Ohio Civil Rights Commission

Memo

To: Desmon Martin, Director of Enforcement & Compliance

From: Denise M. Johnson, Chief Administrative Law Judge

Date: 10/25/2013

Re: *Paulette R. Neer v. Feet First, Inc.*
(DAY) 366022106 030206 22A-2006-19657-F
Complaint No 06-EMP-DAY-17651

CONSIDERATION OF
ADMINISTRATIVE LAW JUDGE'S REPORT

ALJ RECOMMENDS CEASE AND DESIST

Report Issued: October 25, 2013

Report Mailed: October 25, 2013

*****Objections Due:*** November 18, 2013**

Ohio Civil Rights Commission

Governor
John Kasich

October 25, 2013

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Re: ***Paulette R. Neer v. Feet First, Inc.***
(DAY) 366022106 030206 22A-2006-19657-F Complaint No 06-EMP-DAY-17651

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 **November 18, 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, 5th Floor, 30 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

Enclosure

DM:*apo*
Cc: Lori A. Anthony – **Chief, Civil Rights Section**/Duffy Jamieson, **Assistant Chief, Civil Rights Section** /Jason Matthews, Esq. /Michael P. McNamee, Esq. /Paulette R. Neer, Complainant/ Denise M. Johnson – **Chief Administrative Law Judge**

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Paulette R. Neer

Complainant

Complaint No. 06-EMP-DAY-17651

v.

Feet First, Inc. P.C.

Respondent

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

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Complainant

ALJ'S REPORT BY:

Chief Administrative Law Judge
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Ohio Civil Rights Commission
Rhodes Office Tower, 5th Floor
30 East Broad Street,
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INTRODUCTION AND PROCEDURAL HISTORY

Paulette Neer (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 2, 2006.

The Commission investigated the charge and found probable cause that First Feet, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (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 a Complaint on October 26, 2006.

The Complaint alleged that the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(I).

Respondent filed an Answer to the Complaint on November 22, 2006. 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 June 17, 2008 at the Ohio Civil Rights Commission's Dayton Regional Office, 40 West 4th Centre, 40 West 4th Street, Suite 1900, Dayton, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing (219 pages) ; exhibits admitted into evidence during the hearing; and a post-hearing brief filed by the Commission on June 1, 2009. Respondent was not represented by counsel. Respondent did not file a post-hearing brief.

On April 21, 2011 the ALJ issued a Report and Recommendation that Respondent had engaged in illegal retaliatory conduct in violation of R.C. 4112.02(I). The Respondent filed Objections on the basis that Dr. Keane (Respondent) was not

afforded the opportunity to testify in his own defense.[1] On July 21, 2011 the Commission remanded the complaint to the ALJ to allow limited testimony by Respondent.[2]

A second hearing was held on June 26, 2012 at the Commission's Dayton Regional Office. The second hearing record consists of a transcript (241 pages); the post-hearing briefs filed by the Commission on August 27, 2012; by Respondent on October 23, 2012; and the Commission's reply brief filed November 2, 2012.

[1] Although the Respondent is a corporation, Dr. Keane refused to obtain the services of legal counsel to represent the Respondent during the first pre-hearing and hearing process.
[2] Commissioner Agenda, July 21, 2012.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) 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/her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or lack of frankness; and the bias, prejudice and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on March 2, 2006.

2. The Commission determined on September 14, 2006 it was probable Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a podiatry medical office.

5. Daniel Keane, D.P.M. (Dr. Keane) is the only podiatrist in the office.

6. Complainant started working for Respondent as a receptionist on August 2, 2004. (Tr. 18, Vol. I)

7. Complainant's job duties included receiving patients and visitors, answering telephones, making appointments, receiving payments and issuing receipts. (Comm. Exhibit 1)

8. Complainant worked between 32-33 hours per week making $10.00 per hour. (Tr. 19, Vol 1)

9. On January 17, 2006, Complainant found out she was pregnant. Complainant and her husband already had three (3) children.(Tr. 25, Vol. 1)

10. That day Complainant told coworker Shante Collins (Collins) and Office Manager, Lee Ann Kelly (Kelly). Later that same day other coworkers, Dina Spencer (Spencer) and Pam Talmadge (Talmadge), and Dr. Keane, found out. (Tr. 25-26, Vol. 1)

11. Dr. Keane and Kelly had a meeting with Complainant on February 2, 2006 in Dr. Keane's office. (Tr. 27-28, Vol. 1)

12. During the meeting Dr. Keane informed Complainant that after she had the baby her position could not be held open for her. (Tr. 29-30, Vol. 1)

13. Complainant consulted with Attorney Jason Matthews.

14. Kelly and Talmadge met with Complainant on February 14, 2006, and among other things, inquired why Complainant was being so quiet. Complainant informed them she was upset because she understood she would be losing her job after she gave birth to her baby. (Tr. 33, Vol. 1)

15. During the meeting Complainant also stated she had contacted an attorney who would be sending a letter to Dr. Keane explaining what her rights were. (Tr. 32, Vol. 1, Comm. Ex. 6)

16. Later that day, Kelly and Tallmadge met with Dr. Keane to discuss the meeting they had with Complainant. (Tr. 107-108. Vol. 1)

17. The next day, on February 15, 2006, Kelly called Complainant and told her she did not have to come into work. This was not unusual if the weather was bad. There were a lot of elderly patients who would cancel because of the weather.

18. Complainant then called her attorney and requested he send a letter to Respondent's office via facsimile. (Tr. 34, Vol. 1)

19. The letter set forth Complainant's rights as a pregnant employee.

20. On February 16, 2006, Complainant's attorney received a letter, dated that same date, from Respondent indicating Complainant had been terminated. (Tr. 39, Vol. 1, Comm. Ex. 12)

CONCLUSIONS OF LAW AND DISCUSSION[3]

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 the testimony of various witnesses is not in accord with the findings therein, it is not credited.

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

1. The Commission alleged the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(A) and (I).

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

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the ... sex, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any 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.

Sex/Pregnancy Discrimination

3. The term "because of sex" for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

> Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *McFee v. Nursing Care Management of America, Inc.*, (2010) 126 Ohio St. 3d 183. Thus, reliable, probative and

substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA).

6. As further guidance, the Commission has adopted regulations on written and unwritten employment policies relating to pregnancy and childbirth. Ohio Administrative Code (O.A.C.) 4112-5-05(G). One of the central purposes of these regulations is to ensure that female employees are not "penalized in their employment because they require time from work on account of childbearing." O.A.C. 4112-5-05(G)(5).

7. The Commission's pregnancy regulations in O.A.C. 4112-5-05(G) provide, in pertinent part, that:

> Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service

> requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave of absence policy (...)

8. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary frame-work "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 254, 25 FEP Cases at 116, n.8.

9. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra* at 802. In this case, the

Commission may establish a *prima facie* case of sex discrimination by proving that:

> (1) Complainant was pregnant;
>
> (2) Complainant was qualified for her position;
>
> (3) Respondent subjected Complainant to an adverse employment action; and
>
> (4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

Ensley-Gaines v. Runyon, 72 FEP Cases 602 (6th Cir. 1996).

10. The Commission failed to establish a *prima facie* case of pregnancy discrimination. There was no evidence that Respondent treated non-pregnant employees, similar to Complainant in ability or inability to work, more favorably than her.

11. Employers are not required to give pregnant employees preferential treatment:

> The phrase "treated the same" in R.C. 4112.01(B) ensures that pregnant

> employees will receive the same consideration as other employees "not so affected but similar in their ability or inability to work." Thus, the statute does not provide greater protections for pregnant employees than nonpregnant employees. (...)
>
> *McFee, supra* at 186, *citing Tysinger v. Zanesville Police Dept.*, (C.A. 6, 2006), 463 F.3d 569, 575; *Accord. Mullet v. Wayne-Dalton Corp.*, (N.D. Ohio 4004), 338 F.Supp. 2d 806, 811; *Armstrong v. Flowers Hosp, Inc.*, (C.A. 11, 1994), 33 F.3d 1308, 1316-1317, and cases cited therein.

12. In Respondent's staff compensation package the only leave granted by Respondent to its employees is vacation leave. Respondent does not have a sick leave policy, a maternity leave policy, or a leave of absence policy. (Resp. Ex. C)

13. Employees are eligible for one week of paid vacation during the second year of employment, two weeks during the third year and thereafter. Vacation time cannot be accrued.

14. Talmadge's job was terminated due to her need to take time off due a medically-related (non-pregnancy) condition. She was later rehired by Respondent.

15. Complainant was told by Respondent that it did not have a leave of absence policy; and if there was a position available, she could be considered for rehire.

16. Respondent's leave policy provided the same leave to pregnant and non-pregnant employees. Respondent's leave policy, therefore, does not discriminate against women based on their sex/pregnancy.

Retaliation

17. The Commission alleged in the Complaint on or about February 15, 2006, an attorney for Complainant contacted Respondent to inquire about matters relating to perceived discrimination on the basis of Complainant's pregnancy. Thereafter, on or about February 16, 2006, Respondent informed Complainant and her attorney that she was terminated.

18. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

> (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.

19. 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).

20. To establish a case of retaliation, the Commission must prove that:

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

Greer-Burger v. Temesi, 116, 116 Ohio St.3d 324 at para. 13 citing Canitia v. Yellow Freight Sys., Inc. (C.A. 6, 1990), 903 F.2d 1064, 1066 [4]

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[4] The Ohio Supreme Court holds that federal case law interpreting and applying Title VII is generally applicable to R.C. 4112.02 claims unless the statutory terms are distinguishable. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St. 3d. Accordingly, the Court's recent decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ (2013) is inapplicable to alleged violations of R.C. 4112.02(I).

The Court's rationale is premised on the amendments to the Civil Rights Act of 1991(1991 Act), 105 Stat. 1071 which overruled, in part, *Price Waterhouse v. Hopkins*, 490 U.S. 228 at 259 (1989). The amendments changed the causation standard for status-based discrimination but did not change the causation language of the anti-retaliation provision. The Court reasoned that since the legislature only amended Title VII's status provision, there was no intent to eliminate the "but for causation" standard for the retaliation provision. Ohio law has not undergone similar changes. The language of section 2000e-2(m) is substantially different from R.C. 4112.02 (A). The causation standard announced in *Nassar* is narrow based not only on a strict

21. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas, supra,* for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Burdine, supra.* It is simply part of an evidentiary framework

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construction of the statutory language but also on the following policy analysis:

> "[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment." *Id.* Slip. Op. at 18.

R.C. 4112.08 mandates that "this chapter [4112] shall be construed liberally for the accomplishment of its purposes which is to eliminate discrimination in the state of Ohio. *Genaro v. Cent. Transp.*, 84 Ohio St. 3d *293 Helmick v. Cincinnati Word Processing, Inc. (1989), 45 Ohio St. 3d 131, 133, 543 N.E.2d 1212, 1215, Kerans v. Porter Paint Co. (1991), 61 Ohio St. 3d 486, 575 N.E.2d 428, Collins v. Rizkana (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653,*

To apply the *Nassar* analysis to R.C. 4112.02 (I) would result in an interpretation inconsistent with the legislative history of the law. It is a cardinal rule of statutory construction that a statute should not be interpreted to yield a absurd result. *Mishr v. Bd. of Zoning Appeals* (1996), 76 Ohio St.3d 238, 240, 1996 Ohio 400, 667 N.E.2d 365

"intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*

22. When Complainant's attorney sent Dr. Keane a letter Complaint engaged in a protected activity by opposing what she believed to be discriminatory conduct.

> An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.
>
> *EEOC v. Wilson Metal Casket Co.*, 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

23. The Commission is not required to prove the underlying discrimination claim in cases of retaliation. *Little, supra* at 1563; *Drey v. Colt Const. & Development Co.*, 65 FEP Cases 523, 531(7th Cir. 1994).

24. Respondent knew about Complainant's opposition to what she believed to be a discriminatory employment practice based on the meetings she had with staff on February 14,

2006 and the letter from Complainant's attorney dated February 15, 2006. (Comm. Ex. 10)

25. Respondent terminated Complainant's employment, pursuant to letter dated February 16, 2006. (Comm. Ex. 12)

26. There was a causal (temporal) connection between Complainant's opposition to what she believed was discriminatory conduct and Respondent terminating Complainant from employment.

