

**OHIO CIVIL RIGHTS COMMISSION**

**IN THE MATTER OF:**

**SHERRI LYNN HAMLER**

Complainant

Complaint No. 07-EMP-COL-33674

v.

**SOUTHWEST AIRLINES CO.**

Respondent

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

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**ALJ'S REPORT BY:**

Denise M. Johnson  
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Ohio Civil Rights Commission  
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## **INTRODUCTION AND PROCEDURAL HISTORY**

Sherri Hamler (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 5, 2006.

The Commission investigated the charge and found probable cause that Southwest Airlines Company (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 September 13, 2007.

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

Respondent filed an Answer to the Complaint on October 30, 2007. 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 February 18, 2010; February 19, 2010; March 4, 2010; and March 5, 2010 at State Office Tower, 5th Floor in Columbus, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (863 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on August 2, 2010; by Respondent on October 15, 2010; and a reply brief filed by the Commission on November 9, 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 a sworn charge affidavit with Commission on October 5, 2006.

2. The Commission determined on August 23, 2007 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 September 13, 2007, after conciliation failed.

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

5. On May 26, 2006, Joni Taylor (Taylor), Columbus Station Manager, and a recruiter conducted an in-person interview of Complainant. (Tr. 609, 613) (Exhibit S).

6. During the interview process, Complainant was selected by Taylor for a part-time ramp agent position at the Columbus, Ohio station<sup>1</sup>. (Tr. 613, 615).

7. Complainant began work as a probationary part-time ramp agent on July 10, 2006, assigned to the morning shift. (Tr. 14-15, 254, 262, 319)(Exhibit 1).

8. Complainant also held a full-time job working for the United States Postal Service (Post Office), Wednesday through Saturday, from 8:30 A.M. to 5:30 P.M. (Tr. 319-320).

9. Complainant's work schedule at the Post Office was in conflict with her morning shift at Southwest Airlines and required her to regularly obtain partial shift trades<sup>2</sup>. (Tr. 319, 320).

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<sup>1</sup> Port Columbus International Airport

<sup>2</sup> Shift trade is a process where an employee requests that another employee works their shift or agrees to work the shift of another employee. (Tr. 191)

10. In September 2006, Complainant was assigned to Respondent's evening shift from 6:30 P.M. to 12:30 A.M. Complainant's work schedules were no longer in regular conflict. (Tr. 325-326) (Exhibit C).

11. Complainant's ramp agent duties involved various activities such as guiding aircrafts, T-point<sup>3</sup>, provisioning<sup>4</sup>, preparing and cleaning lavatories, loading and unloading luggage from aircraft bins, and acting as a gate lead<sup>5</sup>. (Tr. 20-22, 181-183, 254-255).

12. Newly hired ramp agents are required to serve a probationary work period of one hundred eighty (180) calendar days; and receive performance evaluations after working roughly 50, 100 and 150 days. (Tr. 589-590) (Exhibit Q, pgs. 23-24, Section G) (Tr. 327, 638).

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<sup>3</sup> T-point is the process where traveler luggage is sent down a baggage carousel and placed into a cart which is taken to the aircrafts for loading. (Tr. 183-184).

<sup>4</sup> Provisioning is the process where ramp agents take ice, food, beverages, and other items onto the aircrafts and remove the cabin trash. (Tr. 181, 184-185, 255-256).

<sup>5</sup> Gate leads are ramp agents responsible for completing luggage paperwork and other tasks required for aircraft departure. (Tr. 185, 257, 374).

13. All of the work rules (including mandatory overtime assignments) set forth in Respondent's collective bargaining agreement (CBA)<sup>6</sup> apply to probationary ramp agents with the exception of rules regarding discipline and termination procedures. (Tr. 301, 306, 576) (Exhibit Q).

14. In late September 2006, Respondent's ramp supervisors<sup>7</sup> were behind in preparing written performance evaluations for the probationary ramp agents. (Tr. 232, 633).

15. As a result, Taylor scheduled a meeting with ramp supervisors and trainers to collectively discuss the performance of each probationary ramp agent. (Tr. 633).

16. Following the meeting, instead of a ramp supervisor, Taylor drafted Complainant's performance evaluation after obtaining

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<sup>6</sup> Agreement by and between Southwest Airlines Co. and Transport Workers Union of America (Exhibit Q)

<sup>7</sup> Complainant claims her supervisors in September 2006 were Chuck Engle, Mark Fisher and Joyce Myers (female) (Tr. 262)

feedback from Supervisors Mark Fisher and Joyce Myers, and Trainers Jim Borham and Marty Anderson. All of the supervisors and trainers are Caucasian. (Tr. 230-231, 393, 542, 628-629, 633-635) (Exhibit F2).

17. Complainant and Taylor met to discuss the performance evaluation on September 22, 2006. Complainant did not agree with the assessment. (Tr. 329-330).

18. The CBA required that mandatory overtime assignments be scheduled in reverse order of seniority, and with consideration of other scheduling rules. (Tr. 144, 151, 579-588) (Exhibit Q, pg. 20).

19. Mandatory overtime can be scheduled to start three (3) hours before the ramp agent's regular shift or begin immediately after the end of the regularly scheduled shift. (Tr. 152) (Exhibit Q, pg. 17). Ramp agents called in for mandatory overtime must work a minimum of four (4) hours. (Tr. 111-112, 151-152).

20. The CBA states that the company shall attempt to notify ramp agents of mandatory overtime assignments within two hours of closing the overtime call book (2:00 p.m.). At times, ramp agents are assigned of mandatory overtime, with short notice, after 2:00 p.m. has passed. (Tr. 26-27, 113, 581-584) (Exhibit Q, pg. 19).

21. On Sunday, September 24, 2006, Respondent required additional ramp agents to work a mandatory overtime shift from 3:00 p.m. to 6:30 p.m. on Monday, September 25. (Tr. 112, 143, 275).

22. Among Respondent's employees, Ryan Carlisle (Carlisle) was the most junior probationary ramp agent and Complainant was the second-most junior probationary ramp agent. (Tr. 151).

23. Both Complainant and Carlisle were called to work mandatory overtime by Ramp Supervisor Chuck Engle. (Tr. 151-152, 275, 664-665).

24. At 9:30 p.m. Complainant was told to report for the mandatory overtime assignment scheduled to begin the next day at 3:00 p.m. (Tr. 112, 151-152, 275) (Exhibit C, September 25 Revised).

25. Complainant was already scheduled to work her normal evening shift for Respondent on Monday, September 25, 2006, from 6:30 pm to 12:30 am. (Exhibit C, September 25 Revised).

26. However, the mandatory overtime assignment conflicted with her Post Office work schedule. (Tr. 276-277, 279-281).

27. Complainant made numerous calls to other ramp agents on September 24 to request a shift trade but was unsuccessful. (Tr. 276, 437-439)

28. On September 25, Complainant also made a series of phone calls to Ramp Supervisor Myers for shift trade assistance, but did not find a replacement. (Tr. 656).

29. Around 2:45 p.m. on Monday, September 25, Taylor spoke with Complainant regarding the mandatory overtime and informed

Complainant she must work the entire overtime shift because partial coverage of the assignment was prohibited. (Tr. 656-658).

30. Complainant failed to show up for both the mandatory overtime shift at 3:00 p.m. and her regularly scheduled shift at 6:30 p.m. on September 25. (Tr. 806).

