

**Ohio Civil  
Rights Commission**

# Memo

**To:** Desmon Martin, Director of Enforcement & Compliance

**From:** Denise M. Johnson, Chief Administrative Law Judge

**Date:** 7/30/2013

**Re:** *Tressa Brinkley v. Franklin County Sheriff's Office*

COL71 (37660) 05272010 22A-2010-03245C

Complaint No. 11-EMP-COL-37660

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

**ALJ RECOMMENDS DISMISSAL ORDER**

Report Issued: July 30, 2013

Report Mailed: July 30, 2013

**\*\*\*Objections Due:\*\*\* August 21, 2013**



# Ohio Civil Rights Commission

Governor  
John Kasich

## Board of Commissioners

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July 29, 2013

## Tressa Brinkley

5937 Effingham Rd.  
Columbus, Ohio 43213

## Denise DePalma, Esq.

Assistant Prosecuting Attorney (Civil)  
373 South High Street  
Columbus, Ohio 43215

Re: *Tressa Brinkley v. Franklin County Sheriff's Office*  
**COL71 (37660) 05272010 Amended 22A-2010-03245C Complaint No.11-EMP-COL-37660**

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

Pursuant to Ohio Admin. Code § 4112-1-02, your Statement of Objections must be **received** by the Commission no later than **August 21, 2013**. *No extension of time will be granted.*

Any objections received after this date will be untimely filed and cannot be considered by the Ohio Civil Rights Commission.

*Please send the original Statement of Objections to: **Desmon Martin, Director of Enforcement and Compliance, Ohio Civil Rights Commission, State Office Tower, 5<sup>th</sup> Floor, 390 East Broad Street, Columbus, OH 43215-3414.** All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

*Desmon Martin / apo*

Desmon Martin  
Director of Enforcement and Compliance

DM:apo

Enclosure

Cc: Lori A. Anthony, Chief – Civil Rights Section / Duffy Jamieson, Esq./  
Denise DePalma, Esq./ Amy L Hiers, Esq./ Jeffery Vardaro, Esq. Denise M.  
Johnson, Chief Administrative Law Judge

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**OHIO CIVIL RIGHTS COMMISSION**

**IN THE MATTER OF:**

*Tressa Brinkley*

**Complainant**

Complaint No. 10-EMP-COL-37660

v.

*Franklin County Sheriff's Office*

**Respondent**

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

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**Counsel for the Respondent**

**ALJ'S REPORT BY:**

Denise M. Johnson  
Chief Administrative Law Judge  
Ohio Civil Rights Commission  
State Office Tower, 5<sup>th</sup> Floor  
30 East Broad Street  
Columbus, OH 43215-3414  
(614) 466 - 6684

## **INTRODUCTION AND PROCEDURAL HISTORY**

Tressa Brinkley (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on May 27, 2010 and filed an amended charge on July 27, 2010.

The Commission investigated the charge and found probable cause that the Franklin County Sheriff's Office (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(I).

The Commission attempted, but failed to resolve the matter by informal methods of conciliation. The Commission subsequently issued a Complaint on May 19, 2011.

The Complaint alleged that Complainant was retaliated against for engaging in protected activity.

Respondent filed an Answer to the Complaint on August 10, 2011. 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 March 9, 2012 and March 13, 2012 at State Office Tower, 5th Floor, in Columbus, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing (317 pages), exhibits admitted into evidence during the hearing, post-hearing briefs filed by the Commission on June 5, 2012; by Complainant's Counsel on July 11, 2012; by Respondent on July 13, 2012; and a reply brief filed by the Commission on July 20, 2012 and Complainant's Counsel on July 23, 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<sup>1</sup> with Commission on May 27, 2010<sup>2</sup>, and filed an amended charge on July 27, 2010.
  
2. The Commission determined on April 28, 2011 that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(I).
  
3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint and the Notice of Hearing on May 19, 2011, after conciliation failed.
  
4. Respondent is an employer as defined by R.C. 4112.01(A)(2).
  
5. Respondent had four divisions of law enforcement and staff entitled: Patrol, Corrections, Administration and Criminal. (Tr. 269-270).

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<sup>1</sup> The Complainant filed a charge of discrimination on February 27, 2010 that alleged that she was subject to different terms, conditions, and privileges of employment, including discipline, based on her race (African America) and sex (female) in violation of R.C. 4112.02(A). (Tr. 54-55) (Exhibit 1).

<sup>2</sup> The Commission did not prosecute the allegations of race and sex discrimination against Respondent. (Tr. 9).

6. In September 1994, Complainant began her employment with Respondent as a deputy in the Corrections Division. (Tr. 41).

7. After working in other units, Complainant transferred to the Sex Offender Registration Notification (SORN) unit<sup>3</sup> in 2008. (Tr. 43-44).

8. Complainant was a deputy/detective<sup>4</sup> in the SORN unit until her termination. (Tr. 43-44, 62) (Exhibit 5).

9. Complainant's duties included tracking sex offenders, registering their addresses, verifying offender home addresses, and following up with offenders if they failed to properly register. SORN unit detectives also might be required to testify before a grand jury regarding a sex offender, i.e., registrant. (Tr. 44-46, 273).

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<sup>3</sup> The SORN unit is a subsection of Respondent's Criminal Division. (Tr. 270)

<sup>4</sup> The titles deputy and detective are used interchangeably throughout the transcript (Tr. 43-44, 271-272).

10. Respondent's law enforcement chain of command consisted of (in descending order): the Sheriff; Division Chief Deputies; Lieutenants; Sergeants; and lastly Deputies. (Tr. 282, 16, 247-248, 47).

11. SORN unit deputies reported to Sergeant Stacey Griffith (Griffith)<sup>5</sup>. Griffith reported to Lieutenant Marty Buechner (Buechner). (Tr. 47, 247-248) Chief Deputy of the Criminal Division Stephan Martin (Martin) was the next superior officer. (Tr. 16). And, Sheriff Jim Karnes (Karnes) was highest ranking individual in agency. (Tr. 282).

12. Complainant made several internal complaints<sup>6</sup> of race (African American) and sex (female) discrimination in August 2009; October 2009; December 2009; and January 29, 2010. (Tr. 47-53).

