



Governor John Kasich

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Theresa S. Cordero
Complainant,

Complaint No. 15-EMP-AKR-37534
Complaint No. 15-EMP-AKR-41423

v.

OHIO
CIVIL RIGHTS
COMMISSION

Wilkshire Day Care, Inc.
dba Through the Years Child Care
Respondent.

G. Michael Payton
Executive Director

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

Commissioners

Leonard Hubert, Chairman

Lori Barreras

Juan Cespedes

William W. Patmon, III

Madhu Singh

MIKE DeWINE
ATTORNEY GENERAL

David A. Oppenheimer, Esq.
Senior Assistant Attorney General
Civil Rights Section
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113
Counsel for Commission

Dan Guinn, Esq.
Guinn Law Firm, LLC
104 South Broadway Street
New Philadelphia, Ohio 44663
Counsel for Respondent

William G. Puckett, Esq.
Ohio Disability Rights
Law and Policy Center, Inc.
50 West Broad Street, Ste. 1400
Columbus, Ohio 43215
Counsel for Complainant

Theresa S. Cordero
308 Park Avenue NW
New Philadelphia, Ohio 44663
Complainant

ALJ'S REPORT

Denise M. Johnson
Ohio Civil Rights Commission
Hearing Division
30 East Broad Street, 5th Floor
Columbus, OH 43215
(614) 466-6684
Chief Administrative Law Judge

CENTRAL OFFICE
30 East Broad Street
5th Floor
Columbus, Ohio 43215
(614) 466-2785 Phone
(888) 278-7101 Toll Free
(614) 466-7742 Fax
www.crc.ohio.gov

AKRON | CINCINNATI | CLEVELAND | COLUMBUS | DAYTON | TOLEDO



Ohio Civil Rights Commission

Governor
John R. Kasich

Board of Commissioners

Leonard J. Hubert, Chair
Lori Barreras
Juan Cespedes
William Patmon, III
Madhu Singh

G. Michael Payton, Executive Director

September 8, 2016

David A. Oppenheimer, Esq.
Senior Assistant Attorney General
Civil Rights Section
615 West Superior Avenue, 11th Floor
Cleveland, Ohio 44113
Counsel for Commission

Dan Guinn, Esq.
Guinn Law Firm, LLC
104 South Broadway Street
New Philadelphia, Ohio 44663
Counsel for Respondent

William G. Puckett, Esq.
Ohio Disability Rights
Law and Policy Center, Inc.
50 West Broad Street, Ste. 1400
Columbus, Ohio 43215
Counsel for Complainant

Theresa S. Cordero
308 Park Avenue NW
New Philadelphia, Ohio 44663
Complainant

**Re: Theresa S. Cordero v. Wilkshire Day Care, Inc., dba Through the Years Child Care
Complaint Nos. 15-EMP-AKR-37534 and 15-EMP-AKR-41423**

Attached 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 Administrative Code §4112-1-02, your Statement of Objections must be **received** by the Commission no later than October 3, 2016. *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, 30 East Broad Street, 5th Floor, Columbus, OH 43215-3414.** All parties and the Administrative Law Judge should receive copies of your Statement of Objections.*

FOR THE COMMISSION:

Desmon Martin /eks

Desmon Martin
Director of Enforcement and Compliance

Attachments

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614-466-2785 • TOLL FREE: 1-888-278-7101 • TTY: 614-466-9353 • FAX: 614-644-8776

REGIONAL OFFICES

AKRON • CINCINNATI • CLEVELAND • COLUMBUS • DAYTON • TOLEDO

www.crc.ohio.gov



Ohio Civil Rights Commission

Governor
John R. Kasich

Board of Commissioners

Leonard J. Hubert, Chair
Lori Barreras
Juan Cespedes
William Patmon, III
Madhu Singh

G. Michael Payton, Executive Director

cc: Lori A. Anthony, Section Chief – Civil Rights Section / Kari Stilwell, Administrative Secretary / G. Michael Payton, Executive Director / Keith McNeil, Director of Operations and Regional Counsel / Stephanie Bostos-Demers, Chief Legal Counsel

CENTRAL OFFICE • State Office Tower, 5th Floor, 30 East Broad Street, Columbus, OH 43215-3414
• Central Office: 614-466-2785 • TOLL FREE: 1-888-278-7101 • TTY: 614-466-9353 • FAX: 614-644-8776

REGIONAL OFFICES

AKRON • CINCINNATI • CLEVELAND • COLUMBUS • DAYTON • TOLEDO

www.crc.ohio.gov



INTRODUCTION AND PROCEDURAL HISTORY

Theresa S. Cordero (Complainant) filed sworn charge affidavits with the Ohio Civil Rights Commission (Commission) on July 9, 2014 and November 14, 2014.

The Commission investigated and found probable cause to believe that Wilkshire Day Care, Inc., dba Through the Years Child Care (Respondent) engaged in unlawful discriminatory employment practices in violation of Revised Code Section (R.C.) 4112.02(A) and (I).

The Commission attempted, but failed, to resolve this matter by informal methods of conciliation. The Commission subsequently issued complaints on April 23, 2015.

