra* at 802.

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 (1993), *quoting Burdine, supra* at 254-55.

8. The presumption of discrimination created by the establishment of the prima facie case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks, supra* at 511.

³ 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.

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 reason was applied in a nondiscriminatory fashion.

EEOC v. Flasher Co., 986 F.2d 1312, 1316 (10th Cir. 1992) (citations and footnote omitted).

9. In this case, it is not necessary to determine whether the Commission established a *prima facie* case. Respondent's articulation of legitimate, nondiscriminatory reasons for its decision to terminate 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, 715 (1983) quoting *Burdine*, *supra* at 255.

Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

Aikens, *supra* at 715.

10. Respondent's decision to terminate Complainant was based on her violation of Respondent's Employee Handbook policy against "spreading rumors, creating discord, restricting work output or displaying an attitude hostile to the company" which is conduct subject to corrective action including dismissal. (Exhibit A).

11. The Handbook further provides that “any employee participating in any form of gossip or harassment will be automatically dismissed.” (Exhibit B, pg. 30).

12. Respondent having met its burden of production, the Commission must prove that Respondent unlawfully discriminated against Complainant because of her race and sex. *Hicks, supra* at 511.

13. The Commission must show by a preponderance of the evidence that Respondent’s articulated reasons for discharging Complainant were not the true reasons, but were “a pretext for discrimination.” *Id.*, at 515, *quoting Burdine, supra* at 253.

[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.

14. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing 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., *supra*, at 524.

15. Ultimately, the Commission must provide sufficient evidence to allow the factfinder to infer that Complainant was, more likely than not, the victim of race and sex discrimination. *Mauzy v. Kelly Services, Inc.* (1996), 75 Ohio St.3d. 578, 586-587.

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.⁴

Hicks, supra at 511 (emphasis added).

⁴ 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 512.

16. The Commission may indirectly challenge the credibility of Respondent'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 v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

17. This type of showing, which tends to prove that the reason 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. *Manzer, supra*, at 1084.

18. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing 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...

Hicks, supra, at 524.

19. The Commission alleged that Respondent's policies were not uniformly applied. According to the Commission, Complainant was singled-out and treated unfairly by Wills because she was discharged with only one disciplinary action and two employee warnings, while other employees received numerous warnings but were not terminated. (Tr. 229-230, 236; 230, 237; 230, 237; 230, 238) (Exhibits 6, 7, 8 and 9).

20. The Commission must establish that the comparable employees are similarly situated to Complainant "in all *relevant* aspects" of employment. *Barry v. Noble Metal Processing, Inc.*, 276 Fed. Appx. 477, 480 (6th Cir. 2008), *citing Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F. 3d 344, 352 (6th Cir. 1998) (internal quotation marks omitted).

To be deemed "similarly situated," the individuals with whom ... the [Complainant] seeks to compare ... [her] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances

that would distinguish their conduct or the employer's treatment of them for it.

Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992).

21. In comparing discipline decisions, "a precise equivalence in culpability" is not required; misconduct of "comparable seriousness" can suffice. *Harrison v. Metro. Gov't of Nashville and Davidson Cty.*, 80 F.3d 1107, 1115 (6th Cir. 1996) (quotations omitted).

"The [Complainant] need not demonstrate an exact correlation with the [applicant] receiving more favorable treatment in order for the two to be considered "similarly-situated."

Ercegovich, supra at 352.

22. The Commission's argument is without merit.

23. Respondent's Employee Handbook policies prohibiting "spreading rumors" and mandating the automatic dismissal of "any employee participating in any form of gossip or harassment" were uniformly applied. (Exhibits A and B) (Tr. 174, 176, 239-241).

24. Every employee found to have violated Respondent's policy, which prohibits the spreading of rumors was terminated. (Tr. 174, 176, 239-241).

25. Respondent presented credible evidence which proved that Teri, a Caucasian female, was also terminated for spreading rumors/gossiping prior to Complainant's discharge under the same policies. (Tr. 236, 241, 281).

26. In 2007 Teri was discharged for spreading rumors about the company but was rehired in September of the same year due to her romantic relationship with Wills. (Tr. 243-244, 281; 28, 122, 292).

27. Additionally, when it is the same-actor that both hires and terminates a Complainant there is a strong inference that discrimination was likely not the reason for the discharge. *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 463 (6th Cir.1995).

28. Wills was aware of Complainant's race and sex when he decided to both hire and terminate Complainant. (Tr. 17, 182; 59-62, 174-176, 226).

29. Respondent also presented credible evidence to show that no other employee, besides Teri, engaged in misconduct of "comparable seriousness", i.e., spreading rumors, to that of Complainant mandating automatic dismissal. (Tr. 59-62, 174-176, 226; 229-230, 236; 230, 237; 230, 237; 230, 238) (Exhibits A and B; Exhibits 6, 7, 8 and 9).