27. On February 15, 2006, (the day after Complainant's meeting on February 14, 2006 with Talmadge and Kelley in which Complainant communicated she believed Respondent's policy regarding no maternity leave was discriminatory and she had contacted an attorney), Kelly called Complainant and told her not to come to work. On that same day Complainant contacted her attorney and asked him to send a letter to Respondent.

28. On February 16, 2006, Respondent sent a letter to Complainant's attorney stating she was fired on February 14, 2006. In the letter there was no performance-based reason for Complainant's termination. However, Respondent did write the following:

> (...) I have never received a complaint such as yours which in my opinion contain slanderous, libelous and defamatory written evidence which at my discretion may necessitate legal action against the party whom you represent in your letter and also against your legal association under O.R.C. 2739.

(Comm. Ex. 12)

29. Respondent's actions after he received the letter from Complainant's attorney were swift and decisive. A reasonable inference can be drawn that Respondent's motive for terminating Complainant's employment was retaliatory.

> Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

30. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action. *McDonnell Douglas, supra.* To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact,* would support a finding that unlawful discrimination was not the cause of the employment action.
>
> *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption of unlawful retaliation 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.

31. Respondent met its burden of production with the introduction of evidence that Complainant was terminated because she was uncooperative and dishonest.[5]

32. Respondent having met its burden of production, the Commission must prove Respondent retaliated against Complainant because she engaged in protected activity. *Hicks, supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. 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 was false, *and* that ... [unlawful retaliation] was the real reason.

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

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[5] Dr. Keane described Complainant's tenure as "toxic" (Tr. 36, Vol.II)

33. Thus, even if the Commission proves Respondent's articulated reasons are 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 for the factfinder to answer ....

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

34. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of unlawful retaliation.

35. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing they had no basis *in fact* or were *insufficient* to motivate the employment

decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

> 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.[6]

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

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

[6] 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* 2749, 62 FEP Cases at 100, n.4.

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

37. There is not a scintilla of credible evidence in the record to support Respondent's reasons for Complainant's termination.

38. Complainant received a raise, in part, based on merit. (Tr. 99, Vol. II)

39. Complainant was never disciplined formally or informally. (Tr. 99, Vol. II)

40. Although Dr. Keane testified that he would not give a recommendation letter to someone who did not deserve it, he was prepared to give Complainant a letter of recommendation. (Tr. 150, Vol. II)

41. The ALJ is convinced that Respondent terminated the Complainant in retaliation for opposing what she believed to be a discriminatory practice.

42. The Respondent's conduct constitutes unlawful retaliation and the Complainant is entitled to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 06-EMP-DAY-17651 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of receptionist. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment. The Commission has calculated damages in the amount of $24,868.21. This calculation is based on Complainant's hourly wage, plus raises offset by interim earnings;[7]

[7] Interest accrues on a back pay award under R.C. 4112.05(G) from the time the party was discriminated against, in order to restore victims to the economic

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount she would have earned had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.[8]

4. The Commission order Respondent to receive training regarding the anti-discrimination laws of the State of Ohio. As proof of its 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

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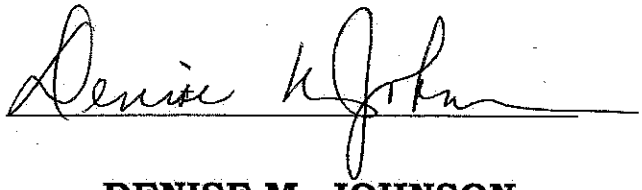
position they would have been in had no discrimination occurred. *Ohio Civil Rights Commission v. David Richard Ingram, D.C.*, (1994), 69 Ohio St. 3d 89, 93.

[8] Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

October 25, 2013

Respondent's Statement of Objections

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:	:	**Case No. 06-EMP-DAY-17651 (DAY 36022106 (17651) 030206**
PAULETTE R. NEER	:	**22A-2006-19657-F**
Complainant,	:	**ALJ DENISE M. JOHNSON**
v.	:	
FEET FIRST, INC.	:	
Respondent.	:	

RESPONDENT FEET FIRST, INC.'S STATEMENT OF OBJECTIONS

I. INTRODUCTION AND STATEMENT OF THE CASE

In the initial complaint in this case, the Ohio Civil Rights Commission ("Commission") alleged that Respondent Feet First, Inc. ("Feet First") engaged in two distinct unlawful employment practices when it terminated Complainant Paulette Neer's ("Neer") employment. First, the Commission alleged that Feet First terminated Neer's employment because she was pregnant, and in doing so discharged her for reasons not equally applied to all of Feet First's employees without regard to their sex (pregnancy), in violation of R.C. § 4112.02(A).

Second, the Commission alleged that Feet First terminated Neer's employment because she consulted an attorney in order to oppose what she believed was unlawful discrimination based on her pregnancy. In doing so, the Commission alleged retaliatory discharge in violation of R.C. § 4112.02(I).

Following an initial hearing on June 17, 2008, the ALJ issued an April 21, 2011, written decision holding that Feet First had not violated R.C. § 4112.02(A) when it terminated Neer's

employment because there was no evidence that Feet First had treated Neer any differently than it had treated its other employees during their pregnancies.[1]

The ALJ did determine, however, that Feet First had terminated Neer in violation of R.C. § 4112.02(I). Specifically, the ALJ determined that Feet First had terminated Neer because she consulted an attorney about what she believed to be an unlawful discriminatory practice, to wit, a termination of her employment based on her pregnancy.[2]

Feet First filed objections to that decision, and at its July 21, 2011, meeting the Commission remanded the case back to the ALJ so that Dr. Daniel Keane, Feet First's owner, could be allowed to testify in support of his non-discriminatory reasons for terminating Neer's employment. A subsequent hearing for that purpose was then held in front of the ALJ on June 26, 2012.

On October 25, 2013, the ALJ issued a second written decision, virtually identical to the April 21, 2011, decision. In it, the ALJ again determined that Feet First had not violated R.C. § 4112.02(A) because it had not treated Neer any different regarding her pregnancy that it did its other employees.

The ALJ also again held in the October 25, 2013, decision that Feet First had terminated Neer in violation of R.C. § 4112.02(I). Feet First now files this statement of objections to that decision. In particular, Feet First asks the Commission to consider and give appropriate weight to the additional testimony and exhibits offered into evidence on June 26, 2012. During that hearing, Dr. Keane described a history of divisive and insubordinate behavior by Neer. It was that history that culminated in her termination on February 14, 2006, for reasons wholly separate from her pregnancy and her consultation with an attorney.

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[1] April 21, 2011, Chief Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations, attached hereto as Exhibit 1, at 13, ¶ 10.
[2] April 21, 2011, Decision, at 24, ¶ 40.

II. STATEMENT OF FACTS

Neer began working for Feet First on August 2, 2004, initially hired as a receptionist.[3] On January 17, 2006, Feet First was initially informed that Neer was pregnant, when she told co-worker Shante Collins ("Collins") and Office Manager Lee Ann Kelly ("Kelly"). Dr. Keane was initially informed of her pregnancy that day as well.[4]

As a father himself, Dr. Keane was happy for Neer, even writing "Congratulations on your new 'miracle' and being a new mom again!" on her request for a morning off due to an obstetrician appointment.[5] But unfortunately Neer's employment with Feet First had been rocky for quite some time by then.

In fact, at the June 26, 2012, hearing, Dr. Keane described Neer's employment in the 18 months she had worked for Feet First as "toxic."[6] Dr. Keane substantiated that assessment with specific incidents that demonstrated the divisive effect Neer had on the office.

A. The no-solicitation policy incident.

One of the first problems Feet First encountered with Neer was what Dr. Keane described as the no-solicitation policy incident. Feet First had a written policy that prohibited employees from soliciting during work hours. According to the office manual received and signed by Neer, "Employees-persons employed by FEET [FIRST] INC., P.C., may not solicit for any purpose during work hours. Employees may not distribute literature on the premises or in an area where employees perform work during working hours or non-working hours."[7]

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[3] October 25, 2013, Chief Administrative Law Judge's Findings of Fact, Conclusions of Law, and Recommendations, attached hereto as Exhibit 2, at 5-6, ¶¶ 6-7.
[4] October 25, 2013, Decision, at 5, ¶ 10.
[5] Exhibit B18; *see also* June 26, 2012, Transcript, p. 34-35.
[6] June 26, 2012, Transcript, p. 36.
[7] Exhibit E, p. 5; *see also* June 26, 2012, Transcript, p. 54.

Soon after being hired, Neer began selling Avon and similar products at the office.[8] She was soliciting employees and patients alike, during work hours, and distributing brochures for those products, in direct violation of the no-solicitation policy.[9] Despite being instructed to stop, Neer continued that solicitation and ultimately it took Feet First four to six months to put a stop to it.[10] Even then, she would surreptitiously conduct that business in the parking lot.[11]

B. The "Shelly's boyfriend" incident.

Neer's conduct also created friction among other employees at Feet First. One employee, Shelly Smith ("Smith"), was an office assistant and medical assistant for Dr. Keane.[12] During office hours, within earshot of patients and other employees, Neer would intimate that Dr. Keane and Smith were having a sexual relationship, saying things to Smith like "your boyfriend wants you."[13]

Disrespectful enough to Dr. Keane and Smith, Neer's comments were disruptive for the entire office. At one point, Smith became so upset about it she went to Kelly, the office manager, crying.[14] Like the no-solicitation policy incident, Neer had to be told repeatedly to stop making comments before she finally stopped, again after several months.[15]

C. The parking lot incident.

Another particularly troubling incident occurred just before Neer's termination, one day in early 2006.[16] Neer and Dr. Keane arrived at the office at the same time that day, and Dr.

[8] June 26, 2012, Transcript, p. 54.
[9] June 26, 2012, Transcript, p. 54.
[10] June 26, 2012, Transcript, p. 54-55.
[11] June 26, 2012, Transcript, p. 55.
[12] June 26, 2012, Transcript, p. 50.
[13] June 26, 2012, Transcript, p. 50-51.
[14] June 26, 2012, Transcript, p. 51.
[15] June 26, 2012, Transcript, p. 52.
[16] June 26, 2012, Transcript, p. 41.

Keane observed Neer park her car in a handicapped spot.[17] Feet First had offices at a larger hospital complex, where the handicapped spots were necessary for elderly and infirm patients.[18]

Dr. Keane immediately notified Neer that she was parked in a handicapped spot, and instructed her to move her vehicle.[19] Her response, as Dr. Keane described it, "was essentially to scoff at me and say, 'what are you going to do about it?'"[20]

When Dr. Keane and Neer got onto the elevator, he again raised the issue and told her that she needs to move her vehicle. And again, she dismissed his instruction and said "'what are you going to do about it?'"[21] This time, the exchange took place in the presence of the wife of another doctor who had offices in the building, Mrs. Lynn. After hearing the exchange, Mrs. Lynn asked Dr. Keane "Does that lady work for you?"[22]

That morning, Dr. Keane had the office manager, Kelly, broach the subject with Neer. Kelly was met with the same dismissive response Neer had given Dr. Keane, and she reported back to Dr. Keane that she was refusing to move her vehicle.[23]

To be sure, this matter was quite serious as far as Dr. Keane was concerned. Neer's conduct portrayed an obvious disrespect for Dr. Keane and Kelly, and a disregard for the purposes served by the handicapped parking spots. In addition, as a commercial tenant at the hospital complex, Dr. Keane's privileges associated with that tenancy could be jeopardized by such conduct from his employees.[24]

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[17] June 26, 2012, Transcript, p. 41-42.
[18] June 26, 2012, Transcript, p. 42.
[19] June 26, 2012, Transcript, p. 42
[20] June 26, 2012, Transcript, p. 42-43.
[21] June 26, 2012, Transcript, p. 43.
[22] June 26, 2012, Transcript, p. 43.
[23] June 26, 2012, Transcript, p. 44-45.
[24] June 26, 2012, Transcript, p. 47-48.