The Commission alleged that: (1) Complainant is a disabled person as defined by R.C. 4112.01(A)(13), (2) Complainant could perform the essential functions of the job of Teacher's Aide with reasonable accommodation of her disability, (3) Respondent terminated Complainant because of her disability, and (4) Respondent made a threat of suing Complainant because she filed a charge of discrimination with the Commission and in an attempt to

chill her pursuing that charge and intimidate her into withdrawing her charge.

Respondent filed Answers to the Commission's Complaints on May 11, 2015.

A public hearing was held on January 20 and 21, 2016, at the Tuscarawas County Courthouse located at 101 East High Avenue, New Philadelphia, Ohio.¹

The record contains previously described pleadings, a hearing transcript consisting of 527 pages, a post-hearing brief filed by the Commission on March 17, 2016, Respondent's post-hearing brief filed on April 25, 2016, and the Commission's reply brief filed on May 2, 2016.

¹ On June 17, 2015, the ALJ issued an order by granting the parties' joint motion to consolidate the complaints for purposes of a hearing.

FINDINGS OF FACT

The following findings of fact are based, in part, upon the ALJ's assessment of the credibility 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 charges with the Commission on July 9, 2014, and on November 14, 2014.
2. The Commission determined on February 19, 2015, that it was probable that Respondent engaged in unlawful discriminatory practices in violation of R.C. 4112.02(A) and (I).
3. The Commission attempted to resolve this matter by informal methods of conciliation.

4. The Commission issued the complaints after conciliation failed.
5. Respondent is a child care center that has been operating for 17 years and provides services for infants, toddlers, and school-age children. (Tr. 369, 371)
6. Respondent is owned by Karen Terrigan (Terrigan), Cheryl Ann Swartz (Swartz), and Patricia Risher (Risher). (Tr. 438-439)
7. Terrigan is the Administrator for Respondent, Swartz and Risher are both office managers. (Tr. 368-369, 415-416, 468-469)
8. Respondent's child care center has five classrooms, including an infant room, a toddler room, two preschool rooms, and a school-age room. (Tr. 371, 417-418)
9. Nancy Singer (Singer) has been the Lead Teacher in the infant room since 2001. (Tr. 273)
10. Amber Dinger (Dinger) has been a Teacher's Aide in the infant room since June of 2013. (Tr. 314-315)
11. Complainant was born and raised in Toledo, Ohio, and received her high school diploma from Robert S. Rogers High School. (Tr. 118, Comm. Exh. 8)

12. Complainant has macular degeneration, a condition that she was diagnosed with at the age of 13 by her physician, Dr. Pesin. (Tr. 119)
13. Complainant's macular degeneration, a permanent condition, began in her left eye and spread to her right eye. (Tr. 119-120)
14. Complainant has blind spots in her central vision but still has peripheral vision. (Tr. 120)
15. Due to her condition, Complainant cannot obtain a driver's license and has difficulty reading small print. (Tr. 121-123)
16. After Complainant's graduation from high school, she attended Owens Community College in 2010, where she had books on CD and had access to a portable closed-circuit television that could magnify print. (Tr. 126-128, 196)
17. In 2012, Dr. Pesin referred Complainant to the Sight Center, an agency that provides vocational services and guidance to visually impaired individuals. (Tr. 37, 126)
18. The Sight Center performed a low-vision assessment and a vocational assessment to determine Complainant's skills and aptitude with her remaining vision. (Tr. 48-50)

19. The themes from the assessments were used in selecting a vocational goal for Complainant, which had to be a job available in the state of Ohio. (Tr. 49)
20. Child care was a very strong theme in Complainant's assessment. (Tr. 50)
21. Once the goal was selected, Complainant went through two community-based assessments. (Tr. 50)
22. The community-based assessments allowed Complainant to work at a child care center with a job coach from The Sight Center to see if she was interested in that type of work. (Tr. 42-43, 51)
23. In October 2013, Complainant completed her first community-based assessment at Children at Apple Tree Childcare Center (Apple Tree). (Tr. 51, Comm. Exh. 6)
24. Complainant completed 46 hours of work over six days at Apple Tree. (Tr. 51, Comm. Exh. 6)
25. Complainant worked with preschoolers and toddlers. (Comm. Exh. 6)

26. In November 2013, Complainant completed her second community-based assessment at the Children's Discovery Center (Discovery Center). (Comm. Exh. 7)
27. Complainant completed 49 hours of work over seven days at the Discovery Center. (Comm. Exh. 7)
28. Complainant worked with preschoolers, toddlers, and older infants. (Comm. Exh. 7)
29. In December 2013, Complainant moved to New Philadelphia. (Tr. 139)
30. Complainant submitted her resume at multiple child care facilities in the area, including Respondent. (Tr. 140)
31. On June 18, 2014, Terrigan called Complainant to schedule an interview for a part-time position as a Teacher's Aide in the infant room. (Tr. 140-141, Comm. Exh. 10)
32. On June 19, 2014, Complainant had her first interview with Respondent. (Tr. 143, Comm. Exh. 11)
33. Terrigan interviewed Complainant with Risher and Swartz in the room. (Tr. 143-144, 442)
34. On June 24, 2014, Complainant had a working interview. (Tr. 147, Comm. Exh. 11)