31. Carlisle worked the mandatory overtime shift on September 25. Carlisle subsequently resigned because he was aware of the potential for continuous conflicts between his school and unpredictable mandatory overtime work schedules. (Tr. 151, 664-666) (Exhibit C, September 25 Revised) (Exhibit 11).

32. On September 28, 2006, Complainant met with Taylor and Fisher to discuss the missed mandatory overtime assignment. At the meeting, Complainant was terminated by Taylor and received a memorandum stating the reason for her discharge. (Tr. 280, 659, 803-805) (Exhibit I).

## **CONCLUSIONS OF LAW AND DISCUSSION<sup>8</sup>**

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.

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<sup>8</sup> Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

33. 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).

34. 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.

35. 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).

36. 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).

37. 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.

38. 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).

39. 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.<sup>9</sup>

*McDonnell Douglas, supra* at 802.

40. 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.

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<sup>9</sup> 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).

41. 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.

42. 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.

43. Respondent articulated two reasons for its decision to terminate Complainant:

(1) Complainant's refusal to work mandatory overtime on September 25 in violation of Respondent's Ground Operations<sup>10</sup> policies against insubordination and other employment that interfered with availability for duty (Tr. 243, 246-247, 810) (Exhibit A, SWA00008, Item 15 and SWA00009, Item 23); and

(2) Complainant's poor performance which entailed lack of initiative and deficient attitude toward the job. (Tr. 137, 331, 628, 634-635, 639-647, 660) (Exhibit F2).

44. 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. 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.

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<sup>10</sup> Ground Ops–Employee Policies Sign and Return Packet 2006 (Exhibit A).

45. 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 [sex] is correct. That remains a question for the factfinder to answer... *Id., supra*, at 524.

46. The Commission must ultimately 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.

47. 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] employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994) (emphasis added).

48. 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.<sup>11</sup> *Hicks, supra* at 511.

49. 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

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<sup>11</sup> 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.

prove that the reasons did not actually motivate the employment decision. The Commission is required to produce evidence in addition to a prima facie case to show unlawful discrimination occurred. *Id.*

50. The Commission attempted to show that Respondent's reasons for terminating Complainant were pretextual because its explanations were "unworthy of credence." *Burdine, supra* at 450.

51. The Commission alleged that Respondent's poor performance argument was meritless. According to the Commission, Complainant was singled-out by Taylor and treated unfairly by management despite Complainant's hard work and improvements. (Tr. 263-266, 185-186, 193, 198-199).

52. The Commission offered evidence that Complainant's work performance improved after she requested and adhered to feedback from Jamil Hasan and Mark Fisher<sup>12</sup> to "step up" her performance

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<sup>12</sup> The transcript incorrectly identifies Mark Fisher as "Fischer" on various occasions.

and become one of the first ramp agents to unload aircraft bins. (Tr. 200, 202, 264, 289).

53. The Commission's argument is unpersuasive. The perception of a decisionmaker 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).

54. Additionally, when it is the same-actor (Ms. Taylor) 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).

55. Taylor was aware of Complainant's race and sex when she decided to both hire and terminate Complainant. (Tr. 209, 609, 613, 803-805).

56. The Commission also attempted to prove that several probationary employees with attendance issues were similarly situated to Complainant. (Tr. 673-687, 691-698).

57. Pretext can be shown by showing that similarly situated employees were treated better who engaged in the same or similar conduct. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583

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.

*Id.* at 583.

58. The Commission must establish 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).

59. 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.

60. Respondent presented credible evidence that no other probationary ramp agent or probationary employee had ever engaged in misconduct of “comparable seriousness” to that of Complainant when she refused to work a mandatory overtime assignment. (Tr. 156-157, 237, 545, 658, 808-810).

61. Complainant was the only probationary employee to “refuse to follow a [direct] work order” of mandatory overtime. Complainant’s act

of insubordination alone was a sufficient reason for termination<sup>13</sup>. (Tr. 662-664) (Exhibit A, SWA00008, Item 15).

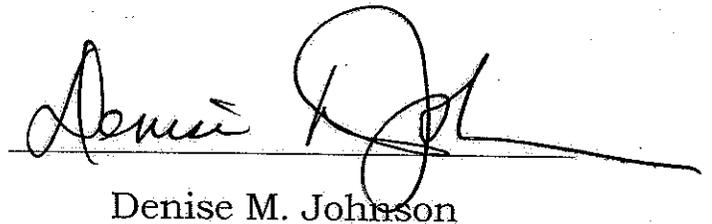
62. The Commission failed to establish that the Complainant was terminated from employment because of her race and sex.

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<sup>13</sup> Any violation of rules set forth under the Basic Principles of Conduct is grounds for disciplinary action. Discipline can range from a reprimand to discharge, depending on the particulate violation and the circumstances. (Exhibit A, SWA00008).

**RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 07-EMP-COL-33674.

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

Denise M. Johnson  
CHIEF ADMINISTRATIVE LAW JUDGE

June 25, 2013

Complainant's  
Statement  
of  
Objections

RECEIVED

OHIO CIVIL RIGHTS COMMISSION

JUL 18 2013

IN THE MATTER OF:

SHERRI LYNN HAMLER

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

Complainant

Complaint No. 07-EMP-COL-33674

v.

SOUTHWEST AIRLINES CO.

Respondent

**Complainant Sherri Lynn Hamler's Objections to Chief Administrative Law Judge's  
Third Amended Findings of Fact, Conclusions of Law, and Recommendations**

Now comes Complainant, Sherri Hamler, and pursuant to the provision of Ohio Admin. Code §4112-1-02, hereby timely objects to the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendation(s) issued in this matter on or about June 25, 2013 in the following respects:

- 1. The ALJ erred by finding that Complainant did not present evidence of similarly situated white male employees who were not terminated for the same actions for which Respondent claims it terminated Ms. Hamler.**

This case is about white male employees being treated better than black female employees at Southwest Airlines Co. The Administrative Law Judge (ALJ) erred in finding that Respondent's stated reasons for terminating Ms. Sherri Hamler were not pretextual because Ms. Hamler presented evidence of several white male comparables who were treated significantly better.

Despite Respondent's claims to the contrary, Respondent does not terminate employees the first time that they "no show" on a job—at least not white male employees. Ms. Hamler's supervisor, Ms. Joni Taylor, testified that she did not have any discretion to decide whether or

not to terminate Ms. Hamler for a first occurrence of missing mandatory overtime. (Tr. at 778). This is not true. Ms. Taylor later admitted that she did have discretion to determine whether or not to terminate an employee for a “no show” and in fact, she had exercised such discretion not to terminate white male employees in the past for “no shows”. (Tr. at 49, 55, 765-766, 789, 808-809).

**Ms. Taylor chose not to terminate Michael Coleman, a white male, for his “no show” or his unreported tardy.** Mr. Coleman had a “no show” on August 22, 2006. (Tr. at 52, 222; Commission Exhibit 3, August 22, 2006, exception log; Commission Exhibit 10). Mr. Coleman also had an unreported tardy on September 17, 2006. (Tr. at 52-53, 222; Commission Exhibit 3, September 17, 2006, exception log, Commission Exhibit 10). Mr. Coleman was not fired for either the “no show” or the unreported tardy. **See Exhibit A attached hereto (warning letter for no show).**

Ms. Taylor chose to meet with Mr. Coleman and discuss her attendance expectations after Mr. Coleman no showed. She gave Mr. Coleman the opportunity to explain his “no show” and accepted his claim that “it wouldn’t happen again.” (Tr. at 49).