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<sup>5</sup> Complainant's immediate supervisor was Griffith. (Tr. 214)

<sup>6</sup> Complainant informed Chief Martin; Lieutenant Buchner, Sheriff Karnes, and EEO Officer Lieutenant Karen Cotner (Cotner) of her discrimination allegations. (Tr. 48, 54, 90, 91, 114)

13. On February 4, 2010, Complainant was engaged in a conversation with Deputy Mike Kirkpatrick (Kirkpatrick) about a recent cruise she had taken with her brother. (Tr. 92).

14. Deputy David Crabtree (Crabtree) overheard the comments but did not participate in the conversation. (Tr. 211-212).

15. During the conversation Complainant referred to her brother's sexual orientation in a derogatory manner by calling to him a "fag" and/or "faggot." (Tr. 92, 57).

16. Also on February 4, 2010, immediately following the cruise discussion, Complainant had a second conversation with deputies Kirkpatrick, Crabtree, and Todd Tallman (Tallman) regarding potential candidates to fill a vacancy deputy position in the SORN unit. (Tr. 57-59, 92-93, 210-213).

17. During the second conversation Crabtree alleged that he heard Complainant make derogatory comments about Deputy Jean

Neal (Neal) being a homosexual and that Complainant disapproved of Neal's anticipated transfer into the SORN unit. (Tr. 212-213).

18. On February 5, 2010, Crabtree reported what Complainant said about Neal to his immediate supervisor Buechner. (Tr. 214-215).

19. On February 8, 2010, Buechner drafted an inner-office communication detailing Crabtree's allegations against Complainant and sent the correspondence to Karnes and Martin. (Tr. 251-253, 17-18) (Exhibit 2).

20. On February 9, 2010, Martin authorized an Internal Affairs (IA) investigation of the allegations against Complainant and the use of polygraph exams. (Tr. 17-19, 274-277) (Exhibit 3).

21. During the IA investigation, Crabtree volunteered to take a polygraph to verify the truthfulness of his allegations that Complainant made derogatory statements about Neal. (Tr. 215-217, 277-278).

22. Crabtree passed the examination. (Tr. 21).

23. Pursuant to the Collective Bargaining Agreement (CBA), Respondent may require persons accused of wrongdoing to submit to a polygraph after the accuser voluntarily takes a polygraph exam and passes. (Tr. 150-151, 159) (Exhibit P, Section 6.8).

24. On April 14, 2010, Complainant was ordered to take a polygraph and found to be deceptive in her responses. As such, on April 23, 2010, IA charged Complainant with Lying to Internal Affairs, which is a terminable offense. (Tr. 21, 23-24). (Exhibit 3).

25. On May 27, 2010, Complainant filed an external charge of discrimination with the Commission based on race, sex and retaliation for engaging in a protected activity. (Exhibit L, FCSO #000394).

26. On June 11, 2010, Patrick Garrity (Garrity), Hearing Officer and Director of Management Services, held a pre-disciplinary

hearing for Complainant regarding Crabtree's allegations against her. (Tr. 104-105) (Exhibit 4).

27. After the hearing, a meeting was held to discuss Complainant's termination. Karnes, Garrity, Martin, the Prosecutor's office, Cotner, and Internal Affairs investigator Sergeant Charles Williamson were in attendance. (Tr. 105-106, 183-184).

28. Martin reviewed IA's summary and concluded that Complainant lied because she failed the polygraph exam. (Tr. 22-23, 106-107).

29. Martin recommended to Karnes that Complaint be terminated for lying to Internal Affairs. Karnes had the final authority to make termination decisions. (Tr. 17, 22-24, 37-38, 280-281).

30. Karnes accepted Martin's recommendation and terminated Complainant's employment on July 2, 2010. (281-282, 12, 62).

31. Respondent provided Complainant with a removal notice on July 2, 2010 and subsequently sent her a revised notice on August

16, 2010 to reflect the correct date of her IA investigation. (Tr. 62, 118-119) (Exhibit 5).

## **CONCLUSIONS OF LAW AND DISCUSSION<sup>7</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>7</sup> 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, including termination, in retaliation for having engaged in activity protected by R.C. 4112.02(I).

2. These allegations provide, in pertinent part, that:

It shall be an unlawful discriminatory practice:

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

3. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C.

4112.02(I) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

4. 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 and retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973) for disparate treatment cases applies to retaliation cases.

6. This framework normally requires the Commission to prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The proof required to establish a *prima facie* case may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802, 5 FEP Cases 969, n.13.

7. 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, 25 FEP Cases 113 (1981).

8. 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>8</sup> *McDonnell Douglas*, *supra* at 802, 5 FEP Cases at 969.

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

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<sup>8</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, 25 FEP Cases at 116.

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 reasoning was applied in a nondiscriminatory fashion.

*EEOC v. Flasher Co.*, 60 FEP Cases 814, 817 (10<sup>th</sup> Cir. 1992) (citations and footnote omitted).

was not the cause of the employment action.

*St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), quoting *Burdine*, *supra* at 254-55, 25 FEP Cases at 116, n.8.

9. The presumption created by the establishment of a *prima facie* case “drops out of the picture” when the employer articulates a legitimate, nondiscriminatory reason for the employment action. *Hicks*, *supra* at 511, 62 FEP Cases at 100.

10. In this case, it is not necessary to determine whether the Commission proved a *prima facie* case. Respondent’s articulation of a legitimate, nondiscriminatory reason for Complainant’s discharge 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, 713, 31 FEP Cases 609, 611 (1983), quoting *Burdine*, *supra* at 255, 25 FEP Cases at 116.

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

*Aikens, supra* at 713, 31 FEP Cases at 611.

11. Respondent stated that its decision to terminate Complainant was based on her deceptive responses during an Internal Affairs investigation polygraph exam. Specifically, Complainant was charged with the terminable offense of Lying to Internal Affairs. (Tr. 21, 23-24, 281-282) (Exhibit 5).

12. Respondent having met its burden of production, the Commission must prove that Respondent retaliated against Complainant because she engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100.

13. The Commission must show by a preponderance of the evidence that Respondent's articulated reason for Complainant's discharge was not the true reason, but was "a pretext for . . .

[unlawful retaliation].” *Id.*, at 515, 62 FEP Cases at 102, quoting *Burdine*, *supra* at 253, 25 FEP Cases at 115.

[A] reason cannot be proved to be a “pretext for [unlawful retaliation]” unless it is shown *both* that the reason is false, *and* that . . . [unlawful retaliation] is the real reason.

*Hicks*, *supra* at 515, 62 FEP Cases at 102.