35. For her working interview, Complainant worked with toddlers and infants so the staff could see how she interacted with the children. (Tr. 147, 291)
36. Complainant went outside with both groups to watch and assist the children play on the playground. (Tr. 148-149)
37. On June 26, 2014, Complainant had her second working interview with Respondent. (Tr. 150, Comm. Exh. 11)
38. At the end of Complainant's second working interview, Terrigan offered Complainant a job as a Teacher's Aide. (Tr. 145, 152)
39. Complainant was to work in the infant room, which has ten children from 6 weeks to 18 months old. (Tr. 145, 274)
40. The responsibilities for a Teacher's Aide include feeding and monitoring the infants, changing diapers, implementing daily activities, cleaning, filling out the daily sheet, and communicating with parents. (Tr. 320-321, Comm. Exh. 18)
41. Before accepting the job, Complainant told Terrigan that she had vision issues and could use a magnifying glass to see small print. (Tr. 152, 445, 483)

42. Terrigan inquired about Complainant's ability to get to work and was assured that Complainant would always have a ride. (Tr. 446, 483-484)
43. Terrigan gave Complainant paperwork to fill out. (Tr. 155-158)
44. Complainant completed all of the forms except the Employee Medical Statement for Child Care Centers and Type A Homes because she did not have a primary care physician in New Philadelphia. (Tr. 157)
45. Terrigan allowed Complainant extra time to get the medical form filled out. (Tr. 158)
46. On June 30, 2014, Complainant called off sick for her first scheduled day of work. (Tr. 160, 449)
47. On July 1, 2014, Complainant worked for five hours with Dinger in the infant room. (Tr. 160, 164, 333-334)
48. Dinger showed Complainant the daily sheet, which is where information such as diaper changes, feedings, and medication administration is documented per child. (Tr. 164, 321)
49. Complainant made an error while filling out the daily sheets, marking that a child's diaper was dirty when it was wet. (Tr. 169)

50. Dinger corrected Complainant. (Tr. 334)
51. Complainant requested a copy of the daily sheet so she could memorize it that night. (Tr. 172)
52. Complainant requested that the labels on cubbies and baskets be added on some and fixed on others so she could see them. (Tr. 167-168)
53. Some of the black baskets were labeled in black marker on clear tape. (Tr. 167, 431)
54. Swartz relabeled the containers. (Tr. 425)
55. During outside time, Complainant told Dinger that she had macular degeneration. (Tr. 171-172, 336)
56. The next day, Dinger told Singer about Complainant's vision loss. (Tr. 295, 337)
57. Singer recommended that Dinger tell Terrigan because she believed Complainant's vision loss to be a safety issue. (Tr. 295, 337)
58. Dinger told Terrigan that Complainant had macular degeneration. (Tr. 337, 450)
59. Terrigan's mother-in-law had macular degeneration. (Tr. 451)

60. Terrigan called the Ohio Department of Job and Family Services hot line to see what the licensing rules were concerning having a visually impaired individual work in a child care facility. (Tr. 460, 501-502)
61. The person at the hot line told Terrigan to use her discretion as the director to determine if it was a safety issue. (Tr. 460-461)
62. Terrigan used the knowledge of her mother-in-law's condition to determine that Complainant's macular degeneration was a safety issue. (Tr. 464, 496)
63. On July 2, 2014, Terrigan called Complainant and told her she no longer had a job with Respondent. (Tr. 174-175, 465)
64. Complainant did not protest her termination during that phone call. (Tr. 176, 465)
65. Complainant later called back the same day to ask for a letter stating why she was terminated. (Tr. 177, 466)
66. Terrigan sent a letter stating that Complainant was terminated "due to the extent of [her] vision loss" and that the State said it would be a safety issue for Complainant to work for Respondent. (Comm. Exh. 21)

67. On July 3, 2014, Complainant contacted her case worker with Bureau of Services for the Visually Impaired (BSVI) to let her know that she had been terminated due to her vision impairment. (Tr. 37, 181)
68. On July 8, 2014, Complainant filed her charge with the Commission. (Tr. 183)
69. In October of 2014, Complainant received a letter from Respondent's attorney asking that she withdrawal her complaint with the Commission or a suit would be brought against her. (Tr. 184-187, Comm. Exh. 23)

CONCLUSIONS OF LAW AND DISCUSSION

All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that the proposed findings and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted; to the extent they are inconsistent therewith, they have been rejected. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the material issues presented. To the extent that the testimony of various witnesses is not in accord with the findings therein, it is not credited.²

1. The Commission's complaint alleges that: (a) Respondent failed to engage in the interactive process to provide a reasonable accommodation that would enable Complainant to perform the essential functions of the job of Teacher's Aide, (b) terminated Complainant because of her disability and (c) threatened to file a lawsuit against Complainant because she filed a charge of discrimination with the Commission.
2. These allegations, if proven, would constitute a violation of R.C. §4112.02(A) and (I), which provides in pertinent part that it shall be an unlawful discriminatory practice:

² Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

- (A) For any employer, because of the . . . disability . . . of any person . . . to discharge without just cause . . . or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

- (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(A) by a preponderance of reliable, probative, and substantial evidence. R.C. 4112.05(G).

- 4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *Columbus Civ. Serv. Comm. v. McGlone*, 82 Ohio St.3d 569 (1998).

- 5. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful disability discrimination under the Americans with Disabilities Act (ADA) as amended by the Americans with Disabilities Act

Amendments of 2009 and unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

6. The Commission may establish a *prima facie* case of unlawful discrimination and retaliation by a preponderance of the evidence. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981), *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973).
7. The creation of a *prima facie* case allows the fact finder to:

. . . infer from proof of certain facts . . . which, while not proof of any act or omission of discrimination, if unexplained give rise to an inference of discrimination.” *E.E.O.C. v. Electrolux Corp.*, 611 F.Supp. 926, 927-928 (1985).
8. The establishment of a *prima facie* case creates a rebuttable presumption of unlawful discrimination. *Burdine*, 450 U.S. at 254.
9. Once the Commission establishes a *prima facie* case, the burden of production shifts to Respondent to “articulate some legitimate, nondiscriminatory reason” for its adverse employment action. *McDonnell Douglas v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

10. The presumption created by the establishment of a *prima facie* case shifts the burden back to the Commission to show that Respondent's reasons are not the real reasons but a pretext for illegal discrimination. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 2749, 125 L.Ed.2d 407 (1993).

11. In the instant case the Commission relies upon direct evidence to prove that Respondent engaged in illegal employment discrimination.

Direct evidence of discrimination is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." Circumstantial evidence, on the other hand, is proof that does not on its face establish discriminatory animus, but does allow a factfinder to draw a reasonable inference that discrimination occurred. *Wexler v. White's Fine Furniture, Inc.*, 317 F.3d 564, 570 (6th Cir. 2003), quoting *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999).

I. Disability Discrimination

10. The order of proof in a disability discrimination case requires the Commission to prove that:

- (1) Complainant was disabled under R.C. 4112.01(A)(13);
- (2) Complainant, though disabled, could safely and substantially perform the essential functions of the job in question, with or without reasonable accommodation; and
- (3) Respondent took the alleged unlawful discriminatory action, at least in part, because of Complainant's disability.

McGlone, 82 Ohio St.3d at 571 (citation omitted).

11. R.C. 4112.01(A)(13) defines "Disability" as:

. . . a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being

regarded as having a physical or mental impairment.³

12. It is undisputed in this case that Complainant has a physical impairment. The Commission presented evidence from Complainant's physician, Dr. Pesin, about Complainant's medical diagnosis. (Comm. Exh. 4, 5)
13. Although Complainant has a physical impairment, the first part of R.C. 4112.01(A)(13) requires the Commission to show that Complainant has an actual disability. The Commission must prove that Complainant's macular degeneration substantially limits one or more major life activities.

Determining whether a physical or mental impairment exists is only the first step in determining whether or not an individual is disabled. Many impairments do not impact an individual's life to the degree that they constitute disabling impairments. An impairment rises to the level of disability if the impairment substantially limits one or more of the individual's major life activities . . . The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment on the life of the individual. *Interpretive*

³ The ADA's definition of disability under 42 U.S.C. § 12102(1) is substantially the same as R.C. 4112.01(A)(13). 42 U.S.C. § 12102(1) provides: [t]he term "disability" means, with respect to an individual— (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.

Guidance of Title I of the Americans with Disabilities Act (EEOC Interpretive Guidance), 29 C.F.R. pt. 1630 App., § 1630.2(j).

14. Major life activities are “those basic activities that the average person in the general population can perform with little or no difficulty.” *EEOC Interpretive Guidance*, at § 1630.2(i). Such activities include, but are not limited to:

. . . caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, . . . working[,] . . . sitting, standing, lifting, and reaching. *Id.* (legislative citations omitted).

15. Three factors should be considered when determining whether an impairment substantially limits an individual's ability to perform a major life activity:

- (1) The nature and severity of the impairment;
- (2) The duration or expected duration of the impairment;
and
- (3) The permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment.

EEOC Interpretive Guidance, at § 1630.2(j).

18. This determination, which must be made on a case-by-case basis, requires comparison with the abilities of the average person:

An individual is not substantially limited in a major life activity if the limitation, when viewed in light of the . . . [three factors], does not amount to a significant restriction when compared with the abilities of the average person. *EEOC Interpretive Guidance*, at § 1630.2(j).

19. Respondent asserts that Complainant is not disabled because being unable to read small print or drive does not make a person disabled.

[M]illions of elderly Americans cannot read small print nor drive. Does this make them disabled? Obviously not.⁴

20. Respondent makes a false comparison that infers that in order to show that Complainant is substantially limited in the major life activity of seeing that she must be completely unable to see.

21. Respondent's assertion has no merit.

The [ADA] addresses substantial limitations on major life activities, not utter inabilities. . . . [T]he definition of disability does not turn on personal choice. When significant limitations result from the

⁴ The quote is directly from Respondent's post-hearing brief.

impairment, the definition is met even if the difficulties are not insurmountable. *Bragdon v. Abbott*, 524 U.S. 624, 641, 118 S.Ct. 2196, 2210, 141 L.Ed.2d 540 (1998).

22. Complainant requires assistance to read small print. (Tr. 123)
23. Complainant needs to use a magnifying glass when reading small print. (Tr. 123)
24. Complainant's condition also prevents her from being unable to pass the vision test for a driver's license, so she is unable to drive.⁵ (Tr. 121-122)
25. The credible evidence supports the determination that Complainant's visual impairment substantially limits her in performing the major life activities of seeing, reading, and driving. (Tr. 118-121, 123, 126-127, 180, 209-212; Comm. Exh. 4, 5)

⁵ Although reading and driving are not listed as a major life activity under state or federal law, courts have held that reading and driving are major life activities. See *Head v. Glacier Northwest Inc.*, 413 F.3d 1054, 1062 (9th Cir. 2005) ("The ability to read is necessary in many instances to perform major life activities such as caring for oneself, learning, and working. As such, it is of central importance to most people's daily lives."); *Bartlett v. N.Y. State Bd. of Law Examiners*, 226 F.3d 69, 79-80 (2nd Cir. 2000) ("The regulations list life activities that are 'major life activities per se,' (. . .) This list . . . is meant to be illustrative and not exclusive." (citations omitted)).

II. Qualified Disabled Person

26. The Commission must next prove that Complainant was a qualified disabled person, e.g., she could safely and substantially perform the essential functions of Teacher's Aide, with or without reasonable accommodation.
27. Respondent raises the affirmative defense that an employer is not required to employ a person with a disability "in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability." R.C. 4112.02(L).
28. In order to rely on R.C. 4112.02(L), Respondent must present evidence showing the "manner and degree" to which Complainant's employment increased safety risks to its children. Ohio Administrative Code (O.A.C.) 4112-5-08(D)(3)(a).
29. The Commission's rules also provide that an employer cannot rely on R.C. 4112.02(L) to exclude a disabled person "unless the job requires him or her to routinely undertake a task which such person cannot substantially perform." O.A.C. 4112-5-08(D)(4)(b).

30. Respondent must show that the increased risk was “significant” and “reasonably foreseeable with a significant probability of happening.” O.A.C. 4112-5-08(D)(3)(a).
31. When an employer raises the affirmative defense under the ADA of direct threat or safety, the employer has the burden of proving that the employee is a direct threat. *Nunes v. Wal-Mart Stores, Inc.*, 1164 F.3d 1243, 1247 (9th Cir. 1999). See *Rizzo v. Children’s World Learning Ctrs., Inc.*, 84 F.3d 758, 764 (5th Cir. 1996); *Equal Employment Opportunity Comm’n v. Union Pacific Railroad*, 6 F.Supp.2d 1135, 1138 (D.Idaho 1998).
32. The Commission’s rules further provide under O.A.C. 4112-5-08(D)(4)(e) that:

A physician’s opinion on whether a person’s disability substantially and inherently impairs his or her ability to perform a particular job will be given due weight in view of all of the circumstances including:

- (i) The physician’s knowledge of the individual capabilities of the applicant or employee, as opposed to generalizations as to the capabilities of all persons with the same disability, unless the disability is invariable in its disabling effect;
- (ii) The physician’s knowledge of the actual sensory, mental and physical qualifications

required for substantial performance of the particular job; and

(iii) The physician's relationship to the parties.

33. Respondent failed to provide sufficient evidence to conclude that Complainant's employment significantly jeopardized the safety of the children thereby creating reasonably foreseeable risks to their well-being.
34. Prior to applying for the Teacher's Aide position with Respondent, Complainant was assessed by the Sight Center to determine what jobs would be feasible for Complainant with her visual impairment. (Tr. 42-50)
35. The assessment revealed that Complainant was particularly suited for jobs in child care. (Tr. 49-50, 132)
36. After the vocational assessment, Complainant worked in a Community Based Assessment (CBA) in which she worked in a two different child care centers for a duration lasting between two to four weeks each. (Tr. 42-45, 62-67)
37. The CBA's assessment process determined what accommodations were needed, e.g. magnifier and CCTV, to assist Complainant in reading small print. (Tr. 43, 53-54, 136)

38. The evaluation of Complainant's work at the CBA's showed that she was able to keep track of the children, was safe with the children, and that her visual impairment did not impeded her ability to perform child-care work. (Tr. 50-56, 86-91, 133-136, Comm. Exh. 6, 7)
39. There were two instances during Complainant's brief employment as a Teacher's Aide with Respondent that she found that her visual impairment made it difficult for her to read small print: reading the small print on bins that contained the children's diapers and wipes, and reading the small print on a child's daily sheet. (Tr. 166-167, 169-170, 431)
40. It was not a problem for Swartz to change the labels on the bins from black marker written on clear tape to labels in black marker written on white paper, which made them easier for Complainant to read. (Tr. 166-167, 353-354, 399-400, 425, 431-433)
41. In order to know what needed to be recorded for a child on the daily sheet, Complainant asked that she be permitted to take the daily sheet home so that she could familiarize herself with its contents. (Tr. 172)

42. Complainant went outside with the children, changed diapers, provided snacks and played with the children until their parents came to pick them up. (Tr. 165-166)
43. Therefore, the Commission introduced credible evidence that Complainant requested reasonable accommodations that would have enabled her to safely and substantially perform the essential functions of the job of Teacher's Aide.
44. Other than generalizations and assumptions, Respondent failed to present evidence showing the manner in which Complainant's employment increased safety risks to the children in the infant room.
45. Respondent presented no credible evidence, medical or objective, to support the conclusion that Complainant's disability created a safety risk to her performing the duties of Teacher's Aide in the infant room.