D. Disregard for employment duties.

Neer's employment with Feet First was also marked by regular disregard for her employment duties. She refused to be cross-trained for any duties other than a receptionist, which is detrimental to a small office, where it is important for the employees to be able to cover for each other so that the office can function on a daily basis if someone is out.[25]

Neer also consistently failed to update patient charts to reflect new or changed medications and updated insurance information.[26] Doing so was critical, obviously, particularly for patients who had not been seen in a long time.[27] Yet this was a problem with Neer's performance throughout her employment.[28]

Neer also disobeyed Feet First's policy against scheduling luncheons with drug company representatives.[29] And after she failed to organize and monitor Dr. Keane's continuing medical education courses, he had to re-direct those responsibilities to someone else.[30]

All of this led both Dr. Keane and Lee Ann Kelly to the conclusion that Neer "is very unhappy" at Feet First, and "doesn't want to follow our office policies [or] to learn anything new or help out as a team member."[31]

E. The Dena incident.

In the context of that employment history, the parties moved towards February 2006, and the incident that culminated in Neer's termination. In February 2006 Dena Spencer, another Feet First employee, approached Kelly crying because Neer had told her she was going to be fired,

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[25] June 26, 2012, Transcript, p. 27.
[26] June 26, 2012, Transcript, p. 55-56; *see also* Exhibit D, re-attached hereto as Exhibit 3.
[27] June 26, 2012, Transcript, p. 55-56.
[28] *See generally* Exhibit D.
[29] June 26, 2012, Transcript, p. 58-59; *see also* Exhibit D.
[30] June 26, 2012, Transcript, p. 59; *see also* Exhibit D.
[31] Exhibit D; *see also* June 26, 2012, Transcript, p. 60-61.

which was not true.[32] Kelly informed Dr. Keane about the matter and asked to have a meeting with Neer about it, and to have another employee, Pam Talmadge, present.[33]

That meeting occurred on the afternoon of February 14, 2006. Importantly, the purpose of the meeting was to verify that Neer told Spencer that she was going to be fired and to, in Kelly's words, "ask Paulette why she has an attitude of anger and discontent."[34] But Neer steered the meeting to the topic of her pregnancy, stating that she believed she too was going to be fired, for taking time off due to her pregnancy, and that she had contacted an attorney.[35] Despite that, Kelly continually reassured Neer at that meeting that she was not going to be terminated for taking time off due to her pregnancy.[36]

Kelly then had a meeting with Dr. Keane later that evening, to discuss what had transpired during the first meeting.[37] At the conclusion of that second meeting on February 14, 2006, Dr. Keane made the determination to fire Neer.[38] That decision was made at the recommendation of Lee Ann Kelly, and Dr. Keane agreed.[39]

That decision was the result of Neer's tumultuous employment and divisive behavior.[40] Her false representation to Dena Spencer that Spencer was going to be fired was only the latest in the string of incidents that created hostility and resentment in the office, and together with her history of insubordination, both Dr. Keane and Kelly agreed she could not be trusted.[41]

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[32] June 26, 2012, Transcript, p. 38, 73.
[33] June 26, 2012, Transcript, p. 40, 71.
[34] Exhibit 6; *see also* June 26, 2012, Transcript, p. 73.
[35] Exhibit 6; *see also* June 26, 2012, Transcript, p. 73.
[36] Exhibit 6.
[37] June 26, 2012, Transcript, p. 74.
[38] June 26, 2012, Transcript, p. 75.
[39] June 26, 2012, Transcript, p. 75.
[40] Exhibit 6; *see also* June 26, 2012, Transcript, p.75-76.
[41] Exhibit 6; *see also* June 26, 2012, Transcript, p.75-76.

F. The termination.

The following day, February 15, 2006, Kelly called Neer to tell her she did not need to come in to the office, which was not unusual if the weather was bad since a number of elderly patients would typically cancel their appointments.[42] Neer then called her attorney and instructed him to send a letter to Feet First, which he did by fax that same day.[43]

Dr. Keane sent a response to Neer's attorney the next day, in a letter dated February 16, 2006.[44] Because Dr. Keane had not seen Neer since he made the decision to terminate her employment on the evening of February 14, 2006, he thought it best to communicate that fact through her attorney since she had now retained counsel.[45] In addition, as he testified, "I didn't want to put my staff in the position of having another conflict with her."[46] So he communicated the fact of her termination "[a]s of February 14, 2006," to her attorney in his February 16, 2006, letter and asked her attorney to inform her.[47]

III. LAW AND ARGUMENT

The Ohio Supreme Court has of course unequivocally held that federal case law interpreting Title VII generally applies to employment discrimination claims under R.C. Chapter 4112: "federal case law interpreting Title VII of the Civil Rights Act of 1964, Section 2000(e) et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112[.]"[48]

Under such federal precedent, the Ohio Supreme Court in *Green-Burger v. Temesi* observed the elements of a *prima facie* claim for retaliation under R.C. § 4112.02(I):

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[42] October 25, 2013, Decision, at 8, ¶ 17.
[43] October 25, 2013, Decision, at 8, ¶¶ 18-19.
[44] October 25, 2013, Decision, at 20, ¶ 20; *see also* Exhibit 12.
[45] June 26, 2012, Transcript, at 77.
[46] June 26, 2012, Transcript, at 77.
[47] Exhibit 12.
[48] *Green-Burger v. Temesi* (2007), 116 Ohio St.3d 324, ¶ 12, 879 N.E.2d 174 (quoting *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.* (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128).

> To establish a case of retaliation, a claimant must prove that (1) she engaged in a protected activity, (2) the defending party was aware that the claimant had engaged in that activity, (3) the defending party took an adverse employment action against the employee, and (4) there is a causal connection between the protected activity and adverse action.[49]

If the complainant proves a *prima facie* case, the burden of production shifts to the employer to "'articulate some legitimate, non-discriminatory reason' for the employment action."[50] Finally, if the employer carries that burden, the burden shifts back once again to the complainant, this time to prove that the respondent's articulated non-discriminatory reasons for the employment action were not the true reasons for the action.[51]

A. The ALJ erred in holding that the complainant proved a *prima facie* case of retaliation.

1. *Nassar* requires proof of "but-for" causation in an Ohio retaliation claim under R.C. § 4112.02(I).

In the case at bar, the ALJ began the retaliation analysis by contending that the United States Supreme Court's recent decision in *University of Texas Southwestern Medical Center v. Nassar* does not apply to retaliation claims under Ohio law.[52] Feet First respectfully suggests that the ALJ is mistaken in that regard, and that as a result the decision applies an incorrect burden of proof to Neer's *prima facie* case.

As described above, the Ohio Supreme Court has held that federal jurisprudence implementing Title VII applies to Ohio employment discrimination claims under R.C. Chapter 4112.[53] In its recent decision in *Nassar*, the United States Supreme Court considered whether a Title VII retaliation claim under 42 U.S.C. § 2000e-3(a) required a showing that the protected activity was the "but-for" cause of the alleged retaliatory action, or whether such a claim was

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[49] *Id.* at ¶ 13 (citing *Canitia v. Yellow Freight Sys., Inc.* (C.A.6, 1990), 903 F.2d 1064, 1066).
[50] *Id.* at ¶ 14 (citing *McDonnell Douglas Co. v. Greene* (1973) 411 U.S. 792, 802, 93 S.Ct. 1817).
[51] *Id.* at ¶ 14 (citing *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 256, 101 S.Ct. 1089).
[52] October 25, 2013, decision, fn. 4.
[53] *Green-Burger, supra* note 48.

subject to the less stringent "motivating factor" causation test. That is, whether a retaliation claim could be made merely be showing that the protected activity was just one motivating factor in the alleged retaliatory action.[54]

In resolving that question, the Court extensively analyzed Title VII. The Court began by revisiting its decision in *Price Waterhouse v. Hopkins*, where it construed Title VII's status-based discrimination provision in 42 U.S.C. § 2000e-2(a), prohibiting discrimination on the basis of race, color, religion, sex, or national origin.[55] In *Price Waterhouse*, the Court had held that the causation element of a status-based discrimination claim was established by demonstrating that the personal traits were a "motivating" or "substantial" factor in the discrimination.[56]

The Court then described the Congressional action that followed, including the implementation of 42 U.S.C. § 2000e-2(m), which codified that lesser "motivating factor" causation burden for status-based discrimination claims under § 2000e-2(a).[57] However, the Court in *Nassar* held that nothing in the post-*Price Waterhouse* Congressional action modified the "but-for" burden of proof applicable to the causation element of a retaliation claim under § 2000e-3(a): "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."[58]

Yet the ALJ in the case at bar expressly rejected that clear holding, and instead reasoned that *Nassar* had no applicability to a retaliation claim under R.C. § 4112.02(I).[59] Feet First respectfully suggests that reasoning is flawed. First, after acknowledging that the Court in *Nassar* recognized the more lenient "motivating factor" causation burden for status-based discrimination cases, but expressly *rejected* that lesser burden for retaliation claims, the ALJ

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[54] *University of Texas Southwestern Medical Center v. Nassar* (2013), 133 S.Ct. 2517, 2522-2523,
[55] *Id.* at 2525-2526.
[56] *Id.*
[57] *Id.* at 2526.
[58] *Id.* at 2528 (citing *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, 176, 129 S.Ct. 2343 (2009)).
[59] October 25, 2013, Decision, at fn. 4.

asserted that "Ohio law has not undergone similar changes. The language of section 2000e-2(m) is substantially different from R.C. § 4112.02(A)."[60]

However, that analysis misses the mark. Whether Ohio's *status-based* causation burden under R.C. § 4112.02(A) is or is not impacted by the *Nassar* Court's analysis of the Title VII status-based causation burden under § 2000e-2(a) (as a result of § 2000e-2(m)) is immaterial for the instant matter. Rather, the clear holding of *Nassar*—that the more stringent "but-for" causation burden applies to Title VII retaliation claims—only requires consideration of whether Ohio's *retaliation* claim under R.C. § 4112.02(I) is subject to that analysis under the general applicability principle countenanced by the Ohio Supreme Court in *Green-Burger*.

And the answer to that question is yes. Under R.C. § 4112.02(I), unlawful retaliation against an employee exists if the employer's action is taken "because that person has" engaged in protected activity.[61] Under § 2000e-3(a), unlawful retaliation exists if the employer's action is taken against an employee "because he has" engaged in protected activity.[62] It was that causal "because" language that formed the basis for the Court's conclusion in *Nassar* that the more stringent "but-for" requirement applied.[63] The same conclusion is necessitated under Ohio's retaliation statute, R.C. § 4112.02(I).

Second, the ALJ's citation to the *Nassar* decision's policy language is misplaced. In *Nassar*, the Court justified the more stringent retaliation causation burden by warning that "lessening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer, administrative agencies, and courts to combat

[60] October 25, 2013, Decision, at fn. 4.
[61] R.C. § 4112.02(I).
[62] 42 U.S.C. § 2000e-3(a).
[63] *Nassar*, 133 S.Ct. 2517, at 2528.

workplace harassment."[64] The Court offered that policy perspective after recognizing the precipitous increase in retaliation claims being made by employees since 1997.[65]

Yet, the ALJ decision offers that quote in support of the determination that the more stringent "but-for" requirement should *not* apply to retaliation claims. In fact the Court in *Nassar* used it for just the opposite. In other words, the *Nassar* Court determined that retaliation claims should be subject to the more stringent causation requirement as a means of preventing frivolous retaliation claims by employees.

Third, the ALJ's rejection of *Nassar* to retaliation claims brought under R.C. § 4112.02(I) directly conflicts with at least two recent cases. The Tenth District recently confronted that exact issue in *Smith v. Ohio Department of Public Safety*. There, the court described the plain meaning of the holding in *Nassar* construing § 2000e-3(a) retaliation claims:

> In other words, to 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.[66]

Observing that the language of R.C. § 4112.02(I) is "virtually identical" to that of 2000e-3(a) at issue in *Nassar*, the Tenth District held that "we conclude that R.C. 4112.02(I) also requires the plaintiff to prove that retaliation is the but-for cause of adverse employment action."[67]

The United States District Court for the Northern District of Ohio held identically in *Goodsite v. Norfolk Southern Railway Co.* Construing a retaliation claim under both Title VII and R.C. § 4112.02(I), the court in that case, citing *Nassar*, held that the plaintiff's causation

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[64] *Id.* at 2531-2532.
[65] *Id.* at 2531.
[66] *Smith v. Ohio Department of Public Safety* (10 Dist.), 2013-Ohio-4210, ¶ 59.
[67] *Id.* at ¶ 60.

burden requires her to show that the protected activity was "the 'but-for cause' of her termination."[68]

The ALJ decision ignores the clear effect of *Nassar* on the burden of proof to be applied to the causation element in Neer's *prima facie* case. The courts in *Smith* and *Goodsite* unequivocally recognized that effect in two decisions that conflict directly with the ALJ decision. Feet First respectfully posits that the ALJ decision therefore applied an incorrect burden of proof to Neer's *prima facie* case.