14. Thus, even if the Commission proves that Respondent’s articulated reason is false or incomplete, the Commission does not automatically succeed in meeting 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 . . . [unlawful retaliation] is correct. That remains a question for the factfinder to answer . . . .

*Id.*, at 524, 62 FEP Cases at 106.

15. Ultimately, the Commission must provide sufficient evidence for the factfinder to infer that Complainant was, more likely than not, the victim of unlawful retaliation.

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.<sup>9</sup>

*Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added)

16. The Commission may indirectly challenge the credibility of Respondent's reason by showing that the sheer weight of the circumstantial evidence makes it "more likely than not" that the reason is a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove that the reason did not *actually* motivate the employment decision, requires the

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<sup>9</sup> 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.

Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

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 [sex] is correct. That remains a question for the factfinder to answer...

*Id.*, *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 Deputy James Shotsky (Shotsky) engaged in the same or similar conduct as Complainant but was treated better than Complainant because he was not required to take a polygraph examination.

22. The Commission's argument is not persuasive.

23. Shotsky was investigated by Internal Affairs for the alleged sexual harassment of a female deputy. (Tr. 24-25, 109-110). (Exhibit 8).

24. Shotsky was not required to take a mandatory polygraph because he admitted to the wrongdoing and the examination was unnecessary to pursue appropriate discipline. (Tr. 279-280).

25. Conversely, Complainant did not admit to any of the allegations asserted by Crabtree or misconduct. Thus, Complainant was ordered to take a mandatory polygraph pursuant to the terms

of Respondent's CBA. (Tr. 150-151, 159, 280) (Exhibit P, Section 6.8).

26. Shotsky admitted that he made inappropriate sexual statements to the female deputy. Moreover, another deputy witnessed Shotsky's conduct and corroborated that Shotsky made the statements and observed him trapping the female deputy with his legs on a counter. (Tr. 181, 279-280, 287-289, 292-293).

27. Shotsky was not similarly situated to Complainant because he admitted his inappropriate statements and was not required to take a polygraph. Shotsky did not lie during his investigation and investigators did not charge him with the terminable offense of Lying to Internal Affairs. (Tr. 181, 109, 140-141).

28. The Commission failed to produce any credible evidence that Complainant's termination was causally connected to the numerous internal EEO charges that Complainant filed with Respondent during the course of her employment.

**RECOMMENDATION**

For all the foregoing reasons, it is recommended that the Commission issue a Dismissal Order in Complaint No. 10-EMP-COL-37660.



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Denise M. Johnson

CHIEF ADMINISTRATIVE LAW JUDGE

July 30, 2013

# The Gittes Law Group

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Jeffrey P. Vardaro  
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August 21, 2013

**Via Hand Delivery**

Desmon Martin  
Director of Enforcement and Compliance  
Ohio Civil Rights Commission  
State Office Tower  
30 East Broad Street, 5<sup>th</sup> Floor  
Columbus, Ohio 43215-3414

RECEIVED

AUG 21 2013

Re: Tressa Brinkley v. Franklin County Sheriff's Office  
Complaint No. 10-EMP-COL-37660  
(COL71 (37660) 05272010 Amended 22A-2010-03245C)  
**HEARING REQUESTED**

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

Dear Mr. Martin:

Enclosed please find one original and one copy of the Objections of Complainant, Tressa Brinkley, to the Report and Recommendation of the Administrative Law Judge: Hearing Requested, to be filed in the above captioned case.

Please do not hesitate to call if you have any questions.

Very truly yours,

  
Brooke Jennings  
Office Manager

Cc:

Via Regular U.S. Mail

Duffy Jamieson  
Assistant Chief, Civil Rights Section  
Ohio Attorney General  
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Denise L. DePalma  
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## **I. Summary of Objections**

Complainant Tressa Brinkley hereby submits the following objections to the Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations ("Recommendation") in Complaint No. 10-EMP-COL-37660, and requests the opportunity to appear before the Commission to present her arguments at a Commission meeting:

A. The ALJ relied on serious misstatements of the undisputed hearing evidence—including documentary evidence produced by the Respondent—in concluding that the key comparator, James Shotsky (a deputy who was found to have lied to Internal Affairs, but was not subjected to a polygraph or terminated), was not similarly situated to the Complainant.

B. The ALJ completely disregarded additional comparators, besides Deputy Shotsky, who were also found to have lied to Internal Affairs, but were not terminated.

C. The ALJ completely disregarded the Respondent's departure from its own mandatory procedures, which is evidence of pretext and retaliation.

## **II. Introduction and Pertinent Factual Background**

This case presented a single clear question: whether Franklin County Sheriff's Office deputy Tressa Brinkley was terminated in retaliation for her protected activity. The Commission found probable cause that she was, and presented reliable and probative evidence that the Complainant that the Respondent retaliated against the Complainant.

The Complainant, who made internal and external discrimination complaints against the Respondent, was then subjected to an Internal Affairs investigation for alleged "harassment." This "harassment" was an alleged homophobic statement the Complainant made about another deputy, outside that deputy's presence. The Complainant denied the comment, and her account was corroborated by two other deputies who witnessed the conversation. The Respondent

ordered polygraphs of the Complainant and the deputy who accused her, then used the results as the sole basis for terminating the Complainant, on a charge of “lying to Internal Affairs.”

This treatment of the Complainant was far harsher than the Respondent’s treatment of at least three other employees: Deputy James Shotsky, Deputy Anthony Whitworth, and Nurse Shannon Walton. All of these employees were found to have lied to Internal Affairs, but none of them was terminated, as the Complainant was.

Deputy Shotsky was the clearest comparator. During the same time period, the same decision-makers oversaw an Internal Affairs investigation of Deputy Shotsky for the same charge (“harassment”). The only difference in Shotsky’s case was that his conduct was far more severe than the conduct allegedly committed by the Complainant. Shotsky was not just accused of making an inappropriate comment; he was accused of physically assaulting a female deputy by trapping her in between his legs and telling her, in crude terms, to perform oral sex on him. This conduct was corroborated by the testimony of a third officer in the room at the time.

**Shotsky falsely denied the allegations against him.** He said he did make a crude comment to the female deputy, but he denied physically assaulting her by trapping her between his legs. As in the Complainant’s investigation, the accuser took (and passed) a polygraph, but unlike the Complainant, the Respondent did not then order Shotsky to take a polygraph. Even without polygraph findings, though, Shotsky **was** found by the Respondent to have **lied to Internal Affairs**, based on the testimony of his accuser and the corroborating witness. Yet, unlike Brinkley, Shotsky was not terminated; he was given only a brief suspension.