In order to properly evaluate [an employee] on the basis of [the employee's direct-threat risk], the employer must conduct an individualized inquiry into the individual's actual medical condition, and the impact, if any, the condition may have on that individual's ability to perform the job in question. *Holiday v. City of Chattanooga*, 206 F.3d 637, 643 (6th Cir. 2000).

[A]nd the risk assessment must be based on medical or other objective evidence. *Abbott*, 524 U.S. at 649.

46. Before Terrigan terminated Complainant's employment, she did not talk to Complainant to inquire about her vision-loss nor did Terrigan ask for medical documentation from Complainant. (Tr. 180, 461-464, 499-500)

To protect disabled individuals from discrimination based on prejudice, stereotypes, or unfounded fear, [courts have] required an individualized direct threat analysis that relies on the best current medical or other objective evidence. Specific factors to be considered include (1) the duration of risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. *Nunes*, 164 F.3d at 1248 (citing *Bragdon v. Abbott*, 524 U.S. 624, ---, 118 S.Ct. 2196, 2210, 141 L.Ed.2d 540 (1998); *Sch. Bd of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987)).

60. Terrigan's "discretion" was based on a knee-jerk reaction and prejudice, not an informed, individualized assessment.

In the opening provisions of the ADA, . . . Congress determined that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social

problem.” *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 588, 119 S.Ct. 2176, 2181 (1999).

III. Request for a Reasonable Accommodation

61. An employer has an affirmative duty to make a reasonable accommodation to the disability of an employee. O.A.C. 4112-5-08(E)(1).
62. Therefore, the *McDonnell Douglas prima facie* case and burden shifting analysis does not apply in a failure-to-accommodate case. *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1283-1284 (7th Cir. 1996).
63. To establish a *prima facie* case that Respondent failed to engage in the interactive process regarding a reasonable work accommodation, the Commission must establish evidence demonstrating that:
 - (1) Respondent knew about Complainant's disability;
 - (2) Complainant requested accommodations or assistance for her disability;
 - (3) Respondent did not make a good faith effort to assist Complainant in seeking accommodations; and
 - (4) Complainant could have been reasonably accommodated but for Respondent's lack of good faith.

Shaver v. Wolske & Blue, 138 Ohio App.3d 653, 664, 742 N.E.2d 164, 171-72 (2000) (citing *Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 319-20 (3d Cir. 1999)).

64. Before an employer can be found to have violated the reasonable accommodation provisions of the ADA, an employee has the initial duty to inform the employer of his or her disability. *Shaver*, at 668 (citation omitted).
65. Respondent asserts that Complainant did not request an accommodation at any time during her employment.
66. While Complainant did not approach Terrigan to formally request an accommodation to assist her with performing her job, she told Dinger, who told Singer. (Tr. 171-172, 336-337)
67. Singer directed Dinger to inform Terrigan of Complainant's disclosure of her disability, and the accommodations that she requested in order to read the labels on the bins and properly fill out the daily sheets. (Tr. 307-308, 337, 358-359, 449-451, 494-496, 498)
68. Although Complainant did not formally make an "accommodation request" to Terrigan in writing, a reasonable inference can be drawn that Complainant made a request for an accommodation.

What matters under the ADA are not formalisms about the manner of the request, but whether the employee or a representative for the employee provides the employer with enough information that, under the circumstances, the employer can be fairly said to know of both the disability and desire for an accommodation. *Taylor*, 184 F.3d at 313.

69. Once Respondent was informed by Dinger of Complainant's disability and a request for a reasonable work accommodation, Respondent had a duty to initiate an interactive process with Complainant. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000), *vacated on other grounds* 535 U.S. 391, 122 S.Ct. 1516 (2002).

[T]he duty of an employer to make a reasonable accommodation . . . mandates that the employer interact with an employee in a good faith effort to seek a reasonable accommodation. *Shaver*, 138 Ohio App.3d at 664 (citing *Taylor*, 184 F.3d at 319-20).

70. Terrigan failed to engage in the interactive process with Complainant to determine whether a reasonable accommodation was possible.

IV. Respondent Terminated Complainant Because of Her Disability

71. The Commission introduced credible direct evidence in the record to support a determination that Complainant was terminated because of her disability.

72. Terrigan's mother-in-law had macular degeneration and Terrigan assumed that Complainant's vision was similar to the way in which her mother-in-law's vision had been affected.

(Tr. 451, 496)

Q (Oppenheimer): And then when the term "macular degeneration" came up, as I understand it, you essentially took your experience with your mother-in-law and applied it to Ms. Cordero. Is that correct?

A (Terrigan): Yes.

Q: But you didn't contact Ms. Cordero and say, I hear you have macular degeneration, please explain the extent of the impairment as it applies to you, did you?

A: No, I did not.