2. The evidence is insufficient to demonstrate "but-for" causation in the case at bar.

In holding that Neer established her *prima facie* case, the ALJ decision relied for its causation determination exclusively on the temporal proximity between Dr. Keane's receipt of Neer's attorney's letter on February 15, 2006, and his response letter on February 16, 2006.[69] But that is an insufficient basis for a *prima facie* causation determination, especially under the more stringent "but-for" requirement.

Initially, it is important to consider the extreme caution federal courts have used when determining the weight to be given to the temporal proximity between the protected activity and the alleged retaliatory action. Indeed, in *Vereecke v. Huron Valley School District*, the Sixth Circuit admonished:

> Substantial case law from this circuit cautions about the permissibility of drawing an inference of causation from temporal proximity alone. *See, e.g., Tuttle v. Metro. Gov't of Nashville*, 474 F.3d 307, 321 (6th Cir. 2007) ("The law is clear that temporal proximity, standing alone, is insufficient to establish a causal connection for a retaliation claim."); *Randolph v. Ohio Dep't of Youth Servs.*, 453 F.3d 724, 737 (6th Cir. 2006) ("Although temporal proximity itself is insufficient to find a causal connection, a temporal connection coupled with other indicia of retaliatory conduct may be sufficient to support a finding of a causal connection."); *Cooper v. City*

[68] *Goodsite v. Norfolk Southern Railway Co.* (N.D. Ohio 2013), 2013 WL 3943505, at 5.
[69] October 25, 2013, Decision, at 21-22, ¶¶ 26-29.

> *of N. Olmsted*, 795 F.2d 1265, 1272 (6th Cir. 1986) ("The mere fact that Cooper was discharged four months after filing a discrimination claim is insufficient to support an interference [sic] of retaliation.")[70]

Only in limited circumstances, the Sixth Circuit cautioned, has temporal proximity been used to infer a retaliatory motive. And even then, additional indicia of retaliation have typically been present:

> In applying employment discrimination statutes, however, we have accepted temporal proximity as a valid basis from which to draw an inference of retaliatory motivation under limited circumstances. *See Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 524–25 (6th Cir.2008). Specifically, the more time that elapses between the protected activity and the adverse employment action, the more the plaintiff must supplement his claim with "other evidence of retaliatory conduct to establish causality." *Id.*[71]

In describing those limited circumstances where temporal proximity has been used to infer retaliation, the Sixth Circuit focused on *Mickey v. Zeidler Tool & Die Co.*, where the employer fired the employee the same day he learned of an EEOC complaint filed by the employee.[72] But the court was careful to note "that evidence in addition to that of temporal proximity buttressed" the employee's argument in that case.[73]

In the case at bar, the ALJ gave undue weight to temporal proximity. Unlike in *Mickey*, where there were at least some additional indicia of retaliation, there is absolutely no such evidence here. To the contrary, the additional evidence *contradicts* a retaliatory motive. The February 14, 2006, meeting, after all—the very meeting at which Neer initially informed Feet First that she had contacted an attorney—had in fact been scheduled to address a *separate, unrelated disciplinary matter* involving Neer.

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[70] *Vereecke v. Huron Valley School District* (6th Cir. 2010), 609 F.3d 392, 400.
[71] *Id.*
[72] *Id.* (citing *Mickey v. Zeidler Tool & Die Co.*, 516 F.3d 516, 524–25 (6th Cir.2008))
[73] *Id.*

With zero additional indicia of a retaliatory motive, and separate indicia from the immediate time frame at issue that suggests a non-retaliatory motive, Complainant simply cannot be considered to have met her causation burden. Complainant, therefore, did not meet her burden of proving a *prima facie* case of retaliation.

B. The ALJ erred in holding that the complainant had proved pretext.

Assuming the necessity to move beyond the *prima facie* analysis, the ALJ decision nevertheless improperly determined that Neer satisfied her final burden of proving that Feet First's legitimate, non-discriminatory reasons for her termination were in fact pretextual.

It bears noting initially the cursory attention paid in the ALJ decision to the determination that Feet First had met its reciprocal burden of identifying legitimate, non-discriminatory reasons for Neer's termination. While the ALJ did indeed find that burden to have been met, the decision offers absolutely no mention of the myriad disciplinary matters described by Dr. Keane during his testimony. The decision offers only a single paragraph on this element of the analysis, with only a footnote to denote Dr. Keane's general description of Neer's employment as "toxic."[74]

And that wholesale disregard of Dr. Keane's entire testimony in the ALJ decision had a severe impact on the final level of analysis, where the ALJ determined that Neer had met her ultimate burden of proving that Feet First's proffered non-discriminatory reasons for termination were in fact pretextual. After all, it defies reason to suggest that the decision could adequately make any such determination without having even *acknowledged*, let alone considered, the non-discriminatory reasons that Feet First offered.

Turning to that ultimate analysis, the Sixth Circuit has described three ways that a complainant can establish pretext once the burden is shifted back. In *Manzer v. Diamond*

[74] October 25, 2013, Decision, at 24, ¶ 31.

Shamrock Chemicals Co. the Sixth Circuit held that pretext can be shown if: 1) the employer's stated reason for termination has no basis in fact; 2) the non-discriminatory reason offered for the termination was not the actual reason for the termination; or 3) the reason offered for the termination was insufficient to explain the termination.[75]

It is unclear from the ALJ decision exactly which prong of that analysis was determined to satisfy Neer's pretext argument. In fact the totality of the ALJ decision on this ultimate issue held that:

> 37. There is not a scintilla of credible evidence in the record to support Respondent's reasons for Complainant's termination.
>
> 38. Complainant received a raise, in part, based on merit. (Tr. 99, Vol. II)
>
> 39. Complainant was never disciplined formally or informally. (Tr. 99, Vol. II)
>
> 40. Although Dr. Keane testified that he would not give a recommendation letter to someone who did not deserve it, he was prepared to give Complainant a letter of recommendation. (Tr. 150, Vol. II)
>
> 41. The ALJ is convinced that Respondent terminated the Complainant in retaliation for opposing what she believed to be a discriminatory practice.[76]

1. <u>There is nothing to demonstrate that Feet First's non-discriminatory reasons for Neer's termination had no basis in fact.</u>

The first prong of the pretext burden, that the stated reason for termination has no basis in fact, "'is easily recognizable and consists of evidence that the proffered bases for the plaintiff's [discipline and/or termination] never happened, *i.e.*, that they are 'factually false.'"[77]

Moreover, the Sixth Circuit has adopted the "honest belief" test under the first *Manzer* prong.[78] Under that test, a complainant must prove more than just a dispute over the facts

[75] *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).
[76] October 25, 2013, Decision, at 27-28, ¶¶ 37-41.
[77] *Mora v. Walgreen Co.* (S.D. Ohio), 2013 WL 1089679, at 10 (quoting *St. Mary's Honor Center v. Hicks* (1993), 509 U.S. 502, 515, 113 S.Ct. 2742).

underlying the non-discriminatory reasons for the termination, but must put forth evidence that the employer did not "honestly believe" in the proffered non-discriminatory reason for the termination.[79] That, in turn, requires the complainant to demonstrate that the employer did not make a "reasonably informed and considered decision" based on the particularized facts available to the company at the time of termination.[80]

In the instant case, the evidence cannot support a determination that Neer demonstrated pretext under the first *Manzer* prong, and the ALJ decision is inadequate to support any such holding. First, as described above the ALJ decision makes absolutely no mention, let alone consideration, of the non-discriminatory reasons testified to by Dr. Keane. The no-solicitation policy incident, the "Shelly's boyfriend" incident, the parking lot incident, Neer's disregard for her employment duties, and the culminating Dena Spencer incident were all described at length by Dr. Keane (and by Lee Ann Kelly during the June 17, 2008, hearing), with supporting exhibits, yet ignored entirely in the ALJ decision.

Second, Neer freely acknowledged the accuracy of the facts underlying several of those incidents. She acknowledged selling Avon and other products while she was working.[81] She acknowledged parking in the parking spot reserved for patients under the hospital's rules.[82] She admitted to failing to manage Dr. Keane's continuing medical education credits.[83]

Third, there was absolutely no evidence that Dr. Keane did not honestly believe the factual underpinnings of those incidents. His testimony, and the corroborating testimony of Lee Ann Kelly, patently demonstrates the honesty of his belief and, to be sure, the accuracy of the facts underlying each and every incident.

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[78] *Abdulnour v. Campbell Soup Supply Co., LLC* (6th Cir. 2007), 502 F.3d 496, 502.
[79] *Id.* (citing *Braithwaite v. The Timken Co.* (6th Cir. 2001), 258 F.3d 488, 494.
[80] *Id.* at 503.
[81] June 17, 2008, Transcript, p. 77.
[82] June 17, 2008, Transcript, p. 70.
[83] June 17, 2008, Transcript, p. 76.

Thus to the extent that the ALJ decision based its pretext holding on the first *Manzer* prong, such a determination is both legally and factually unsupportable. There was ample evidence not only of the accuracy of the underlying disciplinary incidents, but of Dr. Keane's honest belief of them.

2. <u>There is nothing to demonstrate that Feet First's non-discriminatory reasons for Neer's termination were not the actual reasons for the termination.</u>

The Sixth Circuit has elaborated on the burden imposed by second *Manzer* pretext prong:

> A plaintiff using the second *Manzer* method...must show that the proffered reason(s) "did not actually motivate the defendant's challenged conduct." In this type of showing,
>
> The plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was *more* likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of [retaliation] makes it "more likely than not" that the employer's explanation is a pretext, or coverup.[84]

In addition, this type of showing requires that the complainant produce additional evidence of unlawful discrimination besides the evidence that is part of the *prima facie* case.[85] It is also critical to note that "a reason 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."[86]

The Sixth Circuit's decision in *Singleton v. Select Specialty Hospital-Lexington, Inc.* is also instructive here. In that case, the Sixth Circuit opined that the evidence of the adverse action itself was not competent evidence to show a discriminatory motive.[87]

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[84] *Singleton v. Select Specialty Hospital-Lexington, Inc.*, 391 Fed.Appx. 395, 401 (6th Cir. 2010) (internal citations omitted) (emphasis in original).
[85] *Cicero v. Borg-Warner Automotive, Inc.* (6th Cir. 2002), 280 F.3d 579, 589 (citing *Reeves v. Sanderson Plumbing Products* (2000), 530 U.S. 133, 143, 120 S.Ct. 2097).
[86] *St. Mary's Honor Ctr. V. Hicks* (1993), 509 U.S. 502, 510-11; 113 S.Ct. 2742.
[87] *Singleton*, 391 Fed.Appx. at 402.

In the context of the second *Manzer* pretext prong, evidence of a history of performance and workplace conflict problems has been held to sufficiently tip the scale against pretext. For instance, in *Chen v. Dow Chemical Co.*, a terminated employee sued for discrimination and retaliation, and the only issue before the Sixth Circuit was pretext.[88]

The employer in that case presented evidence that the employee had difficulty "adjusting to the work procedures" of the employer and that "[b]oth coworkers and customers found her combative, and she was involved in a number of interpersonal conflicts that came to the attention of Dow management."[89] And despite the employer's attempts to resolve these issues, the evidence showed that the employee refused to accept the employer's guidance and continued to engage in "'inappropriate and unprofessional behavior.'"[90]

The Sixth Circuit held that the employee's 18-month history of performance problems and conflicts with coworkers "provides strong support for Dow's claim that it fired Chen for performance-related reasons, and Chen has offered scant evidence to discredit Dow's explanation."[91] Consequently, the employee in that case did not carry her burden of showing that Dow's proffered reason for her termination was pretextual.

(i) <u>The record is replete with evidence demonstrating the toxic workplace atmosphere created by Neer.</u>

In the instant case, the record reflects an abundance of evidence supporting Feet First's proffered non-discriminatory reasons for terminating Neer's employment, many of which Neer herself acknowledges. In fact, the evidence now in the record shows that Neer's entire employment with Feet First was beset with conflict, insubordination, and performance problems.