If Shotsky and Brinkley are not similarly situated for purposes of this case, no two people can ever be considered similarly situated in any discrimination or retaliation case. Every aspect of their cases is as similar as they can possibly be. The same decision-makers, analyzing

harassment charges against two employees of the same rank, ordered one to take a polygraph (the one with a history of protected activity), and not the other. They found both deputies to have lied to Internal Affairs, but terminated one (the one with a history of protected activity), and not the other. The only difference in the underlying charges against them was that one (the one with a history of protected activity) was accused of only a single inappropriate statement, while the other was accused of making both an inappropriate statement and committing an aggressive, offensive physical assault. The only plausible explanation for their different treatment was that the Complainant had a history of protected activity, while Shotsky did not.

Two other comparators were also presented by the Commission: Deputy Whitworth and Nurse Walton. Deputy Whitworth was accused of an even more serious offense: physically assaulting and injuring a jail detainee. He was found to have lied in his report to Internal Affairs about his use of force. He was not terminated. Nurse Walton was accused of stealing money from her co-workers. She lied to Internal Affairs, and her lie was proven by video evidence of her taking the money. She was not terminated.

Finally, it is undisputed that the Sheriff's Office has mandatory policies, enshrined in its Collective Bargaining Agreement, against terminating deputies based on polygraph examinations alone. It admittedly violated that policy here, which is further evidence of pretext and retaliation.

### **III. Analysis**

The ALJ's Recommendation makes no mention at all of Deputy Whitworth, Nurse Walton, or the mandatory policy violated by the Sheriff's Office. It focuses only on Shotsky. Focusing on Shotsky is understandable, since Shotsky's case alone is very clear evidence of retaliation against the Complainant, and it is all the evidence the Complainant needed to support her claim. But in addressing Shotsky, the ALJ's Recommendation grossly misstates the

evidence. The Recommendation states that Shotsky “was not required to take a mandatory polygraph because he admitted to the wrongdoing and the examination was unnecessary to pursue appropriate discipline.” It then states, “Shotsky did not lie during his investigation and investigators did not charge him with the terminable offense of Lying to Internal Affairs.” (Recommendation, pp. 22-23). These conclusions are the *only* basis the Recommendation cites for finding against the Complainant, and they conflict with the undisputed facts: Shotsky did *not* admit to the most serious offense of which he was accused (the physical assault), and he *did* lie to Internal Affairs, as the Internal Affairs report itself states. If the ALJ had made these factual findings consistent with the undisputed evidence, there would be no way to avoid the conclusion that the Respondent retaliated against the Complainant. The Commission should overrule the ALJ’s Recommendation and issue an order granting the relief requested by the Complainant.

**A. The Recommendation Misstates the Undisputed Facts Regarding Shotsky**

As stated above, the ALJ’s entire recommendation is based on two conclusions about the Shotsky case: that Shotsky “was not required to take a mandatory polygraph because he admitted to the wrongdoing and the examination was unnecessary to pursue appropriate discipline” (Recommendation, p. 22, ¶ 24); and that “Shotsky did not lie during his investigation and investigators did not charge him with the terminable offense of Lying to Internal Affairs.” (Recommendation, p. 23, ¶ 26). Both of these statements are false. These are not matters of credibility, but simple, discrete matters of undisputed testimony and documentary evidence.

First, the idea that Shotsky was not required to take a polygraph because he admitted wrongdoing, making a polygraph unnecessary, is frankly ridiculous and indefensible. Shotsky was accused of two things: making an inappropriate statement about oral sex to a female co-worker; and *trapping her between his legs while telling her to perform oral sex on him*. (Exhibit

8, Internal Affairs summary of investigation). Imagine a deputy who is accused of swearing at a co-worker and then punching the co-worker in the face. If the deputy then admits the swearing, but denies the punch, is the matter resolved? No!

That is just what happened here. Shotsky admitted to the most minor possible infraction and flatly denied the much more serious charge that led to his investigation. Chief Martin, the Respondent's key witness, admitted in his hearing testimony that Shotsky denied the most serious allegation against him, trapping his co-worker between his legs. (Transcript of Hearing, Volume II, p. 294).<sup>1</sup> This is also what the Internal Affairs investigators stated. (Exhibit 8, p. 2 ("In an interview pursuant to this investigation Deputy Shotsky denied placing his feet on the counter around Deputy Beaudry at any time")). These are undisputed facts. The ALJ did not have discretion to find otherwise. The statement in the ALJ's Recommendation at page 22, paragraph 24 is simply incorrect, and the Commission must overrule this conclusion.

Second, the Recommendation states, "Shotsky did not lie during his investigation and investigators did not charge him with the terminable offense of Lying to Internal Affairs." (p. 23, ¶ 27). This is also contrary to the undisputed facts. The investigation summary, which the Respondent produced, states as follows: "In an interview pursuant to this investigation Deputy Shotsky denied placing his feet on the counter around Deputy Beaudry at any time" (Exh. 8, p. 2); "Deputy James Shotsky did place his feet on the counter in the one west guard post around Deputy Beaudry" (Id.); and "The sustaining of a violation of the Sheriff's Sexual Harassment Policy and **LYING TO INTERNAL AFFAIRS** reflect poorly upon Deputy Shotsky and impairs the operational efficiency of the Office by creating an investigation into misconduct and impairing his credibility as a law enforcement officer." (Id., p. 4 (emphasis added)).

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<sup>1</sup> Actually, as Chief Martin testified, Shotsky even denied making the offensive statement he was accused of, claiming he made a milder inappropriate comment. (Transcript, Vol. II, p. 288).

Again, this document was authored by the Respondent, produced in discovery, and admitted as evidence in the hearing in this matter. There was no contrary evidence upon which the ALJ could rely to conclude that Shotsky (who did not testify) “did not lie during his investigation.” (Recommendation, p. 23, ¶ 26). He lied. He was found by Internal Affairs to have lied. These facts are undisputed, and the Commission must correct this error.

The only differences between Shotsky’s case and that of Complainant are that Shotsky committed much more serious misconduct, yet Shotsky was not ordered to take a polygraph, and Shotsky was not terminated *even after the Respondent concluded in writing that he had lied to Internal Affairs*. These differences in the treatment of similarly situated deputies, which have not been explained by the Respondent, must result in a finding of disparate treatment and retaliation.