Q: Did Ms. Dinger tell you that Ms. Cordero had told her that she was legally blind in one eye and only had peripheral vision in her other eye?

A. Yes.

Q: After Ms. Dinger told you about Ms. Cordero's macular degeneration, did you contact Ms. Cordero to ask what kinds of accommodations might be possible for her to continue working at Through the Years?

A: No, I did not. (Tr. 496-497)

73. When Terrigan terminated Complainant she told Complainant that there was a law against visually impaired people working at a child care facility. (Tr. 174-175, 238, 465, 505)
74. There is no credible evidence in the record that Terrigan researched or articulated a law that prohibits visually impaired people from working at a child care facility.
75. Terrigan, Swartz, Risher, Singer, and Dinger have never received training on federal or state anti-discrimination laws. (Tr. 300, 345, 381, 428, 468)
76. Terrigan terminated Complainant's employment based on her "knee jerk" reaction to Complainant's disability and did not make an individualized assessment as to whether Complainant could perform the position of Teacher's Aide with the requested accommodation.

V. Retaliation

77. In this case the Commission may establish a *prima facie* case of retaliation with the introduction of evidence that:

- (1) Complainant engaged in a protected activity;
- (2) Respondent was aware that Complainant had engaged in that activity;
- (3) Respondent took an adverse action against Complainant; and
- (4) There is a causal connection between the protected activity and adverse action.

Greer-Burger v. Temesi, 116 Ohio St.3d 324, 327 (citing *Canitia v. Yellow Freight Sys., Inc.* (C.A. 6, 1990), 903 F.2d 1064, 1066).

78. After Complainant was terminated by Respondent and filed a charge of disability discrimination with the Commission, Respondent sent Complainant a letter dated October 10, 2014. (Comm. Exh. 23)

79. In the letter Respondent accused Complainant of misrepresentation, defamation, abuse of process, and fraud

and threatened to initiate a lawsuit against her unless she dismissed her complaint with the Commission.

80. The Commission therefore established a *prima facie* case of retaliation.

81. The Commission ultimately bears the burden to prove that the adverse action would not have occurred “but for” Respondent having engaged in unlawful retaliation. *University of Texas Southwest Medical Center v. Nassar*, 133 S.Ct. 2517, 2535, 186 L.Ed.2d 503 (2013).

[T]o prevail on a retaliation claim, a plaintiff must show that retaliation is a determinative factor—not just a motivating factor—in the employer's decision to take adverse employment action. Thus, the causation standard imposed in retaliation cases (but-for causation) is a higher standard than that applied in USERRA or Title VII discrimination claims (‘motivating factor’). *Smith v. Dept. of Pub. Safety*, 2013-Ohio-4210, 997 N.E.2d 597, ¶59 (10th Dist

82. Respondent asserts that because the letter was written to Complainant after her termination from employment, Respondent was not prohibited by R.C. 4112.02(I) from pursuing common law tort claims against Complainant.

83. Additionally Respondent asserts that even if the Commission can prove a violation of R.C. 4112.02(I), Complainant cannot

recover damages because the Commission failed to prove that Complainant suffered an adverse action.

84. A plain reading R.C. 4112.02(I) does not limit the conduct that is protected to only actions occurring or arising during the employment relationship:

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.⁶

85. There is a distinct difference behind the purpose of the anti-discrimination provision of R.C. 4112.02(A) and the anti-retaliation provision of R.C. 4112.02(I).

The antidiscrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. (citation omitted) The antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.

⁶ *c.f.* the language of R.C. 4112.02(A): "It shall be an unlawful discriminatory practice for any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."

The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct. *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, 126 S.Ct. 2405, 2412 (2006).

[A] plaintiff must show that a reasonable [person] would have found the challenged action materially adverse, “which in this context means it well might have ‘dissuaded a reasonable [person] from making or supporting a charge of discrimination.’” *Id.* at 68 (citation omitted).

86. Here, the conduct of Respondent, threatening a lawsuit, was to discourage Complainant from pursuing her charge of discrimination with the Commission, exactly the type of conduct the anti-retaliation provision is designed to prevent.

“[A] lawsuit . . . may be used by an employer as a powerful instrument of coercion or retaliation” and that such suits can create a “chilling effect” on the pursuit of discrimination claims. *E.E.O.C. v. Outback Steakhouse of Florida, Inc.*, 75 F.Supp.2d 756, 758 (1999) quoting *Bill Johnson’s Restaurants, Inc. v. National Labor Relations Bd.* 461 U.S. 731, 740-41 (1983).

87. Although Respondent’s letter threatening to sue Complainant “shocked” her when she received the letter, it did not prevent Complainant from moving forward with her charge of discrimination with the Commission.

Q (Oppenheimer): And when you received this letter saying that if you did not dismiss your complaint, that Through the Years may sue you, what happened? What was your reaction to that?

A (Complainant): I—I was just shocked.

Q: Okay. Did you have any reason to doubt that if you didn't dismiss your charge that, in fact, you would face a countersuit from Through the Years?

A: I'm sorry. Repeat that please.

Q: Did you have any reason to doubt what was written here? That if you didn't dismiss your charge against Through the Years, that you'd face some kind of countersuit.

A: No.

