

**Ohio Civil
Rights Commission**

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 3/7/2013

Re: Sandra K. Montgomery v. State of Ohio, Rehabilitation Services
Commission

**COL A1 (35376) 01182008 22A-2008-01921; Complaint No. 08-
EMP-COL-35376**

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

ALJ RECOMMENDS DISMISSAL ORDER

Report Issued: February 04, 2013

Report Mailed: March 07, 2013

*****Objections Due:*** March 25, 2013**



Governor
John Kasich

Ohio Civil Rights Commission

Board of Commissioners

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Compliance Division

G. Michael Payton, *Executive Director*

Date: March 07, 2013

Sandra K. Montgomery
1752 East Frankfort Street
Columbus, Ohio 43206-1826

Re: Case Name: *Sandra K. Montgomery v. State of Ohio, Rehabilitation Services Commission*
Complaint No. 08-EMP-COL-35376

Enclosed is a copy of the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) ALJ's Report) in the above-captioned matter.

Pursuant to Ohio Admin. Code §4112-1-02, you may submit a "Statement of Objections" to the enclosed to the Commission no later than (**23 days after the date mailed**). Consequently, no extensions of time will be granted beyond **Monday, March 25, 2013**. A request to appear before the Commission must also be submitted by this date.

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, Ohio 43215-3414

NOTE: All parties and the Administrative Law judge MUST receive copies of your "Statement of Objections."

FOR THE COMMISSION

Desmon Martin /apo

Director of Enforcement and Compliance

cc: Darlene K. Fawkes, *Commission* / Joseph N. Rosenthal, *Respondent*
Denise M. Johnson, *Chief Administrative Law Judge*

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OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

SANDRA K. MONTGOMERY

Complainant

Complaint No. 08-EMP-COL-35376

v.

STATE OF OHIO, REHABILITATION SERVICES COMMISSION

Respondent

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

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Respondent

Complainant

AL'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

INTRODUCTION AND PROCEDURAL HISTORY

Sandra K. Montgomery (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on January 18, 2008.

The Commission investigated the charge and found probable cause that State of Ohio, Rehabilitation Services Commission (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (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 December 11, 2008.

The Complaint alleged that Complainant was terminated because of her race (African American) on August 15, 2007.

Respondent filed an Answer to the Complaint on May 4, 2009. 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 December 11, 2009 and January 5, 2010 at the State Office Tower, 5th Floor, in Columbus, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (234 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on July 22, 2010, and by the Respondent on August 26, 2010.

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 sworn a charge affidavit with the Commission on January 18, 2008.

2. The Commission determined on October 2, 2008 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 December 11, 2008, after conciliation failed.

4. Respondent is an employer as defined by R.C. 4112.01(A)(2).

5. In June 2005, Complainant applied for Respondent's Diversity Manager position. Complainant was interviewed by a three-member panel, which consisted of Recruiter Barbara Kiefer, Assistant Executive Director Ginger Howard, and General Counsel Darla Burns (Burns). (Tr. 12-13, 15).

6. Subsequently, Burns recommended to Respondent's Executive Director, John Connelly (Connelly), that Complainant be selected for the position of Diversity Manager. (Tr. 102-103).

7. Complainant began working as the Diversity Manager on June 27, 2005 and reported directly to Burns. Burns also supervised four other employees, including Phyllis Plear (Plear), Maria Lee (Lee), Felicia Davis (Davis), and Kimberly Hudak (Hudak).¹ (Tr. 14- 15, 209).

8. Burns, Plear, Lee, Davis and Complainant are all African American. Hudak is a Caucasian woman. (Tr. 74, 223, 10).

9. EEO Manager Plear and Lee worked in the EEO Office. Davis worked as an administrative support person. Hudak worked as an attorney and held the position of Assistant General Counsel. (Tr. 15, 112).

¹ The transcript incorrectly identifies Phyllis Plear as "Clear" on each occasion.

10. Complainant was the only employee in the Office of Diversity Management. Her duties included educating Respondent's staff and management regarding the importance of diversity. She advised diversity committees, generated activities and presentations to increase staff knowledge about diversity, and assisted with recruiting to increase the diversity of Respondent's employee population. (Tr. 15-16).

11. In 2007, Burns started requiring Complainant to document all of her activities and account for her time on a weekly basis. Complainant had to submit a report that summarized the work she completed and listed planned tasks for the upcoming week. (Tr. 32, 166).

12. On February 22, 2007, Burns completed an evaluation of Complainant's work performance. Prior to this evaluation, Burns and Complainant met to discuss the goals enumerated in the performance review document and set target deadlines for completion of these goals. Complainant acknowledged and signed the performance review on March 1, 2007. (Tr. 32-34, 133-135).

13. In July 2007, Burns and Complainant met again to discuss the goals.). After the meeting, Burns told Complainant that she could resign or Burns would recommend that Complainant be removed for failure to complete the goals. Complainant did not resign. (Tr. 84, 132, 164).

14. Burns recommended to Executive Director Connelly that Complainant be terminated.

15. On August 8, 2007, Connelly notified Complaint that he was considering terminating her employment and placed her on administrative leave. (Tr. 60, 164-165).

16. Connelly provided Complainant with a copy of Burns' termination recommendation and permitted her an opportunity to respond to the recommendation. (Tr. 60-62).

17. Burns submitted a response letter. (Exhibit 5).

18. In addition, members of the central office diversity committee submitted a memorandum to Connelly discussing Complainant's leadership and success in her position. (Tr. 63-64).

19. On August 13, 2007, Connelly notified Complainant that her employment was being terminated effective August 15, 2007. (Tr. 199-200) .

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 terminated by Respondent because of her 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 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.

8. 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.

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. 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.

10. 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.