This is especially true in light of recent Sixth Circuit Court of Appeals decisions reinforcing the axiom that comparators in discrimination cases do not have to be identical, but rather, need only be similarly situated in ways that are relevant to the case. See, e.g., *Bobo v. UPS* (6th Cir. 2012), 665 F.3d 741, 751 (holding that employee does not need “to demonstrate an exact correlation between himself and others similarly situated,” but rather, must simply show that he or she was similarly situated in the respects relevant to the case); accord *Louzon v. Ford Motor Co.* (6th Cir.), 2013 U.S. App. LEXIS 11156, at \*19. The Complainant and Shotsky were similarly situated in every relevant respect imaginable. The law simply does not permit the conclusion the ALJ’s Recommendation reached under these circumstances.

#### **B. The ALJ’s Recommendation Ignored Other Comparators**

Even if the Recommendation’s statements regarding Deputy Shotsky were correct, there was a great deal of other evidence to support the Complainant’s charge, including other comparators who are simply ignored in the Recommendation. Deputy Anthony Whitworth

deliberately knocked a jail detainee unconscious with a knee strike to the head, and was caught on video doing so. But in his Use of Force Report (which is a report to Internal Affairs), he claimed otherwise. Internal Affairs found him to have been dishonest, but he was not terminated or polygraphed. Again, these facts are undisputed in the record. (Transcript, Volume I, p. 111).

Nurse Shannon Walton was charged with stealing from her co-workers. She denied this in her Internal Affairs interview. A video showed her taking the money. Nurse Walton was not terminated or even polygraphed. These facts are undisputed in the record, including a written investigation report similar to those involving Shotsky and the Complainant, produced by the Respondent. (Transcript, Volume I, pp. 34-35, Exhibit 10).

No one can provide a plausible explanation for why Walton and Whitworth were not terminated—for lying about stealing and a serious act of unlawful violence—when the Complainant was terminated based solely on a polygraph examiner’s allegation that she was untruthful about a single inappropriate statement. Without such an explanation, this evidence stands undisputed as an additional basis for finding unlawful retaliation. Yet it does not even appear in the ALJ’s Recommendation. It is as if it was never presented, yet it was a focus of the Commission’s case and was briefed by both the Commission and the Complainant. The Commission must overrule the ALJ’s Recommendation on this additional ground.

**C. The ALJ Ignored Other Evidence of Pretext, Including the Respondent’s Deviation from Its Mandatory Procedures for Using Polygraphs.**

Finally, the FCSO gave absolutely no explanation at the hearing for why Deputy Brinkley was terminated solely based on the results of a polygraph, when the applicable collective bargaining agreement (CBA) prohibits *any* discipline based solely on polygraph results (Excerpt at Exhibit P, Section 6.8), given the inherent unreliability of these exams, which are inadmissible in court. The evidence showed the FCSO followed this procedure in other cases, but not when it

came to the Complainant. The ALJ's Recommendation even contains a finding that the Complainant's termination was premised solely on the polygraph. (Recommendation, Findings of Fact, p. 10, ¶ 28), but does not mention that the CBA prohibits such conduct.

There is no question that this unexplained violation of the Respondent's procedures is relevant, probative evidence of retaliation. Ohio courts and multiple federal courts, including the Sixth Circuit Court of Appeals and the U.S. Supreme Court, have concluded that such a deviation from standard operating procedure can be evidence of discrimination or retaliation. See *Sweet v. Abbott Foods, Inc.* (10th Dist.), 2005-Ohio-6880, at ¶ 49 ("We agree that evidence that an employer short-circuited company policy when discharging an employee could potentially show that the employer's proffered reasons did not actually motivate the discharge."); *Christian Legal Soc'y Chapter v. Martinez* (2010), 130 S.Ct. 2971, 3018 (stating that deviation from employer's written procedures may prove pretext); *Skalka v. Fernald Env'l Restoration Mgmt. Corp.* (6th Cir. 1999), 178 F.3d 414, 422 (holding that "The jury did not have to accept as credible [the employer's] explanations of why it deviated from its own procedure [in laying off the plaintiff]"); *Rudin v. Lincoln Land Community College* (7th Cir. 2005), 420 F.3d 712, 723 (holding that company's failure to follow own internal procedure "points to a discriminatory motivation" and is "evidence of discrimination"); *Kowalski v. Kowalski Heat Treating Co.* (N.D. Ohio 1996), 920 F.Supp. 799, 805 (holding that company's deviation from its own procedures helped to meet "causal connection" requirement in stating prima facie case of retaliation).

The cases cited above all involved circumstances where an employee alleged an employer's failure to follow its internal procedure demonstrated discrimination. In each case, the court agreed that a failure to follow procedure can be evidence of discrimination. The same is true here, but with an important added factor: in this case, the FCSO did not merely ignore a

general guideline it set for itself in an employee manual; it was so eager to retaliate against Deputy Brinkley that it disregarded a binding contractual agreement with her union. This violation of the CBA is not directly actionable in these proceedings (as it would be in a labor arbitration), but it is powerful evidence of a retaliatory motive for the FCSO's actions. Yet the ALJ's Recommendation does not even mention this policy, much less the Respondent's lack of explanation for violating it in its eagerness to terminate Deputy Brinkley.

Combined with the comparators, Shotsky, Whitworth, and Walton—none of whom were polygraphed or terminated under similar or more compelling circumstances—this evidence of an unexplained departure from protocol is compelling evidence of retaliation. The Commission should overrule the ALJ's Recommendation and order relief for the Complainant.

#### **IV. Conclusion**

For the reasons stated above and in her own and the OCRC's post-hearing briefs, Complainant urges the Commissioners to disapprove the ALJ's written Recommendation, issue a Final Order holding that Complainant was terminated in violation of Ohio's laws against retaliation, issue a Cease and Desist order, and award Complainant an appropriate amount of lost compensation based upon the evidence present in the record.

Complainant also respectfully requests the opportunity to appear before the Commission to present her arguments at a Commission meeting.