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[88] *Chen v. Dow Chemical Co.*, 580 F.3d 394 (6th Cir. 2009).
[89] *Id.* at 397.
[90] *Id.* at 398.
[91] *Id.* at 402.

Equally important, the record demonstrates the corrosive effect Neer's conduct had on the office atmosphere.

Dr. Keane's testimony described four distinct instances of grossly improper conduct by Neer—the no-solicitation policy incident, the "Shelly's boyfriend" incident, the parking-lot incident, and the Dena Spencer incident. Each of those, as described above, was marked by Neer's disregard for her employer and supervisors, and evidenced the conflict Neer created with her coworkers.

Perhaps more importantly, those incidents were not single, isolated instances of such conduct. Rather, despite repeated attempts by Feet First to correct the problems, Neer persisted with the conduct. In the case of the no-solicitation policy incident and the "Shelly's boyfriend" incident, if took Feet First *months* to finally put a stop to Neer's conduct. That disregard for the authority of her employer is matched only by the egregiousness of the parking-lot incident.

And the contentiousness Neer created among her coworkers was particularly unfortunate, as evidenced by the "Shelly's boyfriend" incident and the Dena incident. Shelly and Dena, two of Neer's coworkers, were actually brought to tears by Neer's conduct. Neer's conduct in that regard was inexcusable.

Neer also had a long history of performance problems. From failing to update charts and medical information, to her refusal to be cross-trained on other office duties, to her disregard for abiding by the luncheon scheduling policy, Feet First was forced to conclude that Neer "doesn't want to follow our office policies [or] to learn anything new or help out as a team member."[92]

It is also important to highlight that the reason the February 14, 2006, meeting with Neer was taking place at all was to address yet another coworker conflict she had created, the Dena incident. That meeting had nothing to do with Neer's pregnancy or the leave she was requesting,

[92] Exhibit D; *see also* June 26, 2012, Transcript, p. 60-61.

both of which were issues that had been fully discussed and resolved at that point as far as Feet First was concerned.

Instead, on February 14, 2006, Feet First found itself dealing with another workplace conflict created by Neer. Thus the timing of her termination, be it February 14, 2006, or February 16, 2006, immediately followed not only Feet First's knowledge that she had contacted her attorney but also another workplace incident that she had instigated.

The Complainant offered nothing to suggest, let alone prove, that her termination was caused by the former rather than that latter, other than the proximity in time. With the supplemented record, the evidence now diminishes that temporal argument, since there is now evidence that her termination was just as proximately related in time to the Dena incident as it was to her disclosure that she had contacted an attorney.

Nor does the February 16, 2006, letter Dr. Keane wrote to Neer's attorney do anything to alter that analysis. While unnecessarily combative, the letter was never designed to lay out the reasons for Neer's termination, but rather to respond to her counsel's allegations of discrimination. Feet First's response, that it did not treat Neer differently than any other employee, was ultimately upheld by the ALJ.

The vigor with which Dr. Keane maintained his position in the February 16, 2006, letter only underscores his contention that Neer's termination had nothing to do with the fact that she contacted an attorney. If Feet First was so sure that it had not discriminated against Neer because of her pregnancy, then the fact that she contacted an attorney regarding that alleged discrimination (whether or not she believed in good faith that it was discrimination) does not tend to show that she was terminated for that contact. Put differently, if Feet First did not fire Neer for being pregnant and wanting leave, then why would it fire her for contacting an attorney because she was pregnant and wanted leave?

The second prong of the *Manzer* pretext analysis hinges on the weight of the evidence. By its very nature, that prong requires the Complainant to carry a preponderance of the evidence burden to demonstrate that Feet First's stated non-discriminatory reason for Neer's termination was just a pretext. This she has not done.

(ii) <u>The ALJ erred in relying on the additional evidence of discrimination cited in the decision.</u>

As described above, it is axiomatic under the second *Manzer* prong that a complainant must provide additional evidence of discrimination beyond the *prima facie* case. The most apparent difference between the April 21, 2011, ALJ decision and the October 25, 2013, ALJ decision is an attempt to cite such additional evidence. In the former decision, there was no evidence whatsoever cited. In the more recent decision, the ALJ suggests that:

> 38. Complainant received a raise, in part, based on merit. (Tr. 99, Vol. II)
>
> 39. Complainant was never disciplined formally or informally. (Tr. 99, Vol. II)
>
> 40. Although Dr. Keane testified that he would not give a recommendation letter to someone who did not deserve it, he was prepared to give Complainant a letter of recommendation. (Tr. 150, Vol. II)[93]

As an initial matter, Feet First posits that even taken as true, those three circumstances are woefully insufficient to outweigh the evidence of Neer's long history of turbulent employment in the pretext analysis. That is, even taken as true, Neer has failed to show pretext by the greater weight of the evidence.

But the record also does not support those conclusions. Neer's raise, for instance, was based on an employee evaluation from her first year of employment, August 2, 2004, through

[93] October 25, 2013, Decision, at 27, ¶¶ 38-40.

August 5, 2005.[94] That was of course prior to much of the conduct that led to her termination, including the parking lot incident and of course the Dena Spencer incident.

The record also demonstrates that, even at the time of that evaluation, merit played little role in her raise. In fact she had to be reminded at her evaluation about updating the patient charts and "to be aware of the problems she has had this year and to try and correct these problems."[95] And Dr. Keane pointed out that the evaluation itself had not been signed by anyone on behalf of Feet First, a significant fact.[96]

The ALJ's next conclusion, that Neer "was never disciplined formally or informally" is equally without support. The portion of the transcript cited for that conclusion appears to a mistake.[97] Nevertheless, there was quite clearly disciplinary action taken against Neer. The no-solicitation policy incident, the "Shelly's boyfriend" incident, and the parking lot incident are all prime examples. As described at length above, Neer was reprimanded *repeatedly* for each of those instances. After all, Feet First was so upset with Neer about those incidents precisely *because* she had to be reprimanded about them so many times before she stopped.

The ALJ's final record citation in its pretext analysis suggests that Dr. Keane offered to write a letter of recommendation for Neer upon her termination. Here too, the record requires more scrutiny. The possibility of that letter of recommendation was raised during the February 2, 2006, meeting at which Feet First informed Neer that they did not have a maternity leave policy, and discussed options with her.[98]

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[94] Exhibit 2; *see also* June 26, 2012, Transcript, p. 153-154.
[95] Exhibit D.
[96] June 26, 2012, Transcript, p. 153.
[97] October 25, 2013, Decision, at 27, ¶ 39. The record citation for paragraph 39 (Tr. 99, Vol. II) is identical to the one for paragraph 38, concluding that Neer "received a raise, in part, based on merit." Yet the discussion on page 98 has nothing to do with Neer specifically, but is only a generalized discussion about raises under Feet First's employee manual. Inasmuch as nothing in that portion of the record addresses formal or informal disciplinary actions against Neer, it appears that the citation is simply incorrect.
[98] Exhibit 6; *see also* June 26, 2012, Transcript, p. 68-69.

One of those options, Dr. Keane explained, was to do as some of his other employees in had done in the past, and opt to leave Feet First altogether.[99] As Dr. Keane testified directly: "If you decided to handle it how Karen had or LeeAnn had, that certainly if you were in good standing, that you would receive a recommendation letter, if that's the decision that you made."[100] Thus a recommendation letter was contingent upon how Neer chose to handle the time off she would need for her pregnancy, and *whether she was in good standing*.

The scant evidence the ALJ decision offers as additional evidence of a discriminatory motive in support of the pretext analysis is, in a word, insufficient. It is insufficient to create the weight of authority it is given in the analysis, and it is certainly insufficient to overcome the great weight of evidence showing the legitimate non-discriminatory reasons for Neer's termination.

3. **There is nothing to demonstrate that Feet First's non-discriminatory reasons for Neer's termination were insufficient to explain the termination.**

The third and final prong of the pretext analysis under *Manzer* requires a complainant to demonstrate that the proffered non-discriminatory reasons for the termination would be insufficient to explain the termination. This prong "'ordinarily, consists of evidence that other employees ... were not [disciplined or terminated] even though they engaged in substantially identical conduct to that which the employer contends motivated its [discipline and termination] of the plaintiff.'"[101]

There is no indication however, that the ALJ decision relies on this prong in its pretext analysis. Regardless, there was no evidence of any other employees who had engaged in similar protected activity as Neer and were treated any differently. To the contrary, the evidence confirmed that Neer was treated exactly the same as everyone else as it pertained to the protected

[99] June 26, 2012, Transcript, p. 68-69.
[100] June 26, 2012, Transcript, p. 68-69.
[101] *Mora v. Walgreen Co.* (S.D. Ohio), 2013 WL 1089679, at 11 (quoting *Manzer, supra,* at 1084).

activity that was originally at issue, her pregnancy. There is also no reasonable contention that, absent her pregnancy and contact with an attorney, the toxic atmosphere Neer created in the workplace was insufficient reason to terminate her.

IV. CONCLUSION

Without question, the testimony in this matter has shown that Neer's employment with Feet First was a tumultuous one. Her tenure there was marked by multiple instances of insubordination, combative behavior, and performance problems. Perhaps most disruptive was the conflict she created among coworkers. In other words, as Dr. Keane described it, a "toxic" employment relationship.

That employment history has a critical impact on the discrimination analysis. In this instance, it makes carrying a "but-for" causation burden impossible. Given the extent and nature of Neer's workplace insubordination and performance problems, to suggest that it was solely her contact with an attorney over maternity leave that caused her termination simply defies the evidence.

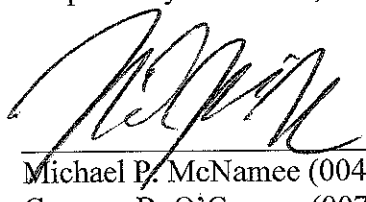
The overwhelming evidence of the toxic workplace atmosphere created by Neer is equally important under the pretext analysis. The facts that led to that atmosphere are scarcely in question. Indeed, Neer freely acknowledges most of them. And the weight of that evidence is overwhelming. In no reasonable sense could it be overcome by the evidence cited in the ALJ decision.

But more troubling is the complete disregard in the ALJ decision of any acknowledgment whatsoever of Neer's long history of insubordination and performance problems. The relegation of that entire employment history to a mere footnote highlights the error of the ALJ decision. It is simply not possible, Feet First contends, to offer a supportable discrimination decision without

any discussion whatsoever of the actual, specific non-discriminatory reasons offered by an employer.

Accordingly, Feet First asks the Commission to affirm in part and disapprove in part the October 25, 2013, decision. Specifically, Feet First requests that the Commission affirm the ALJ decision finding that Feet First did not engage in discrimination under R.C. § 4112.02(A), and to disapprove the ALJ decision finding that Feet First did engage in retaliation under R.C. § 4112.02(I). Feet First further asks that the Commission dismiss the complaint against Feet First altogether.

Respectfully submitted,



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It is hereby certified that a copy of the foregoing was served this 15th day of November 2013, upon the following:

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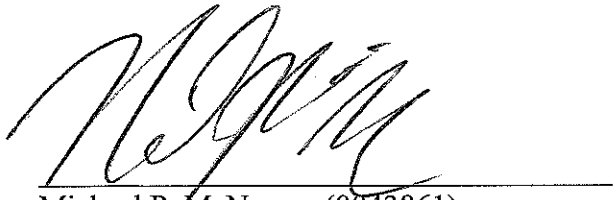

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OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

PAULETTE R. NEER

Complainant

v.

FEET FIRST, INC.

Respondent

Complaint No. 06–EMP–DAY–17651
(DAY) 36022106 (17651) 030206
22A–2006–19657–F

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

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INTRODUCTION AND PROCEDURAL HISTORY

Paulette Neer (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 2, 2006.

The Commission investigated the charge and found probable cause that First Feet, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (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 a Complaint on October 26, 2006.

The Complaint alleged that the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(I).

Respondent filed an Answer to the Complaint on November 22, 2006. 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 June 17, 2008 at the Ohio Civil Rights Commission's Dayton Regional Office, 40 West 4th Centre, 40 West 4th Street, Suite 1900, Dayton, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing consisting of 219 pages; exhibits admitted into evidence during the hearing; and a post-hearing brief filed by the Commission on June 1, 2009. Respondent was not represented by counsel. Respondent did not file a post-hearing brief.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) 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/her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or lack of frankness; and the bias, prejudice and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on March 2, 2006.