**Ms. Taylor chose not to terminate Ryan Carlisle, a white male, for his “no show”.** Mr. Carlisle had a “no show” on August 24, 2006. As with Mr. Coleman, Ms. Taylor chose to meet with Mr. Carlisle to discuss the incident. Ms. Taylor chose to give Mr. Carlisle another chance to keep his job. Ms. Taylor issued Mr. Carlisle a final warning letter, but did not terminate him. (Tr. at 54-55, 222; Commission Exhibit 3, August 24, 2006, exception log; Commission Exhibit 11). **See Exhibit B attached hereto (warning letter for no show).**

Ms. Taylor did not meet with Ms. Hamler to discuss her attendance expectations or provide Ms. Hamler the opportunity to explain her situation, although Ms. Taylor had given

this opportunity to both Mr. Coleman and Mr. Carlisle—both white males. Ms. Taylor immediately terminated Ms. Hamler, a black female, for the exact same error that both Mr. Coleman and Mr. Carlisle made, but these white men were not terminated.

Ms. Taylor gave Mr. Coleman and Mr. Carlisle final warning letters; however, Ms. Taylor did not even consider giving Ms. Hamler a final written warning or any other type of discipline before terminating her. (Tr. at 658-659). Ms. Taylor terminated Ms. Hamler for her first instance of a “no show” simply because she was a black female. If Ms. Hamler was a white male, Ms. Taylor would have given her a second chance as evidenced by her treatment of Mr. Coleman and Mr. Carlisle.

Ms. Taylor did terminate one other employee for missing a single shift. That employee was a black female, just like Ms. Hamler. (Tr. at 56-58, 698, 769; Commission Exhibit 12, Smret Woldegiorgis termination). Clearly, Ms. Taylor only terminates black females for a single “no show” but Ms. Taylor allows white males to have multiple chances.

Other Caucasian male employees of Respondent were also treated better than Ms. Hamler. (Tr. at 58-61, 65, 67, 70-77, 682-684, 691; Commission Exhibits 13, 16, 18). **Duane Cleveland, a white male, was not immediately terminated for his attendance issues.** Mr. Cleveland was only terminated after he fought with a TSA agent and got into a verbal altercation with a Southwest Airlines customer. (Tr. 58-61, 682-683; Commission Exhibit 13).

**Morgan Campbell, a white male, had two (2) no shows and an occurrence during his probationary period, but he was not terminated immediately.** Mr. Campbell was only terminated after he scratched and dented an airplane (Tr. at 65, 67, 684; Commission Exhibit 16). **See Exhibit C attached hereto (warning letter and notice of two (2) no shows).**

**Matt Flaherty, a white male ramp agent, had performance, attendance, attitude and safety issues, but he was not terminated immediately.** Mr. Flaherty made derogatory comments about black women and other employees' sexual orientations. (Tr. at 70-77, 691; Commission Exhibit 18). He referred to black women as "chocolates" (Tr. at 71-72) and said that he did not like to work with individuals of a different sexual orientation than himself (Tr. at 72). Respondent did not terminate Mr. Flaherty, a white male, for any of these infractions. Respondent only terminated Mr. Flaherty after he drove a belt loader truck between a fuel truck and the wing of a moving aircraft, a mistake that could have caused an explosion. (Tr. at 75, 77). **See Exhibit D attached hereto (Notice of 2<sup>nd</sup> occurrence and discussion log of infractions).**

As the above facts demonstrate, Ms. Hamler was treated more harshly than (1) Mr. Coleman, (2) Mr. Carlisle, (3) Mr. Cleveland, (4) Mr. Campbell, and (5) Mr. Flaherty—all white males—because of her race and gender. The only other employee that Ms. Taylor terminated on the first occurrence of a no-show was another black female, Smret Woldegiorgis. **See Exhibit E (termination for first no show).**

Ms. Taylor feebly attempted to excuse her discriminatory behavior by claiming that although she believed she had wide discretion when it came to imposing discipline that she felt that she had no discretion when it came to mandatory overtime. (Tr. at 778-779). **However, Ms. Taylor finally admitted that she did in fact have discretion over a mandatory overtime situation.** (Tr. at 789, 808-809). Indeed, Ms. Taylor exercised that discretion with Mr. Coleman and Mr. Carlisle, and two white male probationary ramp agents as previously described. (Tr. at 49, 55, 765-766). Ms. Taylor chose to give those white males numerous chances before finally terminating them, despite their engaging in far worse behavior than a mere "no show", which

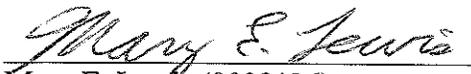
ranged from fighting with a TSA agent and damaging aircraft, to engaging in racial slurs. (Tr. 58-61, 65, 67, 70-77, 682-684, 691; Commission Exhibit 13, Commission Exhibit 16, Commission Exhibit 18). As these facts show, Ms. Hamler was treated more harshly than similarly situated white male employees.

The ALJ erred by finding that there was no evidence of similarly situated employees. Ms. Hamler was terminated after her first instance of not being able to work an assigned shift (Tr. at 274, 277, 662-663) while similarly situated white male employees were not terminated for the same reason. The Commission presented reliable, probative, and substantial evidence showing that Respondent discriminated against Ms. Hamler because of her race and sex in violation of R.C. 4112.02(A).

**Conclusion**

Wherefore, it is respectfully submitted that the ALJ has erroneously decided this issue against the Complainant and in the contravention of the evidence, including testimony and exhibits.

Respectfully submitted,

  
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*Attorney for Complainant*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was served upon the following individuals on July 18, 2013:

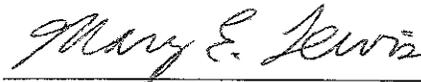
**Byron L. Potts, Esq.**  
415 E. Broad St.  
Columbus, OH 43215-3800  
*Via U.S. Mail*

**Matthew W. Hyot, Esq.**  
Baker & Hostetler  
Capital Square, Ste. 2100  
Columbus, OH 43215-3800  
*Via U.S. Mail*

**Stefan J. Schmidt, Esq.**  
Assistant Attorney General  
*Via e-mail*

**Denise M. Johnson**  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
State Office Tower, 5<sup>th</sup> Floor  
30 E. Broad St.  
Columbus, OH 43215-3414  
*Via personal service*

**Desmon Martin**  
Director of Enforcement and Compliance  
Ohio Civil Rights Commission  
State Office Tower, 5<sup>th</sup> Floor  
30 E. Broad St.  
Columbus, OH 43215-3414  
*Via personal service*



---

Mary E. Lewis  
*Attorney for Complainant*

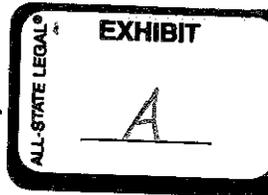


A SYMBOL OF FREEDOM

SOUTHWEST AIRLINES CO.