30. The Commission also attempted show that Wills harbored a discriminatory animus toward African Americans based on an embellishment that Wills made to Complainant's own statement that she was having a "blonde moment" (Complainant's hair is dyed blonde).

31. Wills embellished Complainant's statement adding that she was a "dumb black blonde".

32. Wills' embellishment was made during a casual conversation that he was having with Complainant during a lunch break.

33. Wills' comment was isolated and ambiguous and not made during the decisional process.

Isolated and ambiguous comments are too abstract, in addition to being irrelevant and prejudicial to support a finding of [race] discrimination. (quotations omitted)

Phelps v. Yale Security Inc., 986 F.2d 1020, 1025-26
(6th Cir. 1993)

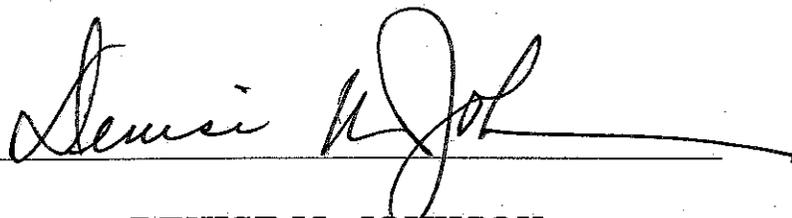
Additionally, because the comment was not made in the context of the decision to terminate the [Complainant], it is too weak to raise a reasonable inference of discrimination. (quotations omitted)

Dungee v. Northeast Foods, Inc., 940 F. Supp. 682, 687-88 (D.N.J. 1996)

34. The Commission failed to establish that the Complainant was terminated from employment because of her race and sex.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 10-EMP-TOL-32955.

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

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

October 16, 2013



Governor
John Kasich

Ohio Civil Rights Commission

Board of Commissioners

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

G. Michael Payton, Executive Director

January 13, 2014

R. Kevin Greenfield, Esq.
3450 West Central Ave., Suite 370
Toledo, Ohio 43606

RE: Rolanda D. Scott v. Will, Inc. dba Servepro
TOL72(32955)04032009
22A-2009002178C
Complaint No. 10-EMP-TOL-32955

The enclosed Order dismissing Complaint No. 10-EMP-COL-32955 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting January 9, 2014.

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



Ohio Civil Rights Commission

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January 13, 2014

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7445 Airport Highway
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RE: Rolanda D. Scott v. Will, Inc. dba Servepro
TOL72(32955)04032009
22A-2009002178C
Complaint No. 10-EMP-TOL-32955

The enclosed Order dismissing Complaint No. 10-EMP-TOL-32955 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting January 9, 2014.

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:)	
)	
ROLANDA SCOTT,)	Complaint No. 10-EMP-TOL-32955
)	
Complainant,)	
)	
vs.)	
)	
WILLS, INC. d/b/a Servepro,)	
)	
Respondent.)	

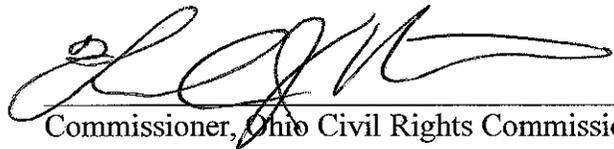
FINAL ORDER

This matter comes before the Commission upon the Complaint and Notice of Hearing No. 10-EMP-TOL-32955; the official record of the public hearing held on November 15, 2011, before Denise M. Johnson, a duly appointed administrative law judge; the post-hearing briefs filed by the Commission and Respondent; the Administrative Law Judge's Report and Recommendation dated October 16, 2013; and the Complainant's Objections to the Administrative Law Judge's Report and Recommendation.

The complaint alleges that the Complainant was discriminated against because of race and sex. After a public hearing, the Administrative Law Judge recommended that the Commission dismiss Complaint No. 10-EMP-TOL-32955. After careful consideration of the entire record, the Commission adopted the Administrative Law Judge's report at its public

meeting on December 12, 2013. Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations contained in the Administrative Law Judge's report, as if fully rewritten herein, and dismisses the complaint against Respondent.

This ORDER issued by the Ohio Civil Rights Commission this 9th day of January, 2014.



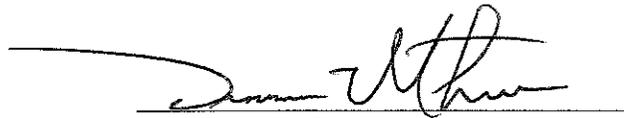
Commissioner, Ohio Civil Rights Commission

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 Final Order issued in the above-captioned matter and filed with the Commission at its Central Office in Columbus, Ohio.

A handwritten signature in black ink, appearing to read 'Desmon Martin', is written over a horizontal line.

Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission