

**Ohio Civil
Rights Commission**

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 8/9/2013

Re: *Stanly Young v. Frostbite, Inc*

(TOL) 72 (31678) 10092007 22A-2008-00973-C

Complaint No. 08-EMP-TOL-31678

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

ALJ RECOMMENDS DISMISSAL ORDER

Report Issued: August 08, 2013

Report Mailed: August 09, 2013

*****Objections Due:*** September 3, 2013**

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Stanly Young

Complainant

Complaint No. 08-EMP-TOL-3I678

v.

Frostbite Brands, Inc.

Respondent

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

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Toledo, Ohio 43606

Complainant

ALJ'S REPORT BY:

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Chief Administrative Law Judge
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INTRODUCTION AND PROCEDURAL HISTORY

Stanly Young (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on October 9, 2007.

The Commission investigated the charge and found probable cause that Frostbite Brands, Inc. (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 11, 2008.

The Complaint alleged that Complainant was terminated because of his race (African American).

Respondent filed an Answer to the Complaint on January 12, 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 September 22, 2011 at One Government Center, 12th Floor in Toledo, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (143 pages), a joint stipulation of facts, exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on December 22, 2011; by Respondent on January 11, 2012; and a reply brief filed by the Commission on January 24, 2012.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) credibility assessment of the witnesses who testified before her in this matter. The ALJ has applied the tests of worthiness of belief used in current Ohio practice. For example, she considered each witness's appearance and demeanor while testifying. She considered whether a witness was evasive and whether his or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with Commission on October 9, 2007.
2. The Commission determined on July 21, 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 September 11, 2008, after conciliation failed.
4. Respondent is an employer as defined by R.C. 4112.01(A)(2).
5. On March 22, 1994, Respondent hired Complainant as a seasonal packager. (Stipulation No. 1) (Tr. 14).
6. Complainant held several hourly positions with Respondent before being promoted to a Production Supervisor position in 2000. (Stipulation No. 2) (Tr. 14).
7. In 2007, Complainant dated a subordinate employee named Valerie Wyatt (Wyatt). (Stipulation No. 16) (Tr. 32-33, 61-62).

8. The relationship took place while Complainant was separated from his wife and ended prior to August 2007. (Tr. 46-47).
9. On August 30, 2007¹, Complainant and Wyatt were involved in a verbal and physical altercation on Respondent's premises. (Stipulation No. 18) (Tr. 19-21, 59-61).
10. During the altercation, Wyatt called Complainant's deceased mother a "bitch." (Stipulation No. 19) (Tr. 20, 22).
11. Complainant slapped Wyatt across the face in response to her comment about his mother. (Tr. 20-22, 34-35, 59-61).
12. Wyatt did not physically strike or otherwise touch Complainant during the altercation. (Stipulation No. 34) (Tr. 68-69, 73).
13. Complainant was placed on suspension on August 31, 2007 pending the conclusion of Respondent's investigation. (Stipulation No. 25) (Tr. 24, 35).

¹ The Joint Exhibit Stipulation of Facts incorrectly refers to the altercation date as August 20, 2007 throughout.

14. In April 2007, Respondent adopted its first written Workplace Violence policy. (Tr. 52-53) (Joint Exhibit 4 at pp. 4-5)
15. The Workplace Violence policy was referred to and enforced by Respondent's management as a "zero tolerance" policy. (Tr. 37, 56-58).
16. Respondent conducted an investigation of the August 30, 2007 incident. (Stipulation No. 19).
17. Deborah Lee² (Lee) interviewed Complainant, Wyatt and several witnesses about the incident. (Tr. 59-60, 88-90) (Joint Exhibit 8).
18. During the investigation, Complainant admitted to pushing Wyatt in the altercation, but claimed that he did not slap or grab her. Complainant later admitted that he slapped Wyatt. (Stipulation No. 23).
19. At the conclusion of the investigation, Respondent's management made the decision to terminate Complainant in accordance with the Workplace Violence policy. (Stipulation No. 26) (Tr. 43-44).

² Deborah Lee was formerly known as Ms. Nowacki at the time of Complainant's discharge.

20. Respondent's management decided to provide Complainant with the opportunity to resign in lieu of termination. (Stipulation No. 27) (Tr. 64).

21. On September 11, 2007, Complainant resigned from his employment. (Tr. 64) (Stipulation No. 3) (Joint Exhibit 11).

CONCLUSIONS OF LAW AND DISCUSSION³

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.

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

1. The Commission alleged in the Complaint that Complainant was subject to different terms, conditions and privileges of employment and termination, based on his race in violation of R.C. 4112.02(A).

2. These allegations, if proven, would constitute a violation of R.C. 4112.02 which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, (...) 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.⁴ *McDonnell Douglas*, *supra* at 802.

To meet this burden of production, Respondent must:

...“clearly set forth, through the introduction of admissible evidence,” reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.

⁴ 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).

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993),
quoting *Burdine*, *supra* at 254-55.