Joni Taylor  
Station Manager - CMH  
Ground Operations

Port Columbus Intl' Airport  
4600 International Gateway  
Columbus, OH 43219  
614-238-7722 SDN: 264-6089



## MEMORANDUM

**To:** Michael Coleman - # 80917  
**From:** Joni Taylor  
**Date:** August 25, 2006  
**Subject:** Final Letter of Warning

A new Employee at Southwest Airlines must serve a probationary period of a predetermined length of time, in order that the Employee has the opportunity to demonstrate his or her qualifications and ability to adapt to Company policies and procedures. The probationary period affords the Company an opportunity to evaluate your qualifications and ability to perform tasks assigned, as well as your commitment to the goals of Southwest Airlines.

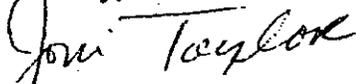
Southwest Airlines Attendance Policy 01.080.30 - Attendance Policy for Probationary Employees states "Any probationary Employee who experiences three occurrences or one "no show" shall be subject to termination. Occurrences are defined as incidents of absence and/or tardiness. Each situation will be reviewed on an individual basis."

Michael, as you know, on Tuesday, August 22, 2006 you failed to report for your scheduled shift within the required timeframe. This incident resulted in a "no-show" of your shift. You also had an Unreported Tardy on July 25, 2006. As outlined above, three occurrences or one "no-show" subjects you to termination of employment at Southwest Airlines. However, after visiting with you today and discussing future expectations, the decision was made to continue your employment under the following provision. ★

**'ANY FUTURE OCCURRENCE RELATED TO ATTENDANCE DURING YOUR PROBATIONARY PERIOD WILL BE GROUNDS FOR IMMEDIATE TERMINATION.'**

Michael, I trust you will make the necessary adjustments to insure your success here at Southwest Airlines. If I can be of any assistance, please do not hesitate to ask.

Sincerely,



Joni Taylor  
Columbus Station Manager



9-27-06

Acknowledgement

Date

Copy to: file



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SOUTHWEST AIRLINES CO.

Joni Taylor  
Station Manager - CMH  
Ground Operations

Port Columbus Intl' Airport  
4600 International Gateway  
Columbus, OH 43219  
614-238-7722 SDN: 264-6089

September 20, 2006

## MEMORANDUM

**To:** Note to File  
**From:** Joni Taylor  
**Subject:** Termination – Michael Coleman

Michael Coleman began his employment with Southwest Airlines on July 10, 2006 and was terminated on September 20, 2006 due to failure to pass probations. Michael's performance in regards to attendance was unacceptable. He had the following occurrences:

- Unreported Tardy – July 25, 2006
- No – Show of Shift – August 23, 2006
- Unreported Tardy – September 17, 2006

Michael was counseled and issued a Final Letter of Warning for attendance on August 25, 2006.

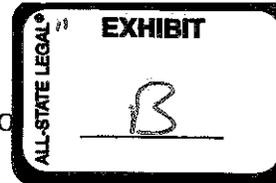


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SOUTHWEST AIRLINES CO

Joni Taylor  
Station Manager - CMH  
Ground Operations

Port Columbus Intl' Airport  
4600 International Gateway  
Columbus, OH 43219  
614-238-7722 SDN: 264-6089



## MEMORANDUM

**To:** Ryan Carlisle - # 81348  
**From:** Joni Taylor  
**Date:** August 25, 2006  
**Subject:** Final Letter of Warning

A new Employee at Southwest Airlines must serve a probationary period of a predetermined length of time, in order that the Employee has the opportunity to demonstrate his or her qualifications and ability to adapt to Company policies and procedures. The probationary period affords the Company an opportunity to evaluate your qualifications and ability to perform tasks assigned, as well as your commitment to the goals of Southwest Airlines.

Southwest Airlines Attendance Policy 01.080.30 - Attendance Policy for Probationary Employees states "Any probationary Employee who experiences three occurrences or one "no show" shall be subject to termination. Occurrences are defined as incidents of absence and/or tardiness. Each situation will be reviewed on an individual basis."

Ryan, as you know, on Thursday, August 24, 2006 you failed to report for your scheduled shift within the required timeframe. This incident resulted in a "no-show" of your shift. As outlined above, one "no-show" subjects you to termination of employment at Southwest Airlines. However, after visiting with you today and discussing future expectations, the decision was made to continue your employment under the following provision. ★

**'ANY FUTURE OCCURRENCE RELATED TO ATTENDANCE DURING YOUR PROBATIONARY PERIOD WILL BE GROUNDS FOR IMMEDIATE TERMINATION.'**

Ryan, I trust you will make the necessary adjustments to insure your success here at Southwest Airlines. If I can be of any assistance, please do not hesitate to ask.

Sincerely,

*Joni Taylor*

Joni Taylor  
Columbus Station Manager

*R. J. [Signature]*

\_\_\_\_\_  
Acknowledgement

*8/27/06*

\_\_\_\_\_  
Date

Copy to: file

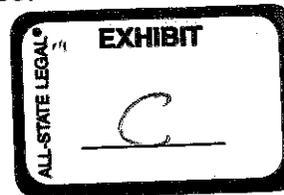


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SOUTHWEST AIRLINES CO.

Joni Taylor  
Station Manager - CMH  
Ground Operations

Port Columbus Intl' Airport  
4600 International Gateway  
Columbus, OH 43219  
614-238-7722 SDN: 264-6089



December 20, 2006

## MEMORANDUM

**To:** Note to File  
**From:** Joni Taylor  
**Subject:** Termination – Morgan Campbell # 81685

Morgan Campbell began his employment with Southwest Airlines on September 11, 2006 and was terminated on December 20, 2006 due to failure to pass probation. Morgan's performance in regards to attendance was unacceptable. He had the following occurrences:

- No-Show of Shift – September 20, 2006
- Reported Personal Absence – November 19, 2006
- No-Show of Shift – December 18, 2006

Morgan was counseled and issued attendance letters on September 22, November 22, and December 18, 2006. Morgan was instructed to meet with me on Tuesday, December 19, at 1200. Morgan did not show up for the meeting until 1235. (This was his scheduled day off.)

I visited with Morgan and discussed the reasons for his No-Show as well as his overall attendance/work performance. I asked him to return to meet with me at the start of his shift on Wednesday, December 20, 2006.

Morgan does a very good job, when he is at work. He continues to struggle with attendance due to challenges outside the work environment. I encouraged Morgan to work on resolution to these challenges and would consider him for rehire at a later date.

COMMISSION EXHIBIT



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SOUTHWEST AIRLINES CO.

Joni Taylor  
Station Manager - CMH  
Ground Operations

Port Columbus Intl' Airport  
4600 International Gateway  
Columbus, OH 43219  
614-238-7722 SDN: 264-6089

September 29, 2006

## MEMORANDUM

**To:** Morgan Campbell # 81685  
**From:** Joni Taylor  
**Subject:** Final Letter of Warning

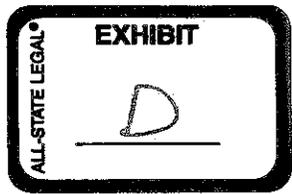
On Wednesday, September 27, 2006 you were involved in an incident that resulted in aircraft damage. A fact-finding meeting was held on Thursday, September 28, to discuss the circumstances surrounding the accident. Present were you, myself and Columbus Ramp Supervisor Mark Fischer.

During the meeting you acknowledged the accident and took full accountability for your actions. You admitted to making an error in judgment while positioning the freight tug and freight carts at the beltloader for the cargo download. You stated you were trying to get the freight carts close to the beltloader and misjudged the clearance between the tug and the end of the beltloader. This resulted in the tug coming into contact with the beltloader. The beltloader then struck, scratched and dented the aircraft.

Morgan I appreciate your honesty and the ownership you displayed in the meeting. You expressed a sincere sense of regret and a true desire to work at Southwest Airlines. The initiative and hustle you have demonstrated in your first two weeks of employment is recognized and appreciated. However, as we discussed, the ability to work with a sense of urgency must be accomplished without compromising safety. It is my firm belief that you can make the necessary adjustments and constructively apply the recommendations provided by Mark and myself. However, please understand this is your final letter of warning and another accident of this nature, could lead to the termination of your employment with Southwest Airlines. Please do not hesitate to seek assistance or ask for direction if you are unsure of policy or procedures - especially in this critical probationary period. We are here to assist you in any possible way.

Morgan Campbell  
Acknowledged Date: 09/29/06

Copy to: Jeanne Frantell  
file



# SOUTHWEST AIRLINES MEMORANDUM

## IMPORTANT NOTICE REGARDING ATTENDANCE

Date: 03/12/07

On 03/10/2007, MATTHEW JAMES FLAHERTY 082257 received a/an (Unreported Tardy, RPA, No show, etc.) This represents their 2nd occurrence while on probation. The Ground Ops/Provisioning Manual states the following:



### 01.080.30 Attendance Policy For Probationary Employees

Any probationary Employee who experiences three occurrences or one "no show" shall be subject to termination. Occurrences are defined as incidents of absence and/or tardiness. Each situation will be reviewed on an individual basis.

Please review the Employees attendance record and take appropriate action.

*Matthew 082257 03/15/07*

*Chuck Lyfe 80898 3/15/07  
Ramp Supervisor*

*Should be 1st occurrence.*

## Discussion Log

Agent Name: Matt Flaherty

Employee # 82257

DATE	COMMENTS	EMP INITIAL	SUP INITIAL
1/31/07	3 Frozen fill lines - ✓ fill ports H2O8 SNACK left in jetway FOR LAS LAYS Check on Heater CARTS MAKE	MF 82257	
	SURE they dont run out of Fuel.		62328
	Matt has the overnight checklist so now he know exactly		
	what needs done. (checklist was placed in each Agents mailbox prior to this incident per Ramp Sup Cmd Posn.)		
★ 1/22/	Driving in safety zone Between fuel truck &	MF 82257	
	wing while A/c was pushing.		
	Be more carefull and be aware of your		62328
	SURROUNDINGS of whats going on.		





**SOUTHWEST AIRLINES  
MEMORANDUM**

TO: Matt Flaherty # 82257  
FROM: Joyce Myers CMH Ramp Supervisor  
DATE: 3/22/2007  
SUBJECT: Suspension – FACT-FINDING NOTUCE

---

Your attendance is required at a FACT-FINDING meeting scheduled for 3/23/2007, at 1100 am at [training room by customer service breakroom] to discuss your [A/C damage]. You are suspended with pay pending the hearing meeting and subsequent results.

You may have your Union Representative present.

*Joyce Myers*

Joyce Myers CMH Ramp Supervisor

Copy to: *Joyce Myers*  
Union Representative  
File

3/22/07

Matt Flanery was Proing Aircraft G35 to BNA I pull The PRO stand UP to The plane and lock The wheels up and went up on The Stand and put ice WENT I was done Proing G35 I went to Help The guys with The bag and lift The Stand on The plane WENT can Back to Push it OF The plane I saw Jason Kruger looking at The plane and saw That The PRO stand hit The plane and made a Big scratch and Then went and told Joyce Myers That The plane got hit and she took it from There.

Flanery 82257

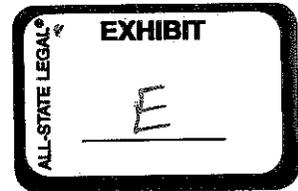


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SOUTHWEST AIRLINES CO.

Joni Taylor  
Station Manager - CMH  
Ground Operations

Port Columbus Intl' Airport  
4600 International Gateway  
Columbus, OH 43219  
614-238-7722 SDN: 264-6089



## MEMORANDUM

**To:** Smret Woldegiorgis - # 80420

**From:** Joni Taylor

**Date:** June 15, 2006

**Subject:** Failure to Pass Probation

A new Employee at Southwest Airlines must serve a probationary period of a predetermined length of time, in order that the Employee has the opportunity to demonstrate his or her qualifications and ability to adapt to Company policies and procedures. The probationary period affords the Company an opportunity to evaluate your qualifications and ability to perform tasks assigned, as well as your commitment to the goals of Southwest Airlines.

Southwest Airlines Attendance Policy 01.080.30 - Attendance Policy for Probationary Employees states "Any probationary Employee who experiences three occurrences or one "no show" shall be subject to termination. Occurrences are defined as incidents of absence and/or tardiness. Each situation will be reviewed on an individual basis."

Smret, as you know, on your first day of employment, you were scheduled to fly to Chicago on June 12, 2006, for badging purposes and upon return to Columbus, local station training. Southwest Airlines provided you a detailed outline of the day's expectations and travel itinerary well in advance.

On June 12, 2006 you were scheduled to travel on Flight 2932 departing Columbus at 8:05 a.m. You did not check in for your flight until 8:36, which was 31 minutes after your flight departed. This constitutes a "no-show" of your shift. Therefore you did not meet the scheduling guidelines and reported to work after your scheduled start time. I regret that observations of your performance, (specifically, attendance), has led us to conclude that you are not suitable for this job, and that your employment is terminated as a result of your failure to pass probation.

I wish you success in future endeavors.

Sincerely,

  
Jon Taylor  
Columbus Station Manager

Copy to: Jeanne Frantell  
file

Respondent's  
Response  
To  
Objections

RECEIVED

AUG 01 2013

STATE OF OHIO  
CIVIL RIGHTS COMMISSION

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

IN THE MATTER OF:

Sherry Hamler

Complainant,

vs.

Southwest Airlines Co.

Respondent.

Complaint No. 07-EMP-COL-33674

Chief Administrative Law Judge  
Denise M. Johnson

---

**RESPONDENT SOUTHWEST AIRLINES CO.'S RESPONSE TO COMPLAINANT SHERRI  
HAMLER'S OBJECTIONS TO THE RECOMMENDATION OF CHIEF ADMINISTRATIVE LAW  
JUDGE DENISE JOHNSON**

---

Counsel of Record:

Stefan Schmidt, Esq.  
Assistant Ohio Attorney General  
30 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215

*Attorney for the Ohio Civil Rights  
Commission*

Matthew W. Hoyt, Esq.  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215

*Attorney for Respondent Southwest  
Airlines Co.*

## INTRODUCTION

On June 25, 2013, the Chief Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Recommendations ("ALJ's Report") recommending that the Complaint of Sherri L. Hamler against Respondent Southwest Airlines for race and sex discrimination be dismissed. The Chief ALJ concluded that "the Commission failed to establish that the Complainant was terminated from employment because of her race or sex." ALJ's Report at ¶ 62.

On July 18, 2013, counsel for Complainant Sherri Hamler filed Objections to the ALJ's Report. Ms. Hamler argues that the Chief ALJ erred in concluding that no similarly situated white male employees were treated more favorably than Hamler.