2. The Commission determined on September 14, 2006 it was probable Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a podiatry medical office.

5. Daniel Keane, D.P.M. (Dr. Keane) is the only podiatrist in the office.

6. Complainant started working for Respondent as a receptionist on August 2, 2004.

7. Complainant's job duties included receiving patients and visitors, answering telephones, making appointments, receiving payments and issuing receipts.

8. Complainant worked between 32-33 hours per week making $10.00 per hour.

9. On January 17, 2006, Complainant found out she was pregnant. Complainant and her husband already had three (3) children.

10. That day Complainant told coworker Shante Collins (Collins) and Office Manager, Lee Ann Kelly (Kelly). Later that same day other coworkers, Dina Spencer (Spencer) and Pam Talmadge (Talmadge), and Dr. Keane, found out.

11. Dr. Keane and Kelly had a meeting with Complainant on February 2, 2006 in Dr. Keane's office.

12. During the meeting Dr. Keane informed Complainant that after she had the baby her position could not be held open for her.

13. Complainant consulted with Attorney Jason Matthews.

14. Kelly and Talmadge met with Complainant on February 14, 2006, and among other things, inquired why Complainant was being so quiet. Complainant informed them she was upset because she understood she would be losing her job after she gave birth to her baby. (Tr. 33)

15. During the meeting Complainant also stated she had contacted an attorney who would be sending a letter to Dr. Keane explaining what her rights were. (Tr. 32, Comm. Ex. 6)

16. Later that day, Kelly and Tallmadge met with Dr. Keane to discuss the meeting they had with Complainant. (Tr. 107-108)

17. The next day, on February 15, 2006, Kelly called Complainant and told her she did not have to come into work. This was not unusual if the weather was bad. There were a lot of elderly patients who would cancel because of the weather.

18. Complainant then called her attorney and requested he send a letter to Respondent's office via facsimile. (Tr. 34)

19. The letter set forth Complainant's rights as a pregnant employee.

20. On February 16, 2006, Complainant's attorney received a letter, dated that same date, from Respondent indicating Complainant had been terminated. (Tr. 39, Comm. Ex. 12)

CONCLUSIONS OF LAW AND DISCUSSION [1]

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 the testimony of various witnesses is not in accord with the findings therein, it is not credited.

1. The Commission alleged the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(A) and (I).

[1] Any Finding of Fact may be deemed a Conclusion of Law, and any Conclusion of Law may be deemed a Finding of Fact.

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

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the ... sex, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any 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.

Sex/Pregnancy Discrimination

3. The term "because of sex" for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

> Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *McFee v. Nursing Care Management of America, Inc.*, (2010) 126 Ohio St. 3d 183. Thus, reliable, probative and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA).

6. As further guidance, the Commission has adopted regulations on written and unwritten employment policies relating

to pregnancy and childbirth. Ohio Administrative Code (O.A.C.) 4112-5-05(G). One of the central purposes of these regulations is to ensure that female employees are not "penalized in their employment because they require time from work on account of childbearing." O.A.C. 4112-5-05(G)(5).

7. The Commission's pregnancy regulations in O.A.C. 4112-5-05(G) provide, in pertinent part, that:

> Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave of absence policy (...)

8. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The

burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 254, 25 FEP Cases at 116, n.8.

9. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802. In this case, the Commission may establish a *prima facie* case of sex discrimination by proving that:

(1) Complainant was pregnant;

(2) Complainant was qualified for her position;

(3) Respondent subjected Complainant to an adverse employment action; and

(4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

Ensley-Gaines v. Runyon, 72 FEP Cases 602 (6th Cir. 1996).

10. The Commission failed to establish a *prima facie* case of pregnancy discrimination. There was no evidence that Respondent treated non-pregnant employees, similar to Complainant in ability or inability to work, more favorably than her.

11. Employers are not required to give pregnant employees preferential treatment:

> The phrase "treated the same" in R.C. 4112.01(B) ensures that pregnant employees will receive the same consideration as other employees "not so affected but similar in their ability or inability to work." Thus, the statute does not provide greater protections for pregnant employees than nonpregnant employees. (...)
>
> *McFee, supra* at 186, *citing Tysinger v. Zanesville Police Dept.*, (C.A. 6, 2006), 463 F.3d 569, 575; *Accord. Mullet v. Wayne-Dalton Corp.*, (N.D. Ohio 4004), 338 F.Supp. 2d 806, 811; *Armstrong v. Flowers Hosp, Inc.*, (C.A. 11, 1994), 33 F.3d 1308, 1316-1317, and cases cited therein.

12. In Respondent's staff compensation package the only leave granted by Respondent to its employees is vacation leave. (Resp. Ex. C) Respondent does not have a sick leave policy, a maternity leave policy, or a leave of absence policy.

13. Employees are eligible for one week of paid vacation during the second year of employment, two weeks during the third year and thereafter. Vacation time cannot be accrued.

14. Talmadge's job was terminated due to her need to take time off due a medically-related (non-pregnancy) condition. She was later rehired by Respondent.

15. Complainant was told Respondent did not have a leave of absence policy; and if there was a position available, she could be considered for rehire.

16. Respondent's leave policy provided the same leave to pregnant and non-pregnant employees. Respondent's leave policy, therefore, does not discriminate against women based on their sex/pregnancy.

Retaliation

17. The Commission alleged in the Complaint on or about February 15, 2006, an attorney for Complainant contacted Respondent to inquire about matters relating to perceived discrimination on the basis of Complainant's pregnancy. Thereafter, on or about February 16, 2006, Respondent informed Complainant and her attorney that she was terminated.

18. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

> It shall be an unlawful discriminatory practice:
>
> (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.

19. 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).

20. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *McFee, supra.* Therefore, reliable, probative and substantial evidence means evidence sufficient to support a finding of unlawful retaliation under Title VII of the Civil Rights Act of 1964 (Title VII).

21. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas, supra,* for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Burdine, supra.* It is simply part of an evidentiary framework "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*

22. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas, supra.* In this case, the Commission may establish a *prima facie* case of unlawful retaliation by proving that:

(1) Complainant engaged in an activity protected by R.C. Chapter 4112;

(2) The alleged retaliator knew about the protected activity;

(3) Thereafter, Respondent subjected Complainant to an adverse employment action; and

(4) There was a causal connection between the protected activity and the adverse employment action.

Hollins v. Atlantic Co., Inc., 80 FEP Cases 835 (6th Cir. 1999), *aff'd in part and rev'd in part*, 76 FEP Cases 533 (N.D. Ohio 1997) (quotation marks omitted).

23. Complainant engaged in a protected activity by opposing what she believed to be discriminatory conduct.

An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.

EEOC v. Wilson Metal Casket Co., 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

24. The Commission is not required to prove the underlying discrimination claim in cases of retaliation. *Little*, *supra* at 1563; *Drey v. Colt Const. & Development Co.*, 65 FEP Cases 523, 531 (7th Cir. 1994).

25. Respondent knew about Complainant's opposition to what she believed to be a discriminatory employment practice based on the meetings she had with staff on February 14, 2006 and the letter from Complainant's attorney dated February 15, 2006. (Comm. Ex. 10)

26. Respondent terminated Complainant's employment, pursuant to letter dated February 16, 2006. (Comm. Ex. 12)

27. There was a causal connection between Complainant's opposition to what she believed was discriminatory conduct and Respondent terminating Complainant from employment.

28. On February 15, 2006, (the day after Complainant's meeting on February 14, 2006 with Talmadge and Kelley in which

Complainant communicated she believed Respondent's policy regarding no maternity leave was discriminatory and she had contacted an attorney), Kelly called Complainant and told her not to come to work. On that same day Complainant contacted her attorney and asked him to send a letter to Respondent.

29. On February 16, 2006, Respondent sent a letter to Complainant's attorney stating she was fired on February 14, 2006. In the letter there was no performance-based reason for Complainant's termination. However, Respondent did write the following:

> (...) I have never received a complaint such as yours which in my opinion contain slanderous, libelous and defamatory written evidence which at my discretion may necessitate legal action against the party whom you represent in your letter and also against your legal association under O.R.C. 2739.
>
> (Comm. Ex. 12)

30. Respondent's actions after he received the letter from Complainant's attorney were swift and decisive. A reasonable inference can be drawn that Respondent's motive for terminating Complainant's employment was retaliatory.

31. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action. *McDonnell Douglas, supra.* To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.
>
> *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption of unlawful retaliation 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.

32. Respondent met its burden of production with the introduction of evidence that Complainant was terminated because she was uncooperative and dishonest.

33. Respondent having met its burden of production, the Commission must prove Respondent retaliated against Complainant because she engaged in protected activity. *Hicks*, *supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. 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 was false, *and* that ... [unlawful retaliation] was the real reason.
>
> *Hicks*, *supra* at 515, 62 FEP Cases at 102.

34. Thus, even if the Commission proves Respondent's articulated reasons are 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 for the factfinder to answer ....
>
> *Id.*, at 524, 62 FEP Cases at 106.

35. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of unlawful retaliation.

36. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing they had no basis *in fact* or were *insufficient* to motivate the employment decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

> 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.[2]
>
> *Hicks, supra* at 511, 62 FEP Cases at 100 (emphasis added).

37. The Commission may indirectly challenge the credibility of Respondent's reasons by showing the sheer weight of the circumstantial evidence makes it "more likely than not" the reasons are a pretext for unlawful discrimination. *Manzer, supra* at 1084. This type of showing, which tends to prove the reasons did not *actually* motivate the employment decision, requires the Commission produce additional evidence of unlawful discrimination besides evidence that is part of the *prima facie* case. *Id.*

38. There is not a scintilla of credible evidence in the record to support Respondent's reasons for Complainant's termination.

[2] 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* 2749, 62 FEP Cases at 100, n.4.

39. After a careful review of the entire record, the ALJ disbelieves the underlying reasons Respondent articulated for Complainant's discharge and concludes that, more likely than not, they were a pretext or a cover-up for unlawful retaliation.

> [t]he 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 a *prima facie* case, suffice to show intentional discrimination.
>
> *Hicks, supra* at 511, 62 FEP Cases at 100.

40. The ALJ is convinced the Respondent terminated the Complainant in retaliation for opposing what she believed to be a discriminatory practice. Such action constitutes unlawful retaliation and entitles Complainant to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 06-EMP-DAY-17651 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of receptionist. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment. The Commission has calculated damages in the amount of $24,868.21. This calculation is based on Complainant's hourly wage, plus raises offset by interim earnings;[3]

[3] Interest accrues on a back pay award under R.C. 4112.05(G) from the time the party was discriminated against, in order to restore victims to the economic position they would have been in had no discrimination occurred. *Ohio Civil Rights Commission v. David Richard Ingram, D.C.*, (1994), 69 Ohio St. 3d 89, 93.

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount she would have earned had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.[4]

4. The Commission order Respondent to receive training regarding the anti-discrimination laws of the State of Ohio. As proof of its 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

[4] Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

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

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

April 21, 2011

OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

Paulette R. Neer

Complainant

Complaint No. 06-EMP-DAY-17651

v.

Feet First, Inc. P.C.

Respondent

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

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ALJ'S REPORT BY:

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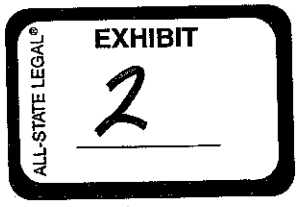

INTRODUCTION AND PROCEDURAL HISTORY

Paulette Neer (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (Commission) on March 2, 2006.

The Commission investigated the charge and found probable cause that First Feet, Inc. (Respondent) engaged in unlawful employment practices in violation of Revised Code Sections (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 a Complaint on October 26, 2006.

The Complaint alleged that the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(I).

Respondent filed an Answer to the Complaint on November 22, 2006. 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 June 17, 2008 at the Ohio Civil Rights Commission's Dayton Regional Office, 40 West 4th Centre, 40 West 4th Street, Suite 1900, Dayton, Ohio.

The record consists of the previously described pleadings; a transcript of the hearing (219 pages) ; exhibits admitted into evidence during the hearing; and a post-hearing brief filed by the Commission on June 1, 2009. Respondent was not represented by counsel. Respondent did not file a post-hearing brief.

On April 21, 2011 the ALJ issued a Report and Recommendation that Respondent had engaged in illegal retaliatory conduct in violation of R.C. 4112.02(I). The Respondent filed Objections on the basis that Dr. Keane (Respondent) was not

afforded the opportunity to testify in his own defense.[1] On July 21, 2011 the Commission remanded the complaint to the ALJ to allow limited testimony by Respondent.[2]

A second hearing was held on June 26, 2012 at the Commission's Dayton Regional Office. The second hearing record consists of a transcript (241 pages); the post-hearing briefs filed by the Commission on August 27, 2012; by Respondent on October 23, 2012; and the Commission's reply brief filed November 2, 2012.

[1] Although the Respondent is a corporation, Dr. Keane refused to obtain the services of legal counsel to represent the Respondent during the first pre-hearing and hearing process.
[2] Commissioner Agenda, July 21, 2012.

FINDINGS OF FACT

The following Findings of Fact are based, in part, upon the Administrative Law Judge's (ALJ) 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/her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed; each witness's strength of memory; frankness or lack of frankness; and the bias, prejudice and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on March 2, 2006.

2. The Commission determined on September 14, 2006 it was probable Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A) and (I).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint after conciliation failed.

4. Respondent is a podiatry medical office.

5. Daniel Keane, D.P.M. (Dr. Keane) is the only podiatrist in the office.

6. Complainant started working for Respondent as a receptionist on August 2, 2004. (Tr. 18, Vol. I)

7. Complainant's job duties included receiving patients and visitors, answering telephones, making appointments, receiving payments and issuing receipts. (Comm. Exhibit 1)

8. Complainant worked between 32-33 hours per week making $10.00 per hour. (Tr. 19, Vol 1)

9. On January 17, 2006, Complainant found out she was pregnant. Complainant and her husband already had three (3) children.(Tr. 25, Vol. 1)

10. That day Complainant told coworker Shante Collins (Collins) and Office Manager, Lee Ann Kelly (Kelly). Later that same day other coworkers, Dina Spencer (Spencer) and Pam Talmadge (Talmadge), and Dr. Keane, found out. (Tr. 25-26, Vol. 1)

11. Dr. Keane and Kelly had a meeting with Complainant on February 2, 2006 in Dr. Keane's office. (Tr. 27-28, Vol. 1)

12. During the meeting Dr. Keane informed Complainant that after she had the baby her position could not be held open for her. (Tr. 29-30, Vol. 1)

13. Complainant consulted with Attorney Jason Matthews.

14. Kelly and Talmadge met with Complainant on February 14, 2006, and among other things, inquired why Complainant was being so quiet. Complainant informed them she was upset because she understood she would be losing her job after she gave birth to her baby. (Tr. 33, Vol. 1)

15. During the meeting Complainant also stated she had contacted an attorney who would be sending a letter to Dr. Keane explaining what her rights were. (Tr. 32, Vol. 1, Comm. Ex. 6)

16. Later that day, Kelly and Tallmadge met with Dr. Keane to discuss the meeting they had with Complainant. (Tr. 107-108. Vol. 1)

17. The next day, on February 15, 2006, Kelly called Complainant and told her she did not have to come into work. This was not unusual if the weather was bad. There were a lot of elderly patients who would cancel because of the weather.

18. Complainant then called her attorney and requested he send a letter to Respondent's office via facsimile. (Tr. 34, Vol. 1)

19. The letter set forth Complainant's rights as a pregnant employee.

20. On February 16, 2006, Complainant's attorney received a letter, dated that same date, from Respondent indicating Complainant had been terminated. (Tr. 39, Vol. 1, Comm. Ex. 12)

CONCLUSIONS OF LAW AND DISCUSSION[3]

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 the testimony of various witnesses is not in accord with the findings therein, it is not credited.

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

1. The Commission alleged the Respondent discharged the Complainant for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected by R.C. 4112.02(A) and (I).

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

It shall be an unlawful discriminatory practice:

> (A) For any employer, because of the ... sex, ... of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any 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.

Sex/Pregnancy Discrimination

3. The term "because of sex" for the purposes of R.C. 4112.02(A) includes, but it is not limited to, discrimination based upon pregnancy, pregnancy-related illnesses, childbirth, or related medical conditions. R.C. 4112.01(B). This division further provides that:

> Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work ....

4. The Commission has the burden of proof in cases brought under R.C. Chapter 4112. The Commission must prove a violation of R.C. 4112.02(A) by a preponderance of reliable, probative and substantial evidence. R.C. 4112.05(G) and 4112.06(E).

5. Federal case law generally applies to alleged violations of R.C. Chapter 4112. *McFee v. Nursing Care Management of America, Inc.*, (2010) 126 Ohio St. 3d 183. Thus, reliable, probative and

substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA).

6. As further guidance, the Commission has adopted regulations on written and unwritten employment policies relating to pregnancy and childbirth. Ohio Administrative Code (O.A.C.) 4112-5-05(G). One of the central purposes of these regulations is to ensure that female employees are not "penalized in their employment because they require time from work on account of childbearing." O.A.C. 4112-5-05(G)(5).

7. The Commission's pregnancy regulations in O.A.C. 4112-5-05(G) provide, in pertinent part, that:

> Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally applied minimum length of service

> requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave (other than its length) and to her return to employment shall be in accordance with the employer's leave of absence policy (...)

8. Under Title VII case law, the Commission is normally required to first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. *McDonnell Douglas Co. v. Greene*, 411 U.S. 792, 5 FEP Cases 965 (1973). The burden of establishing a *prima facie* case is not onerous. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 25 FEP Cases 113, 115 (1981). It is simply part of an evidentiary frame-work "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.* at 254, 25 FEP Cases at 116, n.8.

9. The proof required to establish a *prima facie* case is also flexible and, therefore, may vary on a case-by-case basis. *McDonnell Douglas*, *supra* at 802. In this case, the

Commission may establish a *prima facie* case of sex discrimination by proving that:

> (1) Complainant was pregnant;
>
> (2) Complainant was qualified for her position;
>
> (3) Respondent subjected Complainant to an adverse employment action; and
>
> (4) Respondent treated a non-pregnant employee, similar to Complainant in ability or inability to work, more favorably than her.

Ensley-Gaines v. Runyon, 72 FEP Cases 602 (6th Cir. 1996).

10. The Commission failed to establish a *prima facie* case of pregnancy discrimination. There was no evidence that Respondent treated non-pregnant employees, similar to Complainant in ability or inability to work, more favorably than her.

11. Employers are not required to give pregnant employees preferential treatment:

> The phrase "treated the same" in R.C. 4112.01(B) ensures that pregnant

> employees will receive the same consideration as other employees "not so affected but similar in their ability or inability to work." Thus, the statute does not provide greater protections for pregnant employees than nonpregnant employees. (...)
>
> *McFee, supra* at 186, *citing Tysinger v. Zanesville Police Dept.*, (C.A. 6, 2006), 463 F.3d 569, 575; *Accord. Mullet v. Wayne-Dalton Corp.*, (N.D. Ohio 4004), 338 F.Supp. 2d 806, 811; *Armstrong v. Flowers Hosp, Inc.*, (C.A. 11, 1994), 33 F.3d 1308, 1316-1317, and cases cited therein.

12. In Respondent's staff compensation package the only leave granted by Respondent to its employees is vacation leave. Respondent does not have a sick leave policy, a maternity leave policy, or a leave of absence policy. (Resp. Ex. C)

13. Employees are eligible for one week of paid vacation during the second year of employment, two weeks during the third year and thereafter. Vacation time cannot be accrued.

14. Talmadge's job was terminated due to her need to take time off due a medically-related (non-pregnancy) condition. She was later rehired by Respondent.

15. Complainant was told by Respondent that it did not have a leave of absence policy; and if there was a position available, she could be considered for rehire.

16. Respondent's leave policy provided the same leave to pregnant and non-pregnant employees. Respondent's leave policy, therefore, does not discriminate against women based on their sex/pregnancy.

Retaliation

17. The Commission alleged in the Complaint on or about February 15, 2006, an attorney for Complainant contacted Respondent to inquire about matters relating to perceived discrimination on the basis of Complainant's pregnancy. Thereafter, on or about February 16, 2006, Respondent informed Complainant and her attorney that she was terminated.

18. This allegation, if proven, would constitute a violation of R.C. 4112.02, which provides, in pertinent part, that:

It shall be an unlawful discriminatory practice:

> (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.

19. 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).

20. To establish a case of retaliation, the Commission must prove that:

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

Greer-Burger v. Temesi, 116, 116 Ohio St.3d 324 at para. 13 citing Canitia v. Yellow Freight Sys., Inc. (C.A. 6, 1990), 903 F.2d 1064, 1066 [4]

---

[4] The Ohio Supreme Court holds that federal case law interpreting and applying Title VII is generally applicable to R.C. 4112.02 claims unless the statutory terms are distinguishable. *Genaro v. Cent. Transport, Inc.* (1999), 84 Ohio St. 3d. Accordingly, the Court's recent decision in *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. ___ (2013) is inapplicable to alleged violations of R.C. 4112.02(I).

The Court's rationale is premised on the amendments to the Civil Rights Act of 1991(1991 Act), 105 Stat. 1071 which overruled, in part, *Price Waterhouse v. Hopkins*, 490 U.S. 228 at 259 (1989). The amendments changed the causation standard for status-based discrimination but did not change the causation language of the anti-retaliation provision. The Court reasoned that since the legislature only amended Title VII's status provision, there was no intent to eliminate the "but for causation" standard for the retaliation provision. Ohio law has not undergone similar changes. The language of section 2000e-2(m) is substantially different from R.C. 4112.02 (A). The causation standard announced in *Nassar* is narrow based not only on a strict

21. Under Title VII case law, the evidentiary framework established in *McDonnell Douglas*, *supra*, for disparate treatment cases applies to retaliation cases. This framework normally requires the Commission prove a *prima facie* case of unlawful retaliation by a preponderance of the evidence. The burden of establishing a *prima facie* case is not onerous. *Burdine*, *supra*. It is simply part of an evidentiary framework

---

construction of the statutory language but also on the following policy analysis:

> "[L]essening the causation standard could also contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment." *Id.* Slip. Op. at 18.

R.C. 4112.08 mandates that "this chapter [4112] shall be construed liberally for the accomplishment of its purposes which is to eliminate discrimination in the state of Ohio. *Genaro v. Cent. Transp.*, 84 Ohio St. 3d *293 Helmick v. Cincinnati Word Processing, Inc. (1989), 45 Ohio St. 3d 131, 133, 543 N.E.2d 1212, 1215, Kerans v. Porter Paint Co. (1991), 61 Ohio St. 3d 486, 575 N.E.2d 428, Collins v. Rizkana (1995), 73 Ohio St. 3d 65, 652 N.E.2d 653,*

To apply the *Nassar* analysis to R.C. 4112.02 (I) would result in an interpretation inconsistent with the legislative history of the law. It is a cardinal rule of statutory construction that a statute should not be interpreted to yield a absurd result. *Mishr v. Bd. of Zoning Appeals* (1996), 76 Ohio St.3d 238, 240, 1996 Ohio 400, 667 N.E.2d 365

"intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." *Id.*

22. When Complainant's attorney sent Dr. Keane a letter Complaint engaged in a protected activity by opposing what she believed to be discriminatory conduct.

> An employee is engaged in protected activity if he or she opposes an employer's conduct that he or she has a good faith and reasonable belief is illegal.
>
> *EEOC v. Wilson Metal Casket Co.*, 58 FEP Cases 1523, 1528 (M.D. Tenn. 1992) (citations omitted).

23. The Commission is not required to prove the underlying discrimination claim in cases of retaliation. *Little, supra* at 1563; *Drey v. Colt Const. & Development Co.*, 65 FEP Cases 523, 531(7th Cir. 1994).

24. Respondent knew about Complainant's opposition to what she believed to be a discriminatory employment practice based on the meetings she had with staff on February 14,

2006 and the letter from Complainant's attorney dated February 15, 2006. (Comm. Ex. 10)

25. Respondent terminated Complainant's employment, pursuant to letter dated February 16, 2006. (Comm. Ex. 12)

26. There was a causal (temporal) connection between Complainant's opposition to what she believed was discriminatory conduct and Respondent terminating Complainant from employment.