Respectfully Submitted,



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Attorney for the Complainant

**CERTIFICATE OF SERVICE**

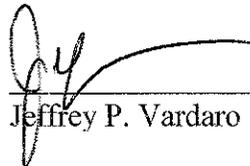
The foregoing Objections of Complainant Tressa Brinkley and her request for a hearing before the Commission on these Objections were served upon the following by regular U.S. mail, postage prepaid, on the 21st day of August, 2013:

Duffy Jamieson  
Assistant Chief, Civil Rights Section  
Ohio Attorney General  
State Office Tower, 15th Floor  
30 East Broad Street  
Columbus, Ohio 43215

Denise L. DePalma  
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Columbus, Ohio 43215-6318

**FILED BY HAND DELIVERY**

Ohio Civil Rights Commission  
Compliance Department  
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\_\_\_\_\_  
Jeffrey P. Vardaro



# RON O'BRIEN

FRANKLIN COUNTY PROSECUTING ATTORNEY

September 4, 2013

**RECEIVED**

**VIA HAND DELIVERY**

SEP 04 2013

Desmon Martin, Director of Enforcement and Compliance  
Ohio Civil Rights Commission  
State Office Tower  
390 East Broad Street, 15<sup>th</sup> Floor  
Columbus, Ohio 43215

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

Re: Tressa Brinkley v. Franklin County Sheriff's Office  
Complaint No. 10-EMP-COL-37660

Dear Mr. Martin:

Enclosed for filing is the Memorandum *Contra* of the Franklin County Sheriff's Office, in response to Ms. Brinkley's Objections to Judge Johnson's Findings of Fact, Conclusions of Law and Recommendations.

Respectfully submitted,

Denise L. DePalma  
Assistant Prosecuting Attorney

Enclosure

c: The Honorable Zach Scott  
Lindsay Smith  
(via electronic mail)  
Jeff Vodaro, Esq.  
Duffy Jamieson, Esq.  
Chief Administrative Law Judge Denise Johnson  
(via regular U.S. and electronic mail)  
w/enclosures

STATE OF OHIO  
CIVIL RIGHTS COMMISSION

SEP 04 2013

OHIO CIVIL RIGHTS COMMISSION  
COMPLIANCE DEPARTMENT

In the Matter of:	:	
	:	
Tressa Brinkley,	:	Complaint No. 10-EMP-COL-37660
	:	
Complainant,	:	
	:	
v.	:	Chief Administrative Law Judge
	:	Denise M. Johnson
Franklin County Sheriff's Office,	:	
	:	
Respondent.	:	

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**MEMORANDUM *CONTRA* OF FRANKLIN COUNTY SHERIFF'S OFFICE  
TO OBJECTIONS OF COMPLAINANT TO  
THE CHIEF ADMINISTRATIVE LAW JUDGE'S THIRD AMENDED  
FINDINGS OF FACTS, CONCLUSIONS OF LAW, AND RECOMMENDATIONS**

---

RON O'BRIEN  
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Counsel for Respondent

## **I. INTRODUCTION**

The Franklin County Sheriff's Office ("the Sheriff's Office") terminated Tressa Brinkley ("Brinkley") effective July 2, 2010, for using offensive and derogatory language regarding the sexual orientation of a coworker and for lying to Internal Affairs ("IA") about it. Specifically, the Sheriff's Office fired Brinkley for making the statement, "If that fucking fag got the job, I'm not working with fucking fags. I'm bidding the fuck out of here" and denying she made the statement when questioned by IA investigators. (Exhibit 5). Chief Administrative Law Judge Denise Johnson found that lying to IA provided a legitimate business reason for Brinkley's termination and further found that the Commission failed to prove pretext. Her findings are based upon her consideration of the witness' testimony, the exhibits presented, and the closing arguments of the parties. Judge Johnson's findings are supported by the evidence and the law. Thus, the Sheriff's Office requests that the Board of Commissioners adopt Judge Johnson's Findings of Fact, Conclusions of Law, and Recommendations ("Report and Recommendation") dismissing Brinkley's charge.

## **II. STATEMENT OF FACTS RELEVANT TO BRINKLEY'S OBJECTIONS**

Brinkley worked for the Sheriff's Office from September of 1994 until her removal in July 2010. During her employment, Brinkley filed three OCRC charges prior to the filings here. (Tr. 79-80). Brinkley's last position with the Sheriff's Office was as a detective in the Sex Offender Registration and Notification ("SORN") unit. (Tr. 271-73; Exhibit A).

On February 4, 2010, Detective David Crabtree heard Brinkley telling Deputy Mike Kirkpatrick about going on a cruise with her brother. She said that she did not like her brother because he was a "fucking faggot" and he liked the same thing she liked, i.e., "dick." Crabtree did not participate in this conversation; he overheard it. The conversation regarding Brinkley's

brother and the cruise took place prior to the conversation about who would be transferring to the open position in the SORN unit. According to Crabtree, when Brinkley heard that Deputy Jean Neal might be transferring to the unit, Brinkley said she was not going to work with a “fucking faggot.” (Tr. 211-212). He reported Brinkley’s comments even though he was worried that he would be labeled a “snitch,” a “tattletale,” and a “snake in the grass” for reporting on a coworker (Tr. 214; 220). Crabtree reported Brinkley’s statements to Lieutenant Marty Buechner, who authored an IOC regarding the allegations, and forwarded it to Lieutenant Karen Cotner, who was the EEO Officer for the Sheriff’s Office. (Exhibit 2; Tr. 250-55).

Steve Martin, then the Chief Deputy of the Criminal Division (which included IA and SORN), authorized an investigation into Crabtree’s complaint on February 9, 2010 (Exhibit 3, p. 1). When Crabtree was interviewed by IA, he told the investigators that he, Detective Mike Kirkpatrick, and Brinkley were having a conversation about who might get the opening in the SORN unit. He said Detective Todd Tallman was at work that day, but was in and out of the office and he was not sure if Tallman was present during the conversation. (Tr. 176-77; 219). According to Crabtree, during the conversation, Brinkley said “If that fucking fag got the job, I’m not working with fags. I’m bidding the fuck out of here,” referring to Neal. (Tr. 187-88; Exhibit 3, p. 1). Crabtree volunteered to take a polygraph test to prove he was not lying about what Brinkley said (Tr. 215; 277-78). Tallman said he was not there for the conversation about who was transferring to the SORN unit, but that he heard Brinkley use the word “fag” or “faggot” in reference to her brother (Tr. 177; 188; Exhibit 3, p. 2). Kirkpatrick told IA that he did not hear Brinkley make the comment about Neal, but said that because Brinkley talks all the time, he tunes her out (Tr. 188; 199; Exhibit 3, p. 2). Kirkpatrick has heard Brinkley refer to her brother as a “fag” or “faggot” (Tr. 188).

IA Lieutenant Chuck Williamson believed Crabtree was credible, in part because he had nothing to gain by making up the remark (Tr. 176). He also believed Crabtree over Brinkley because of Brinkley's demeanor during her IA interview (Tr. 197-98; 201). Martin authorized the use of polygraphs in the Brinkley investigation. He authorized the polygraphs to further the investigation and to either support or rebut Crabtree's allegations. (Tr. 277; 287). Crabtree submitted to a polygraph exam on March 29, 2010, and "no deception" was found in his responses to the questions regarding his allegations of Brinkley (Exhibit 3, p. 2). Because Crabtree took a polygraph and passed, Brinkley was ordered to submit to a polygraph pursuant to Section 6.8 of the contract between the Sheriff's Office and the Fraternal Order of Police (Tr. 150-51; Exhibit P). Brinkley submitted to a polygraph exam on April 14, 2010, and her responses were found to be "deceptive" (Exhibit 3, p. 2). Based on the findings from the IA Investigation, Cotner concluded that the following administrative charges should be sustained against Brinkley: Unbecoming Conduct in violation of AR 102.29; Lying to Internal Affairs in violation of AR 102.1.1.7; and Cause for Suspension or Dismissal x2 in violation of AR 102.43 (Exhibit 3, pp. 3-4).

Martin recommended to the Sheriff that Brinkley be terminated because the Sheriff had always been adamant during his tenure that if an employee lies to IA, the employee is fired. According to Martin, one of the first things you learn when you come on the job as law enforcement personnel is that your truthfulness is incredibly important. Brinkley's lying to IA could be used to impeach her in a criminal trial and the Sheriff's Office could have difficulty finding other personnel who would want to work with her because she had a history of lying to IA (Tr. 281-82; Exhibit A). Martin does not always make a recommendation regarding the level of discipline at the conclusion of an IA investigation because it does not always affect him. In

addition to the Criminal Division, there are three other divisions at the Sheriff's Office: Patrol, Corrections, and Administration. (Tr. 270-71). In this case, it affected him because Brinkley worked in his division.

There are no deputies with a sustained charge of lying during an IA investigation who were not removed from service, although one, Deputy Alan Mann Jr., resigned before he was fired (Tr. 119-20). Deputy James Shotsky (Corrections Division), although the subject of an IA investigation, was found not to have lied to IA during the investigation. In that investigation, Deputy Shannon Beaudry complained to IA that Shotsky placed his feet on the counter on either side of her and said "why don't you suck my cock?" (Exhibit 8, p. 1). Shotsky admitted to making two sexual in nature comments to Beaudry (Id. at p. 2). Beaudry voluntarily submitted to a polygraph and passed. Exhibit R is the polygrapher's report for her polygraph (Tr. 194). Notably, no question was asked regarding whether Shotsky had his *feet* on the counter; the questions asked refer to his *legs* being on the counter. Additionally, no question was asked regarding the specific sexual comment Beaudry alleged; instead, the question refers generically to "a sexual comment." Because Shotsky admitted to making two "sexual comments," there would be no reason to polygraph him to ask if he made a sexual comment to her. According to Martin, the reason Shotsky was not ordered to take a polygraph and Brinkley was ordered to take a polygraph was the difference in fact pattern: Shotsky made admissions and there was another witness to some of his inappropriate behavior with Beaudry, and therefore, there were already sustainable charges against him; Brinkley admitted to nothing and there was no other witness to the misconduct (Tr. 30; 279-80; 287; 292). While there appears to be a typo on page 4 of the IA summary ("Lying to Internal Affairs reflects poorly upon Deputy Shotsky), there was never a

recommendation from IA that a lying to IA charge be sustained against Shotsky (Tr. 138-40; Exhibit 8, pp. 4-5).

With respect to Deputy Whitworth (Corrections Division), he was not subject to an IA investigation, but IA did question a use of force report he submitted and claimed that it was untruthful. Whitworth could not be subjected to a polygraph exam because there was no accuser who could be polygraphed first under the Contract. Further, the charge of falsifying the use of force report was not sustained because the hearing officer concluded that the video of the incident was consistent with Whitworth's written report. (Tr. 111-12; 144).

Similarly, there was no "accuser" to be polygraphed in the investigation regarding Shannon Walton (civilian in Corrections Division). In that case, nurses on a shift pooled money together to buy food; some of the money came up missing; the nurses told a supervisor, who reviewed a camera recording. The supervisor saw Walton on the video by the money and wrote up a report. IA opened an investigation and interviewed Walton. Walton denied that she took the money. The IA investigation was prompted by review of a video recording (Tr. 149). There was no accuser in this case. No one saw Walton take the money and a video recording cannot be given a polygraph. (Tr. 150).

### **III. ARGUMENT**

Brinkley's Objections focus on pretext. As set forth in Judge Johnson's Report and Recommendation, the basis for Brinkley's termination – lying to IA - cannot be proved to be a pretext for discrimination unless it is shown both that the reason was false and that discrimination was the real reason.

One method of showing pretext is through proof of disparate treatment. Judge Johnson correctly determined that the Commission failed to establish that Brinkley was treated differently

from similarly situated employees who did not engage in protected activity. As set forth above, there was evidence in the record of differentiating circumstances between Shotsky and Brinkley. The reason Shotsky was not ordered to take a polygraph and Brinkley was ordered to take a polygraph was due to these differentiating circumstances: Shotsky made admissions and there was another witness to some of his inappropriate behavior with Beaudry, and therefore, there were already sustainable charges against him; Brinkley admitted to nothing and there was no other witness to the misconduct. (Tr. 30; 279-80; 287; 292) Shotsky was not charged with lying to IA and, therefore, could not be terminated for it. (Tr. 109; Ex. 8 pp. 4-5) Because the Brinkley and Shotsky investigations unfolded differently, the Sheriff's Office did not have to treat Brinkley and Shotsky the same.

Brinkley also claims that Judge Johnson failed to consider other evidence of disparate treatment, asserting that Deputy Whitworth and Nurse Walton are comparables. Judge Johnson's failure to discuss these alleged comparables is not error, but instead a rejection of the argument, based upon the facts presented at the hearing. Neither Deputy Whitworth nor Nurse Walton could be subjected to a polygraph exam because there was no "accuser" who could be polygraphed first, as required by the Contract. Further, after review of the video evidence, the Sheriff's Office concluded that there was no proof that either employee lied to IA. (Tr. 111-12, 144, 149-150).