## FACTUAL BACKGROUND

Sherri Hamler was a short-term, poor performer who chose her job at the Post Office over her job with Southwest Airlines. During her eleven weeks as a probationary ramp agent, Ms. Hamler exhibited poor performance, lack of initiative, insubordination and a resistance to constructive feedback.

When the Station Manager, Joni Taylor, personally met with Ms. Hamler to provide her with formal feedback gathered from Ms. Taylor's personal observations and from ramp supervisors and trainers after Ms. Hamler's first fifty days on the job, Ms. Hamler was argumentative and negative. Transcript ("Tr.") at page 330, 651. She told Ms. Taylor that the evaluation contained things that were "not the truth." Tr. 330. For example, Ms. Hamler felt the ratings of her attitude were "wrong" and that she knew better than Ms. Taylor, her supervisors and her trainers whether she was "efficient with her time." Tr. 379-80, 384. Further, Ms. Hamler had no plans to address her perceived shortcomings, testifying "I am a 40 year old woman. I understand what I am doing and what I am supposed to. And I don't need another (inaudible) telling me that. I am doing the best that I am doing at what I am doing. I know what I am doing." Tr. 379.

Just three days after meeting with Ms. Taylor, Ms. Hamler (the second most-junior person on the ramp) was ordered to report for mandatory overtime from 3:00 p.m. to 6:30 p.m. on Monday, September 25. Ms. Hamler was selected for overtime, along with two other ramp agents pursuant to, and in compliance with, collectively-bargained overtime rules set forth in the union contract. Yet Ms. Hamler refused the assignment because the hours overlapped with her other job at the Post Office. In Ms. Taylor's thirty-three years at Southwest and nine years as a Station Manager, this was the first time she was aware of a probationary ramp agent ever refusing to work a mandatory overtime shift.

Ms. Hamler's decision to work her shift at the Post Office rather than report for work at 3:00 p.m. presented Ms. Taylor with a potential breach of the collective bargaining agreement if she were to excuse it. Ms. Hamler's conduct was also insubordinate and a violation of Southwest's policy forbidding outside employment that interferes with an agent's availability for duty. As a result, Ms. Hamler's employment as a probationary ramp agent was terminated.

In finding that the Ohio Civil Rights Commission "failed to establish that the Complainant was terminated from employment because of her race or sex," the Chief ALJ concluded that "Respondent presented credible evidence that no other probationary ramp agent or probationary employee had ever engaged in misconduct of "comparable seriousness" to that of Complainant when she refused to work a mandatory overtime assignment." ALJ's Report at ¶ 60. Specifically, "Complainant was the only probationary employee to 'refuse to follow a [direct] work order" of mandatory overtime. Complainant's act of insubordination alone was a sufficient reason for termination." *Id.* at ¶ 61.

Ms. Hamler objects to the Chief ALJ's conclusion and recommendation based on her belief that white male employees who exhibited general "attendance" problems and other inappropriate behavior had engaged in similar misconduct, yet were treated more favorably than she was. But the individuals to whom Ms. Hamler compares her conduct did not refuse

mandatory overtime or engage in insubordination. Accordingly, Hamler's objections are misplaced, and must be rejected.<sup>1</sup>

### **RESPONSE TO COMPLAINANT'S OBJECTIONS**

The Chief ALJ correctly found that the Commission failed to establish that Southwest's reasons for terminating Ms. Hamler's employment were pretext for discrimination. The Chief ALJ noted that the Commission focused on whether Southwest's reasons were "unworthy of credence."

In support of her conclusion, the Chief ALJ first noted that the person Ms. Hamler accused of discrimination, Station Manager Joni Taylor, was fully aware of Ms. Hamler's race and sex when she personally interviewed and hired her just a few months before termination. As the Chief ALJ found, the involvement of the "same actor" establishes a strong inference that discrimination was likely not the reason for the discharge. ALJ's Report at ¶ 54. The same actor inference provides that it is "implausible" to believe that the same supervisor would hire someone in a protected class without discriminating and then later discriminate against that person because of the protected class. *Pulver v. Rockwood Highland Tower Inv.*, 1<sup>st</sup> Dist. Nos. C-950361, C-950492, 1997 Ohio App. LEXIS 1153; *Pirsil v. Int'l Steel Group*, 8th Dist. No. 85056, 2005-Ohio-3013. As a result, Ohio courts hold that "Where the same actors make positive and adverse employment decisions about an individual, especially within a short time period, a court may strongly infer a nondiscriminatory motivation in the later action." *Pirsil v. Int'l Steel Group*, 8th Dist. No. 85056, 2005-Ohio-3013 at ¶ 15.

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<sup>1</sup> Southwest notes that Ms. Hamler's Objections purports to attach copies of Exhibits used during the hearing. However, these documents contain mark-ups and handwriting that are not part of the record. Specifically, portions of the documents are underlined and/or starred. Southwest objects to the review or consideration by the Commission of any documents in any form other than what was used during the hearing.

The Chief ALJ next found that the white male employees whose treatment forms the basis of Ms. Hamler's Objections were not similarly situated. Similarly situated individuals are those who have (1) dealt with the same supervisor, (2) been subject to the same standards, and (3) engaged in conduct that was similar in all relevant aspects without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it. *Kroh v. Continental General Tire, Inc.*, 92 Ohio St. 3d 30, 32 (2001); *Allen v. ODJFS*, 697 F. Supp. 2d 854, 886 (S.D. Ohio 2010) ("the ultimate question is whether 'all of the relevant aspects of [his] employment situation were nearly identical to those of the [comparator's] employment situation.'") (quoting *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6<sup>th</sup> Cir. 1998)). Many courts have held that where the complaining party was terminated for violation of a company policy or standard of conduct, the similarly-situated standard requires a comparison to other employees who violated the same policy or standard. See, e.g., *Wigglesworth v. Mettler Toledo Int'l, Inc.*, 10<sup>th</sup> Dist. No. 09AP-411, 2010-Ohio-1019; *Warfield v. Lebanon Correctional Inst.*, 181 F.3d 723 (6<sup>th</sup> Cir. 1999); *Elgabi v. Toledo Area Reg. Trans. Auth.*, No. 3:05 CV 7092, 2006 U.S. Dist. LEXIS 33910 (N.D. Ohio, May 26, 2006).

In *Wigglesworth*, the male plaintiff was terminated for what the 10<sup>th</sup> District Ohio Court of Appeals called "multiple, legitimate nondiscriminatory reasons": (1) he hoarded relevant information; (2) he resisted change; (3) his negative attitude and behavior towards co-workers; and (4) his difficulty in responding to stressful situations. 2010-Ohio-1019 at ¶¶ 3-10. To prove age discrimination, the plaintiff compared his conduct to two younger males. The 10<sup>th</sup> District found that neither co-worker was similarly situated in all relevant aspects. While one co-worker hoarded relevant information, he "did not resist change or exhibit a negative attitude and behavior." *Id.* at ¶ 29. The second co-worker may have performed his job poorly, but there was no evidence that he "hoarded information or demeaned and disrespected his co-workers." *Id.* at ¶ 30. These distinguishing facts "preclude[d] any meaningful comparison." *Id.* at ¶ 29; see also *Warfield*, 181 F.3d at 730-31 (it was insufficient for a plaintiff terminated "for committing acts A,

B, C, D, and E” to compare herself to an individual who committed act B or act E alone); *Elgabi*, 2006 U.S. Dist. LEXIS 33910, at \*15 (the plaintiff who was terminated, in part, for falsifying his traffic and criminal conviction history on his employment application could not compare himself to employees who falsified only traffic convictions on their employment applications).