Q: And how well were you situated to defend yourself against a lawsuit financially?

A: Not at all. (Tr. 186-187)

88. Complainant, who suffers from depression and anxiety, had been doing well managing her condition and suffered a setback after she received the threatening letter from Respondent. (Tr. 188)
89. Complainant sought help from her therapist to help her cope with the impact of Respondent's letter threatening legal action

against Complainant if she did not withdraw her charges of discrimination against Respondent. (Tr. 188)

90. But for Complainant having filed a charge of discrimination, Respondent would not have threatened to sue Complainant unless she withdrew her charge with the Commission.
91. Based on the credible evidence in the record, the ALJ finds that it was reasonable for Complainant to have been materially, adversely affected by Respondent's conduct of threatening to file a lawsuit against her because she filed a charge of discrimination with the Commission.

VI. Conclusion

92. The credible evidence in the record supports the determination Respondent's conduct is illegal disability discrimination and retaliation in violation of R.C. 4112.02(A) and (I).
93. Therefore Complainant is entitled to relief as a matter of law.

RECOMMENDATION

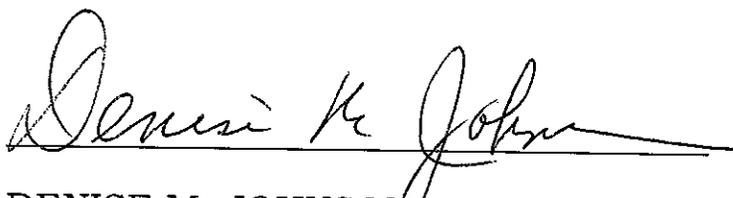
For all of the foregoing reasons, it is recommended in Complaint Nos. 15-EMP-AKR-37534 & 41423 that:

1. The Commission orders Respondent to Cease and Desist from all discriminatory practices in violation of R.C. Chapter 4112; and
2. The Commission orders Respondent within 10 days of the Commission's Final Order to pay Complainant back pay, including raises, benefits and overtime pay based on the wages Complainant would have been paid had she not been terminated from the position of a part-time Teacher's Aide on July 1, 2014;⁷ and
3. Complainant offer the position of full-time Teacher's Aide; and
4. The Commission orders Respondent to receive training on the anti-discrimination laws in Ohio within six (6) months of the date of the Commission's Final Order. As proof of participation in anti-discrimination training, Respondent shall submit certification from the trainer or provider of services that Respondent has successfully completed the training. The letter of certification shall be submitted to the Commission's

⁷ See Addendum A

Compliance Department within seven (7) months of the date of the Commission's Final Order; and

5. The Commission orders Respondent within nine (9) months of the date of the Commission's Final Order to submit to the Compliance Department a draft for an Employee Handbook outlining Respondent's policies and procedures regarding Ohio's anti-discrimination laws, *including but not limited to*, sections regarding disability discrimination and retaliation.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

Date mailed: September 8, 2016

Addendum A

1. Complainant was hired to the position of Teacher's Aide and started her first day of employment on July 1, 2014. (Tr. 160-161, 333, 350-351, 449, 486-487)
2. In 2014, Teacher's Aide salary had a starting rate of \$8.10 per hour, with potential merit raises at the end of the 90 day probationary period and on each anniversary of the employee's hire date. (Tr. 300-302, 363, 379, 384-386, 471-474)
3. Complainant was scheduled to work two full-time days and three part-time days of 2:00-6:00 PM in her first few weeks for training purposes. (Tr. 160-161, 487-488)
4. In Complainant's first few weeks of employment she would work five full-time days and nine part-time days of four hours each, then gone to four hour days with an extra half hour one or two days a week when Singer was scheduled to leave at 1:30 P.M., for an average of 20.75 hours a week. (Tr. 487-488, 491-492; Comm. Ex. 34-35)
5. Complainant would have worked 76 hours during her first three weeks of employment, then 20.75 hours a week on average for the remaining 68 days of her probationary period, for a subtotal of 201.57 hours.

6. During Complainant's probationary period she would have worked a total of 277.57 hours, which multiplied by \$8.10 is \$2,248.32.
7. Starting September 29, 2014, (the end of 90 day probation) Complainant's hourly wage would increase by \$0.15 to \$8.25.
8. Working an average of 20.75 hours per work she would earn on average \$171.19 per week up to her first anniversary date of June 30, 2015, earning an additional \$6,709.41.
9. On Complainant's first year anniversary date, Complainant's hourly wage would have increased by an additional \$0.25 to \$8.50.
10. The individual hired to replace Complainant, Ms. Ashley, went to full-time status a year after she started the position. (Tr. 361-362, 508-509, 511-512)
11. Therefore Complainant's back pay award should be based on an increase to full-time status after the date of June 30, 2015.
12. Complainant did not start at Hardee's until August 2015 and would have earned five additional weeks working for Respondent at \$340.00 per week equaling \$1700.00.

13. Complainant's hourly wage at Hardee's is \$8.10 at 28 hours a week equaling \$226.80.
14. Subtracting the hourly earnings that Complainant makes at Hardee's from the hourly earnings that Complainant would have made from her anniversary date with Respondent on July 1, 2015; Complainant's back pay difference is \$113.20 per week.