Brinkley's final argument in support of pretext is that the Sheriff's Office failed to follow the requirements of the Contract with respect to the polygraph. Brinkley asserts that the lying to IA charge was based solely on her failure to pass a polygraph test. However, Martin testified that the polygraph results were only one of the reasons for the lying to IA charge (Tr. 21). Brinkley ignores the numerous other factors that led the Sheriff's Office to conclude that she lied to IA:

(1) Crabtree's report that she referred to Neal as a "fucking fag"; (2) Reports of first-hand witnesses that she regularly referred to her homosexual brother as a "fucking fag"; (3) Brinkley's complete denial of Crabtree's allegation; (4) Crabtree's lack of motivation to lie and the risk he took by reporting her homophobic slur; and (5) Brinkley's demeanor during her IA interview. (Tr. 176, 180, 188, 204).

#### **IV. CONCLUSION**

Judge Johnson relied on the facts presented at the hearing and her assessment of the credibility of the witnesses in finding that the Commission failed to prove by a preponderance of reliable, probative, and substantial evidence that the Sheriff's Office terminated Brinkley in retaliation for engaging in protected activity. The Board of Commissioners should adopt the Report and Recommendation and dismiss the charge in its entirety. Further, there is no need for an oral argument or hearing on this matter.

Respectfully submitted,

**RON O'BRIEN  
PROSECUTING ATTORNEY  
FRANKLIN COUNTY, OHIO**



Denise L. DePalma (0063233)

Amy L. Hiers (0065028)

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Counsel for Respondent

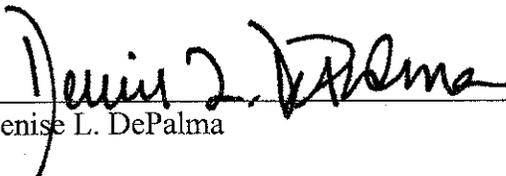
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by electronic and regular U.S. mail on this 4<sup>th</sup> day of September, 2013:

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Denise M. Johnson, Chief Administrative Law Judge  
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\_\_\_\_\_  
Denise L. DePalma



Governor  
John Kasich

# Ohio Civil Rights Commission

**Board of Commissioners**

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

G. Michael Payton, Executive Director

January 13, 2014

Tressa Brinkley  
5937 Effingham Rd.  
Columbus, Ohio 43213

RE: Tressa Brinkley v. Franklin Co. Sheriff's Office  
COL71(37660) 05272010 Amended  
22a-2010-03245C  
Complaint No. 11-EMP-COL-37660

The enclosed Order dismissing Complaint No. 11-EMP-COL-37660 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting January 9, 2014.

This case is closed.

FOR THE COMMISSION

*Desmon Martin/tms*

Director of Enforcement & Compliance  
Ohio Civil Rights Commission

DM/tms  
Enclosure

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



# Ohio Civil Rights Commission

Governor  
John Kasich

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**Board of Commissioners**

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Tom Roberts

G. Michael Payton, Executive Director

January 13, 2014

Jeffrey P. Vardaro, Esq.  
The Gittes Law Group  
723 Oak Street  
Columbus, Ohio 43205

RE: Tressa Brinkley v. Franklin Co. Sheriff's Office  
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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  
Lori Barreras  
William Patmon, III  
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G. Michael Payton, Executive Director

January 13, 2014

Denise DePalma  
Assistant Prosecuting Attorney  
373 South High Street  
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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: )  
Tressa Brinkley, ) COMPLAINT NO. 11-EMP-COL-37660  
Complainant, )  
vs. )  
Franklin County Sheriff's Office )  
Respondent. )

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**FINAL ORDER**

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The Commission has been notified that the parties have reached a settlement regarding this matter. Being satisfied that the allegations raised in its complaint have been resolved, the Commission hereby dismisses Complaint No. 11-EMP-COL-37660.

This ORDER issued by the Ohio Civil Rights Commission this 9<sup>th</sup> day of JANUARY, 2014.

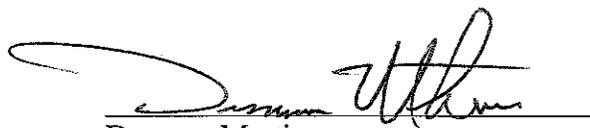
  
\_\_\_\_\_  
Commissioner, Ohio Civil Rights Commission

**NOTICE OF RIGHT TO JUDICIAL REVIEW**

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

**CERTIFICATE**

I, Desmon Martin, Director of Enforcement and Compliance, of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Dismissal 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: 1/13/2014

OHIO CIVIL RIGHTS COMMISSION

AND

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Request for Withdrawal of Charge of Discrimination

Instructions to the person requesting withdrawal: You recently indicated a desire to withdraw your dual-filed charge from the Ohio Civil Rights Commission (OCRC) and the U.S. Equal Employment Opportunity Commission (EEOC). In order to begin such action, please furnish the information below. As a request for withdrawal of charge is subject to the approval of both agencies, your request will be considered and acted upon when received by this office. Please note that at this time both agencies are still prepared to proceed with your case if you so desire.

COL71(37660)05272010
OCRC CASE NUMBER

22A-2010-03245C
EEOC CASE NUMBER

TRESSA BRINKLEY
CHARGING PARTY

FRANKLIN CO. SHERIFF'S OFFICE
RESPONDENT

AGGRIEVED PARTY COMPLETE INFORMATION BELOW

I am aware that OCRC and EEOC protect my right to file a charge and have been advised that it is unlawful for any person covered by ORC 4112 or the laws administered by EEOC to threaten, intimidate, harass or otherwise retaliate against me because I have filed a charge. I have not been coerced into requesting this withdrawal. I request the withdrawal of my charge because:

I have resolved my charge and the related Commission Complaint, No. 10-EMP-COL-37660, through a settlement agreement with the Respondent. I no longer wish to pursue this matter through the Ohio Civil Rights Commission or the Equal Employment Opportunity Commission.

Tressa Brinkley 11/26/13
CHARGING PARTY DATE

B. Jennings 11/26/13
WITNESS DATE

[Signature] 1/9/2014
OHIO CIVIL RIGHTS COMMISSION

Approved [checked]
Disapproved [ ]