Here, as in *Wigglesworth*, the differences in misconduct between Ms. Hamler and the identified white male employees precludes any meaningful comparison.

**1. Michael Coleman**

Michael Coleman was a probationary ramp agent along with Ms. Hamler. On July 29, 2006, after Mr. Coleman’s first fifteen days on the job, Trainer Marty Anderson completed a Ramp Proficiency Checklist in which he noted Mr. Coleman’s need to improve in self-confidence, self-attention and attendance. Tr. 395-400; Resp. Ex. W. Mr. Anderson also testified that Mr. Coleman was too “buddy, buddy” with co-workers. Tr. 396. After those first fifteen days, Mr. Coleman’s performance improved and he was only disciplined thereafter for attendance issues. Tr. 633-34. Ms. Taylor believed Mr. Coleman had good work performance and she never had to discipline him for refusing mandatory overtime or insubordination. Tr. 49, 682. Mr. Coleman did have a no-show on August 22, but he claimed he was not trained on who and how to notify the Station of a medical excuse. Tr. 677-80. Because the Station could not confirm that Mr. Coleman had been properly instructed, his medical excuse – which was supported by a doctor’s note (Resp. Ex. W) – was accepted and Mr. Coleman received a final written warning. Tr. 680.

On September 17, 2006, Mr. Coleman called in to report that he would be late for his regularly scheduled shift. Because he did not call in far enough in advance of his start time, Mr. Coleman was assessed an “unreported tardy.” Tr. 688; Resp. Ex. W. As he was already on a final written warning, this meant Mr. Coleman would be terminated. Tr. 834. On September 20, Ms. Taylor prepared a memorandum stating that “observations of your performance

(specifically, attendance) has led us to conclude that you are not suitable for this job . . . .”

Resp. Ex. W.

Ms. Hamler's refusal to work mandatory overtime and Mr. Coleman's attendance issues are, as Ms. Taylor testified, “two separate issues.” Tr. 778. The rules concerning the assignment of mandatory overtime (which apply to all ramp agents) are collectively-bargained. Tr. 779. Failure to adhere to the mandatory overtime rules could be a breach of the collective bargaining agreement and a grievable offense that could subject Southwest to monetary penalties and friction with its unions if a member of the union is assigned mandatory overtime out of turn. Tr. 580, 737, 788.

There is no similar risk with enforcement of the attendance policy for probationary ramp agents because probationary ramp agents cannot file grievances. Tr. 592. Further, attendance infractions occur on a daily basis, whereas refusal of mandatory overtime was unprecedented in Ms. Taylor's experience. Tr. 812. Ms. Taylor has discretion in disciplining probationary ramp agents for attendance infractions. Tr. 593, 766, 778-79. In fact, it is stated in the policy. Resp. Ex. B. She testified that she does not have the same discretion when it comes to a probationary ramp agent's refusal of mandatory overtime assigned pursuant to the contract.<sup>2</sup> Tr. 682, 778-79.

The Chief ALJ's conclusion that Mr. Coleman's attendance problems and Ms. Hamler's insubordinate refusal to work mandatory overtime were not similar in all relevant aspects (ALJ's Report at ¶¶ 60-61) is correct as a matter of law because neither Ohio courts nor the Chief ALJ sit to second-guess an employer's business judgment or to analyze whether an employer's conclusions were right or wrong. *Wilkins v. Eaton Corp.*, 790 F.2d 515, 521 (6th Cir. 1986) (holding that discrimination statutes do not “change the fact that an employer may make a

---

<sup>2</sup> Ms. Hamler's Objections quotes Ms. Taylor out of context when arguing that Ms. Taylor testified she had discretion with respect to mandatory overtime. Hamler Objections at p. 2. The testimony cited by Ms. (continue)

subjective judgment to discharge an employee for any reason that is not discriminatory”); *McDonald v. Union Camp*, 898 F.2d 1155, 1160 (6th Cir. 1990) (stating “the aim [of discrimination statutes] is not to review bad business decisions, or question the soundness of an employer’s judgment.”); *Brock v. GE*, 125 Ohio App. 3d 403, 408 (1st Dist. 1998). Because Ms. Taylor enforces the two policies differently, comparing the attendance record of Mr. Coleman to Ms. Hamler’s conduct is not a “meaningful comparison.” *Wigglesworth*, 2010-Ohio-1019 at ¶ 29; see also *Warfield*, 181 F.3d at 730-31; *Elgabi*, 2006 U.S. Dist. LEXIS 33910, at \*15.

Furthermore, with respect specifically to Mr. Coleman, Ms. Hamler is comparing the relative seriousness of refusing mandatory overtime in violation of multiple work rules and a collective bargaining agreement to a medical absence supported by a written doctor’s excuse and a tardy. It is clear that Mr. Coleman’s misconduct was very different from Ms. Hamler’s misconduct in all relevant aspects.

As a final note, even if Mr. Coleman was similarly situated, he was not treated more favorably. Mr. Coleman was terminated on September 17 – eleven days **before** Ms. Hamler and after he was on the job for only **sixty** days. Resp. Exs. C, W. Ms. Hamler was terminated after seventy-seven days on the job. The ultimate discipline meted out to Mr. Coleman, therefore, was the same, yet swifter.

## 2. Ryan Carlisle

The Commission next argues that another white male probationary ramp agent, Ryan Carlisle, was treated more favorably when Ms. Taylor issued a final written warning and did not terminate Mr. Carlisle for a no-show on August 24, 2006. Mr. Carlisle was a no-show on August 24, as defined in the attendance policy, because of a power outage that Ms. Taylor could corroborate because she personally experienced it herself. Tr. 674; Resp. Ex. V. Mr.

---

(continued)

Hamler concerned Ms. Taylor’s discretion with respect to refusal of mandatory overtime by full-time, *non-*  
(continue)

Carlisle did not choose to disobey a direct order like Ms. Hamler. Tr. 674. Further, there is no question that Mr. Carlisle's overall performance as a ramp agent was significantly superior to Ms. Hamler's. Ms. Taylor received positive feedback from the supervisors and trainers. Tr. 634. Unlike the numerous blemishes on Ms. Hamler's record, the no-show by Mr. Carlisle was the only mark on his otherwise exemplary record. Resp. Ex. V; Tr. 634, 676.

It is also notable that Mr. Carlisle was scheduled for the same mandatory shift as Ms. Hamler on September 25, which conflicted with his school schedule. Tr. 665, 677, 825; Resp. Ex. C (September 25 – Revised). When told by Ms. Taylor of the consequences of failing to work the shift, Mr. Carlisle did not refuse to work. Tr. 665, 825; Resp. Ex. C (September 25 – Revised). He skipped his class, worked the mandatory overtime, and then submitted his two-week notice of resignation. Tr. 665, 825; Resp. Ex. V.