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

9. In this case, it is not necessary to determine whether the Commission established a *prima facie* case. Respondent’s articulation of legitimate, nondiscriminatory reasons for its decision to terminate Complainant removes any need to determine whether the Commission proved a prima facie case, and the “factual inquiry proceeds to a new level of specificity.” *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983) quoting *Burdine*, *supra* at 255.

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

Aikens, *supra* at 715.

10. Respondent stated that its decision to terminate Complainant was based on his violation of Respondent’s “zero-tolerance” Workplace Violence policy. Specifically, on August 30, 2007, Complainant physically assaulted Wyatt by slapping her across the face while on Respondent’s premises. (Tr. 37, 20-22, 34-35, 59-61).

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

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

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination . . . [n]o additional proof is required.⁵

Hicks, supra at 511 (emphasis added).

15. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason is a pretext for unlawful discrimination. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

16. This type of showing, which tends to prove that the reason did not *actually* motivate the employment decision, requires the Commission to produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Manzer, supra*, at 1084.

⁵ Even though rejection of a respondent's articulated reason is "enough at law to sustain finding of discrimination, *there must be a finding of discrimination.*" *Hicks, supra* at 512.

17. Thus, even if the Commission proves that Respondent's articulated reasons are false, the Commission will not automatically prevail in establishing its burden of persuasion:

That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the [Commission's] proffered reason of race is correct. That remains a question for the factfinder to answer...

Hicks, supra, at 524.

18. Pretext can be shown by proof of disparate treatment. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992).

19. 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).

To be deemed "similarly situated," the individuals with whom ... the [Complainant] seeks to compare ... [her] treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell, supra at 583 (6th Cir. 1992) (citations omitted).

20. 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.

21. The Commission alleged that Respondent’s “zero-tolerance” Workplace Violence policy was not uniformly applied. According to the Commission, Complainant was singled-out and treated unfairly by Respondent’s management because he was not afforded an opportunity to meet with Workplace Resources following his altercation with Wyatt. (Tr. 15-16, 37).

22. The Commission’s argument is not persuasive.

23. Respondent’s “zero-tolerance” Workplace Violence policy went into effect on April 26, 2007. (Joint Exhibit 4) (Tr. 52, 56).

24. Since the 2007 Workplace Violence policy was adopted, every employee found to have violated the policy, irrespective of race, was terminated. (Tr. 58-59, 66-67).

25. Respondent presented credible evidence which proved that since its 2007 implementation, Complainant was the only supervisor to violate the “zero tolerance” Workplace Violence policy. Thus, the policy required Complainant’s mandatory termination. (Tr. 67).

26. Respondent also showed that other subordinate employees: three (3) Caucasian, two (2) African American and two (2) Hispanic employees, were subjected to similar mandatory discharged because of their participation in workplace violence. (Tr. 66-67).

27. Like Complainant, none of the seven employees who also violated the Workplace Violence policy were referred to Workplace Resources prior to termination. (Tr. 67, 75-77).

28. Respondent also presented credible evidence that proved that no other employee or supervisor engaged in misconduct of “comparable seriousness”, i.e., workplace violence, to that of Complainant and was permitted to retain their employment. (Tr. 66-67).

29. The Commission alleged that Frank Nowaczyk (Nowachyk), Jim Donahue (Donahue), Mark Hall (Hall), Mike Popovitch (Popovitch), and Paul Fairchild (Fairchild), engaged in the same or similar conduct/workplace violence, but were treated more favorable than Complainant because none of them were

terminated. (Tr. 105-116, 118-120, 121-124, 124-125, 125-126) (Exhibits 31, 32, 33, 34, 35).

30. These individuals were not appropriate comparatives. Complainant was the only supervisor who engaged in “workplace violence”, by physically assaulting Wyatt, in violation of the Workplace Violence policy. (Tr. 58-59, 66-67).

31. Moreover, the similarly situated argument is entirely inapplicable to Nowaczyk⁶, Hall⁷ and Popovitch⁸ because irrespective of their actual conduct all of their actions took place prior to the implementation of the 2007 “zero-tolerance” Workplace Violence policy. (Tr. 105, 121, 124).

32. Additionally, this argument is unpersuasive as applied to Donahue and Fairchild because neither of their actions constituted “workplace violence” as enumerated in the policy.

⁶ Nowaczyk’s incident took place in April 4, 2007. (Commission Exhibit 1).

⁷ Hall’s incident took place on July 16, 2002. (Commission Exhibit 3).

⁸ Popovitch’s incident took place on March 18, 2003. (Commission Exhibit 4).

Workplace violence is defined as, in pertinent part:

“Acts or threats of **physical violence**... [or] Acts or threats of **violence** includ[ing] **conduct which is sufficiently severe, offensive, or intimidating.**”

(Joint Exhibit 4) (Emphasis Added) (Tr. 58, 117).

33. On June 22, 2007, Donahue attempted to stop a heated dispute between two hourly employees by placing himself in the middle of the argument and physically separating the two combatants. (Commission Exhibit 2) (Tr. 118-119).

34. Donahue was not personally involved in a physical altercation with another employee nor was he an aggressor in the dispute. (Tr. 133).

35. Thus, Donahue’s conduct did not constitute “workplace violence” because he neither displayed physical violence nor violence which was sufficiently severe, offensive, or intimidating conduct. (Joint Exhibit 4).

36. Donahue did not to engage in “workplace violence” and his mandatory termination was not required under the Workplace Violence policy. (Joint Exhibit 4).

37. Similarly, on July 13, 2007, Fairchild’s action in grabbing and holding up an employee’s hand who was touching food product without wearing

appropriate gloves did not constitute “workplace violence.” (Commission Exhibit 5) (Tr. 135).

38. Unlike Complainant, Fairchild did not strike another employee in a “physically violent” manner. Fairchild grabbed the employee’s wrist as a precaution to prevent and discourage unsafe work practices. He was attempting to illustrate the need to wear safety equipment while handling food. (Tr. 135).

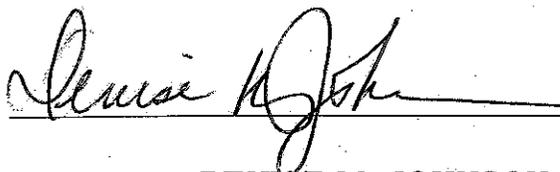
39. Fairchild did not engage in physical violence or violence which was sufficiently severe, offensive, or intimidating conduct. Thus, his conduct did not mandate termination under Respondent’s Workplace Violence policy. (Joint Exhibit 4).

40. Complainant was the only supervisor to violate the Respondent’s “zero-tolerance” Workplace Violence policy and be terminated after its 2007 implementation. (Tr. 37-38).

41. The Commission failed to establish that the Complainant was terminated from employment because of his race.

RECOMMENDATION

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 08-EMP-TOL-31678.

A handwritten signature in cursive script, appearing to read "Denise M. Johnson", is written over a horizontal line.

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

August 8, 2013



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

Stanly Young
3707 Edinborough
Toledo, Ohio 43606

RE: Stanly Young v. Frostbite Brands, Inc.
TOL72(31678)10092007
22a-2008-00973C
22A-2008-00973C
Complaint No. 08-EMP-TOL-31678

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
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November 4, 2013

Carrie L. Sponseller, Esq.
Eastman & Smith
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Toledo, Ohio 43699-0032

RE: Stanly Young v. Frostbite Brands, Inc.
TOL72(31678)10092007
22a-2008-00973C
22A-2008-00973C
Complaint No. 08-EMP-TOL-31678

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

This case is closed.

FOR THE COMMISSION

Desmon Martin/tms

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/tms
Enclosure

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



Governor
John Kasich

Ohio Civil Rights Commission

Board of Commissioners

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

G. Michael Payton, Executive Director

November 4, 2013

Marilyn Tobocman
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615 W. Superior Avenue, 11th Floor
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RE: Stanly Young v. Frostbite Brands, Inc.
TOL72(31678)10092007
22a-2008-00973C
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Complaint No. 08-EMP-TOL-31678

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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:)	
)	
STANLY YOUNG,)	
)	COMPLAINT NO. 08-EMP-TOL-31678
Complainant,)	
)	
vs.)	
)	
FROSTBITE BRANDS, INC.,)	
)	
Respondent.)	

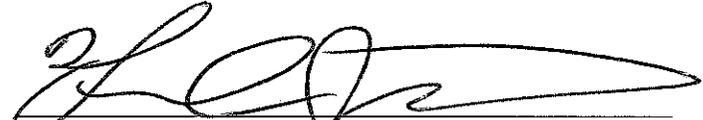
FINAL ORDER

This matter comes before the Commission upon the Complaint and Notice of Hearing No. 08-EMP-TOL-31678; the official record of the public hearing held on September 22, 2011, before Denise M. Johnson, a duly appointed administrative law judge; the post-hearing briefs filed by the Commission and Respondent; and the Administrative Law Judge's Report and Recommendation dated August 8, 2013.

The complaint alleges that the Complainant was subject to different terms, conditions, and privileges of employment and termination based on his race in violation of R.C. 4112.02(A). After a public hearing, the Administrative Law Judge recommended that the Commission dismiss Complaint No. 08-EMP-TOL-31678. After careful consideration of the entire record, the Commission adopted the Administrative Law Judge's report at its public meeting on

September 26, 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 17th day of October, 2013.



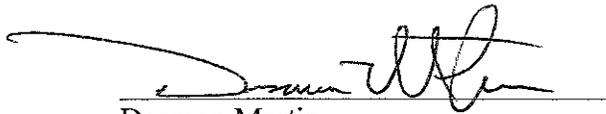
Commissioner, Ohio Civil Rights Commission

NOTICE OF RIGHT TO JUDICIAL REVIEW

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

CERTIFICATE

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



Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission

DATE: 11/4/2013