11. Respondent stated that its termination decision was based on Complainant’s failure to fulfill her job duties. Specifically, Complainant’s failure to satisfy all but one goal⁴, enumerated in Respondent’s performance review summary, by their respective deadlines. (Tr. 128, 132-158) .

⁴ There were a total of eleven enumerated goals, ten of which were applicable to Complainant. Complainant only satisfied Goal 5. (Tr. 132, 139)

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

13. 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.

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

15. To show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's reasons for terminating Complainant. The Commission can directly challenge the credibility of the articulated reasons by showing that the reasons had no basis in fact or [were] insufficient to motivate [the] discharge. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (emphasis added). Direct attacks permit the factfinder to infer illegal discrimination from the disbelief of the articulated reasons without requiring any evidence in addition to the prima facie case. *Id.*, at 1084.

The factfinders 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.

⁵ Even though rejection of the [Respondent's] proffered reasons is enough at law to *sustain* a finding of discrimination, *there [still] must be a finding of discrimination.* *Hicks, supra* at 512.

16. The Commission can indirectly challenge the credibility of Respondent's reasons by proving that the sheer weight of circumstantial evidence makes it "more likely than not" that the reasons articulated are a pretext for unlawful discrimination. *Manzer, supra* at 1084 (emphasis added). Indirect attacks tend to prove that the reasons did not *actually* motive the employment decision. The Commission is required to produce evidence in addition to a prima facie case to show unlawful discrimination occurred. *Id.*

17. In this case, the Commission introduced evidence in an attempt to show that Respondent's reasons for terminating Complainant were pretextual because its explanations were "unworthy of credence." *Burdine, supra* at 450.

18. The Commission argued that Burns' recommendation to terminate Complainant was not credible based on Complainant's response letter, and that a memorandum submitted by Respondent's central office diversity committee expressed the opinion that Complainant was a successful Diversity Manager. (Tr. 62-64).

19. The perception of a decision maker regarding the performance of a Complainant is the relevant consideration, not a Complainant's self assessment nor opinions expressed by fellow workers. *Dejarnette v. Corning, Inc.*, 75 FEP Cases 1088, 1092 (4th Cir. 1998) (footnote, citations, and quotations omitted).

20. 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). Burns recommended to both hiring and terminating Complainant. (Tr.102, 164).

21. The Commission failed in its attempt to show that Respondent's reasons for terminating Complainant were not credible.

22. Pretext can also be shown by disparate treatment. The Commission alleged that a similarly-situated Caucasian employee was treated more favorably than Complainant. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

23. The Commission must prove that the comparable was 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 ... [his] 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, supra at 583 (6th Cir. 1992) (citations omitted).

24. 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 employee receiving more favorable treatment in order for the two to be considered “similarly-situated.” *Ercegovich, supra* at 352.

25. The Commission failed in its attempt to show that Hudak was similarly situated to Complainant because the two employees held different employment positions.

26. Hudak was an attorney who had distinctly different job duties and responsibilities than Complainant. (Tr. 214- 215).

27. Complaint was employed as the Diversity Manager. Complainant’s duties involved diversity education, presentations, and assisting with recruitment. (Tr.14, 16).

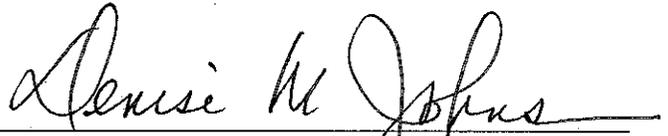
28. Complainant was not an attorney and she did not perform legal task for Respondent. Hudak's job duties were unrelated to Respondent's diversity programs. (Tr. 215, 216).

29. Complainant was not treated less favorably than Hudak when Burns required Complainant to submit weekly reports. The weekly reporting was implemented by Respondent, as a monitoring tool, only after Complainant failed to complete her work and properly allocate her time. (Tr. 166).

30. The Commission failed to present evidence which would tend to show that Respondent's decisions were motivated by illegal discriminatory animus.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 08-EMP-COL-35376.

A handwritten signature in cursive script, reading "Denise M. Johnson", written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

DATE MAILED:

February 04, 2013



Ohio Civil Rights Commission

Governor
John Kasich

Board of Commissioners

Leonard J. Hubert, Chair
Stephanie M. Mercado, Esq.
William Patmon, III
Tom Roberts
Rashmi N. Yajnik
May 20, 2013

G. Michael Payton, Executive Director

Edward G. Kramer
3214 Prospect Avenue E.
Cleveland, OH 44115

Re: Sandra K. Montgomery v. State of Ohio, Rehabilitation Services Commission
COLA1(35376)01182008
22A-2008-01921C
Complaint No. 08-EMP-COL-35376

The enclosed Order dismissing Complaint No. 08-EMP-COL-35376 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting of May 16, 2013.

This case is closed.

FOR THE COMMISSION

Desmon Martin

Desmon Martin
Director of Enforcement and Compliance

DM:cjs
Enclosure

cc: Lori A. Anthony, Chief – Civil Rights Section
Denise M. Johnson, ALJ – Division of Hearings
Compliance [Martin – Kanney – Woods]
Laurence Powers

Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations contained in the Administrative Law Judge's April 25, 2013 report and recommendation as if fully rewritten herein. The Commission hereby dismisses Complaint No. 08-EMP-COL-35376 against Respondent.

This ORDER issued by the Ohio Civil Rights Commission this 16th day of May, 2013.



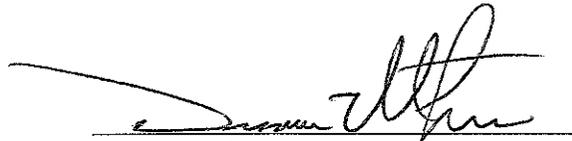
Commissioner, Ohio Civil Rights Commission

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: 5/16/2013