### **3. Matt Flaherty**

Mr. Flaherty (white male) also failed to pass probation and was terminated by Ms. Taylor. Prior to termination, Mr. Flaherty was accused of making derogatory remarks about homosexuals and black females to another agent.<sup>3</sup> Tr. 71-72. When the ramp agent reported it, Mr. Flaherty was counseled by his ramp supervisor. Tr. 73. When Ms. Taylor followed up with her own investigation, Mr. Flaherty denied the allegations. Because there was no corroborating witness, Ms. Taylor reinforced with Mr. Flaherty Southwest's policies against harassment and discrimination and recorded the incident in his personnel records. *Id.* at 73, 692, 696-97.

Following this first incident, Mr. Flaherty's attendance, attitude and safety infractions led to a poor performance evaluation. Tr. 79. He then committed another safety infraction and was terminated for failure to pass probation. Tr. 74-76, 698.

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(continued)

*probationary* ramp agents who are members of the union. Tr. 789.

<sup>3</sup> This occurred after Ms. Hamler was terminated.

Mr. Flaherty is not similarly situated to Ms. Hamler because he did not engage in conduct that was similar in all relevant aspects. He did not refuse mandatory overtime, engage in insubordination, or violate Southwest's policy against conflicting outside employment. While Mr. Flaherty's written performance evaluation could be considered similar to Ms. Hamler (Ms. Taylor testified it was slightly better), Ms. Hamler and Mr. Flaherty were treated the same after their evaluations. Neither individual was terminated immediately. Both were terminated for their next incident of misconduct after their poor evaluations. Neither passed probation.

#### **4. Morgan Campbell**

Mr. Campbell (white male) committed three attendance infractions. He was disciplined once after a dog bite caused his hand to swell to the point where he could not work and a second time for a no-show, after a fight with his roommate caused him to spend the night in his car without an alarm clock. *Id.* at 67, 686. He failed to pass probation and was terminated at that time. *Id.* Mr. Campbell's attendance infractions are not comparable to Ms. Hamler's as Mr. Campbell did not refuse mandatory overtime, engage in insubordination, or violate Southwest's policy on outside employment. Moreover, Mr. Campbell also failed probation.

#### **5. Duane Cleveland**

Ms. Hamler also objects that Duane Cleveland (white male), who had attendance issues and two verbal altercations with third parties (TSA and a customer) before being terminated, engaged in similar misconduct. Even if Mr. Cleveland's attendance issues were similar in all relevant aspects to Ms. Hamler's conduct - which they are not because, for example, they did not involve mandatory overtime - Ms. Hamler fails to mention in her Objections that Ms. Taylor was not in Columbus for Mr. Cleveland's attendance infractions. Tr. 60, 683. Accordingly, she did not make any decisions about Mr. Cleveland's attendance. Moreover, it is undisputed that Ms. Taylor terminated Mr. Cleveland's employment as soon as she became aware of his subsequent verbal altercations. Tr. 682-84. Mr. Cleveland was not given additional chances and did not pass probation. *Id.*

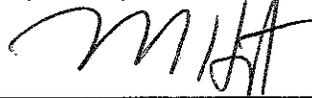
## CONCLUSION

The fact that no other employee under Ms. Taylor refused mandatory overtime, engaged in insubordination, and violated Southwest's rule forbidding other employment that interfered with availability for duty is sufficient to distinguish Ms. Hamler's conduct from anyone else. As the Chief ALJ found, "Complainant was the only probationary employee to 'refuse to follow a [direct] work order' of mandatory overtime. Complainant's act of insubordination alone was a sufficient reason for termination." ALJ's Report at ¶ 61. Accordingly, the Chief ALJ correctly concluded that there is no evidence to establish that Southwest's reasons for terminating Ms. Hamler were unworthy of credence.

For the reasons set forth above, Respondent Southwest Airlines respectfully requests that Complainant's Objections be rejected, that the Commission adopt the ALJ's Report, and that the Complaint be dismissed.

Date: August 1, 2013

Respectfully submitted,



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(614) 462-2616 (fax)  
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Attorney for Respondent Southwest  
Airlines Co.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing was served upon the following by U.S.

Mail, postage prepaid, on this 1<sup>st</sup> day of August 2013:

Stefan Schmidt, Esq.  
Assistant Ohio Attorney General  
30 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215

*Attorney for the Ohio Civil Rights  
Commission*

Desmon Martin  
Dir., Enforcement and Compliance  
Ohio Civil Rights Commission  
State Office Tower, 5<sup>th</sup> Floor  
30 East Broad Street  
Columbus, Ohio 43215-3414  
*By Hand Delivery*

Mary E. Lewis  
Einstein Law LLC  
615 Copeland Mill Road, Suite 1H  
Westerville, Ohio 43018

*Attorney for Complainant Sherri Hamler*

Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
State Office Tower, 5<sup>th</sup> Floor  
30 East Broad Street  
Columbus, Ohio 43215-3414  
*By Hand Delivery*



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Attorney for Respondent Southwest  
Airlines Co.



# Ohio Civil Rights Commission

Governor  
John Kasich

---

**Board of Commissioners**

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

G. Michael Payton, Executive Director

November 4, 2013

Sherri Lynn Hamler  
P.O. Box 83071  
Columbus, Ohio 43203-0071

RE: Sherri Lynn Hamler v. Southwest Airlines Co.  
COL71(33674)10052006  
22A-2007-00521C  
Complaint No. 07-EMP-COL-33674

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



# 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

Byron L. Potts, Esq.  
415 E. Broad Street  
Columbus, Ohio 43215-3800

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COL71(33674)10052006  
22A-2007-00521C  
Complaint No. 07-EMP-COL-33674

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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

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G. Michael Payton, Executive Director

November 4, 2013

Matthew W. Hoyt, Esq.  
Baker & Hostetler LLP  
65 E. State Street, Suite 2100  
Columbus, Ohio 43215

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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

Governor  
John Kasich

**Board of Commissioners**

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

G. Michael Payton, Executive Director

November 4, 2013

Stefan J. Schmidt  
Assistant Attorney General  
Civil Rights Section  
30 E. Broad St., 15<sup>th</sup> Floor  
Columbus, Ohio 43215

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COL71(33674)10052006  
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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:	)	
	)	
SHERRI HAMLER,	)	
	)	COMPLAINT NO. 07-EMP-COL-33674
Complainant,	)	
	)	
vs.	)	
	)	
SOUTHWEST AIRLINES CO.	)	
	)	
Respondent.	)	

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**FINAL ORDER**

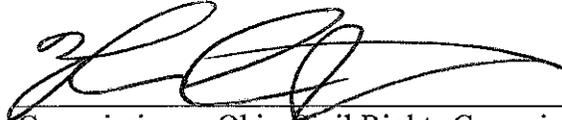
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This matter comes before the Commission upon the Complaint and Notice of Hearing No. 07-EMP-COL-33674; the official record of the public hearing held on February 18 – 19, and March 4 – 5, 2010, before Denise M. Johnson, a duly appointed administrative law judge; the post-hearing briefs filed by the Commission and Respondent, the Administrative Law Judge’s Report and Recommendation dated June 25, 2013, and the Objections filed by Complainant and the Response filed by Respondent.

The complaint alleges that the Complainant was terminated because of her race and sex. After a public hearing, the Administrative Law Judge recommended that the Commission dismiss Complaint No. 07-EMP-COL-33674. After careful consideration of the entire record, the Commission adopted the Administrative Law Judge’s report at its public meeting on

September 5, 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 17<sup>th</sup> 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.

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

DATE: 11/4/2013