27. On February 15, 2006, (the day after Complainant's meeting on February 14, 2006 with Talmadge and Kelley in which Complainant communicated she believed Respondent's policy regarding no maternity leave was discriminatory and she had contacted an attorney), Kelly called Complainant and told her not to come to work. On that same day Complainant contacted her attorney and asked him to send a letter to Respondent.

28. On February 16, 2006, Respondent sent a letter to Complainant's attorney stating she was fired on February 14, 2006. In the letter there was no performance-based reason for Complainant's termination. However, Respondent did write the following:

> (...) I have never received a complaint such as yours which in my opinion contain slanderous, libelous and defamatory written evidence which at my discretion may necessitate legal action against the party whom you represent in your letter and also against your legal association under O.R.C. 2739.

(Comm. Ex. 12)

29. Respondent's actions after he received the letter from Complainant's attorney were swift and decisive. A reasonable inference can be drawn that Respondent's motive for terminating Complainant's employment was retaliatory.

> Temporal relationship between a plaintiff's participation in protected activities and a defendant's alleged retaliatory conduct is an important factor in establishing a causal connection.

Gonzales v. State of Ohio, Dept. of Taxation, 78 FEP Cases 1561, 1564 (S.D. Ohio 1998).

30. The Commission having established a *prima facie* case, the burden of production shifted to Respondent to "articulate some legitimate, nondiscriminatory reason" for the employment action. *McDonnell Douglas, supra.* To meet this burden of production, Respondent must:

> ... "clearly set forth, through the introduction of admissible evidence," reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action.
>
> *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507, 62 FEP Cases 96, 103 (1993), *quoting Burdine, supra* at 254-55, 25 FEP Cases at 116, n.8.

The presumption of unlawful retaliation 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.

31. Respondent met its burden of production with the introduction of evidence that Complainant was terminated because she was uncooperative and dishonest.[5]

32. Respondent having met its burden of production, the Commission must prove Respondent retaliated against Complainant because she engaged in protected activity. *Hicks*, *supra* at 511, 62 FEP Cases at 100. The Commission must show by a preponderance of the evidence that Respondent's articulated reasons for Complainant's discharge were not its true reasons, but were a "pretext for ... [unlawful retaliation]." *Id.*, at 515, 62 FEP Cases at 102, *quoting Burdine*, 450 U.S. 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 was false, *and* that ... [unlawful retaliation] was the real reason.

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

[5] Dr. Keane described Complainant's tenure as "toxic" (Tr. 36, Vol.II)

33. Thus, even if the Commission proves Respondent's articulated reasons are 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 for the factfinder to answer ....

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

34. Ultimately, the Commission must provide sufficient evidence for the fact-finder to infer Complainant was, more likely than not, the victim of unlawful retaliation.

35. In order to show pretext, the Commission may directly or indirectly challenge the credibility of Respondent's articulated reasons for Complainant's termination. The Commission may directly challenge the credibility of Respondent's articulated reasons by showing they had no basis *in fact* or were *insufficient* to motivate the employment

decision. *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994). Such direct attacks, if successful, permit the fact-finder to infer intentional discrimination from the rejection of the reasons without additional evidence of unlawful discrimination.

> 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.[6]

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

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

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[6] 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* 2749, 62 FEP Cases at 100, n.4.

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

37. There is not a scintilla of credible evidence in the record to support Respondent's reasons for Complainant's termination.

38. Complainant received a raise, in part, based on merit. (Tr. 99, Vol. II)

39. Complainant was never disciplined formally or informally. (Tr. 99, Vol. II)

40. Although Dr. Keane testified that he would not give a recommendation letter to someone who did not deserve it, he was prepared to give Complainant a letter of recommendation. (Tr. 150, Vol. II)

41. The ALJ is convinced that Respondent terminated the Complainant in retaliation for opposing what she believed to be a discriminatory practice.

42. The Respondent's conduct constitutes unlawful retaliation and the Complainant is entitled to relief as a matter of law.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 06-EMP-DAY-17651 that:

1. The Commission order Respondent to cease and desist from all discriminatory practices in violation of R.C. Chapter 4112;

2. The Commission order Respondent to make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of receptionist. If Complainant accepts Respondent's offer of employment, Complainant shall be paid the same wage she would have been paid had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment. The Commission has calculated damages in the amount of $24,868.21. This calculation is based on Complainant's hourly wage, plus raises offset by interim earnings;[7]

[7] Interest accrues on a back pay award under R.C. 4112.05(G) from the time the party was discriminated against, in order to restore victims to the economic

3. Whether Complainant accepts Respondent's offer of employment, Respondent shall submit to the Commission within 10 days of the offer of employment a certified check payable to Complainant for the amount she would have earned had she been employed as a receptionist on February 14, 2006 and continued to be so employed up to the date of Respondent's offer of employment, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law.[8]

4. The Commission order Respondent to receive training regarding the anti-discrimination laws of the State of Ohio. As proof of its 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

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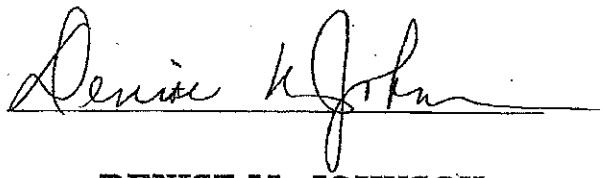
position they would have been in had no discrimination occurred. *Ohio Civil Rights Commission v. David Richard Ingram, D.C.*, (1994), 69 Ohio St. 3d 89, 93.

[8] Any ambiguity in the amount that Complainant would have earned during this period or benefits that she would have received should be resolved against Respondent. Likewise, any ambiguity in calculating Complainant's interim earnings should be resolved against Respondent.

submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order.



DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

October 25, 2013

FEET FIRST, INC PC

2130 LEITER RD.
STE. 201
MIAMISBURG, OHIO 45342
PH (937)847-5551
FAX (937)847-8635

Office Manager documentation in regards to Paulette Neer:

August-September 2004: Trained Paulette for front desk receptionist. I instructed her on how to answer the telephone. Make appointments. Handle problems as they arise. There are other employees that were helping her as well.

I told Paulette that her job is a very important part of a team effort to help service our patients needs.

October of 2004: I spoke to Paulette about handing out brochures for Avon products. Our office manual clearly states no solicitations while on the time clock. She tried to hand out brochures at lunch or before she Was on the time clock. This continued, even after Dr. Keane had told her to stop, while working. We asked her to please sell Avon products after working hours. She stopped for a couple of months, but continued to solicit her Avon products.

November 2004: I spoke to Paulette in regards to these patient charts not being updated. Her job description is to update insurance

EXHIBIT 3

EXHIBIT 2

EXHIBIT 4

information, get an updated signature on file, demographic information and medication lists.

These patient were not updated: Angus C., LouiseT., Emmet F., Adam M., Beverly L., Marquetta L., Mary G., Betty C.

December 2004: I spoke to Paulette in regards to these patients charts:

Martha H. and Helen G. both had appointments they canceled but was not written as to why they missed their appointments.

Thomas Wilson was updated but information was not put into the computer. Leo B. had the wrong information put into the computer. Mildred G. was not updated at all. I explained to Paulette that it is very important to get updated medication lists. After working her

For several months she should be able to get this information correct.

I also had to speak to Paulette in regards to employee Shelly Smith. Shelly was hired in December right before Christmas 2004. Paulette had been heckling Shelly. Saying that she and Dr. Keane are boyfriend/girlfriend. Shelly would deny this allegation. Paulette would continue to heckle her. I had to ask Paulette to stop it. Paulette said, "well its true". I told Paulette that it was not true. It is a blatant untruth and it creates diversity and animosity at the work place which is unnecessary. Shelly was quite upset. Paulette said that she would stop talking about this however, she continued with hurtful innuendoes and sarcasm. We explained to her this isn't conducive to a healthy work

environment. Dr. Keane and Shelly are both single and adults not what they do their own time is their own business.

May 2005, Spoke to Paulette in regards to several issues we are having:

We have a policy about scheduling Luncheons with drug company representatives. She did not follow this policy. She was told to talk to the Office Manager before scheduling. We have had to remind her several times. I told her if she can not handle the representatives at the window to call me up front, and I can talk with them.

Dr. Keane wanted to give Paulette a project to do. She was going to be in charge of organizing Dr. Keane continuing medical education courses. This is very important for this practice, Dr. Keanes license to practice is dependent upon. Paulette was very excited, she was grateful for the responsibility. I told her that when she did have information we would meet with Dr. Keane again to discuss what she had found out.

June 2005, spoke to Paulette in regards to her wanting to take her vacation before her one year anniversary. Dr. Keane said this would be okay, but she will not be given another one weeks paid vacation for this year.

III-F3

We set up a meeting with Dr. Keane and Paulette in regards to the CME courses. Paulette did not have any more information than what was given to her in the folder Doctor had provided to her in May 2005. I asked her why she didn't have this done. She said she didn't know what to do? I told her that if she was having trouble she needed to ask me. She hadn't.

August 2005, spoke to Paulette in regards to her employee review. I reminded her to get complete information when doing updates to patient charts. This is very important. I gave her a fair review. I told her to be aware of the problems she has had this year and to try and correct these problems.

September 2005, spoke to Paulette in regards to patients charts not being updated: These charts were not updated:

Shirley W.-patient became medicare eligible but this was not found out until we sent the insurance claim, Paulette never entered this data into the computer. We found out 3 months later. Her medication and allergies were not updated we had to call her primary care doctor to find out.

December 2005, spoke to Paulette in regards to these problems we are having:

I had an office meeting in regards to updates which were in the office manual. I instructed everyone to read and sign the office manual. I wanted to make sure everyone was aware of the physicians office building

employee parking spots. Also our compensation for uniforms was changing from us picking out what we want at any dollar amount, we are now getting a check for a set amount for each employee.

I had to remind Paulette several times to sign the manual.

These patients were not updated: Robert S., Mary G., Michael M., John S., Arthur R.

I told Paulette that this is very important and she really needs to figure out a way to find time to get this information updated. We are not that inundated with patients for her not to have time. I showed her how she can copy the information then put in the computer when she has time, at least by the end of the day. Paulette said she didn't think she could do this.

I also had to remind her again not to solicit the Avon in the office.

Paulette said she hasn't been feeling well so she hasn't been up to her best job performance. I told her if she needed to she could let me know and I will come up front and relieve her when she needs relief. She said she would not give brochures on the clock.

III-F5

January 2006: I had to speak to Paulette in regards to a parking lot problem. We are instructed to park in the Physician Building employee

Parking lot. This information was updated for 2006 in our employee office manual. We have clear designated parking areas. Dr. Keane and Paulette were coming in to the office at the same time when Dr. Keane noticed Paulette was parking in a visitors parking spot. He mentioned to Paulette that she is not suppose to park there. Paulette said "so". Dr. Keane said, "I am serious." Paulette continued to walk in to work. Dr. Keane told Paulette that she need to moved her car immediately. She did not move her car. I asked Paulette again to move her car. She still sat there and said"really I don't see what the problem is,"she said. I had to finally threaten to call security on her if she didn't go and move her car.

Security called the next day instructing all of our employees to get parking passes from their office. So we did.

It seems that Paulette is very unhappy here. She doesn't want to follow our office policies. I have told her numerously her job responsibilities and I feel that I can't instruct her any more than I have. She really doesn't want to learn anything new or help out as a team member. We are a team of care providers here. I have told her several times. I am very frustrated with her performance and I feel she is causing more problems here that needs to be.

III-F6

February 2006: After Paulette left I have found more, and more charts with out updates: Arthur S., Hazel K., E.S., Garland H., David T., Chad B., Roberta P., Patty A., Angela P., Charles H.. Paulette mailed foot pads to Susan S.

This patient did not request us to mail these. We are not sure who wanted these pads. This cost us $22.07 for nothing. If she would have checked in her chart she might have noticed this patient did not require foot pads.

March-April 2006 still finding on a daily basis more incomplete charts. Patients were being told to sign forms they did not need to sign for medicare. I believe the instructions that were given to Paulette from Palmetto GBA-Medicare were not read by Paulette. If she would have read them she would have known what to do. These patients were not updated: Mary , Troy O, Mary , Janice J.

Attorney General's Response To Objections

STATE OF OHIO
CIVIL RIGHTS COMMISSION

IN THE MATTER OF:	:	COMPLAINT NO. 06-EMP-DAY-17651
Paulette Neer,	:	Chief Administrative Law Judge: Denise M. Johnson
Complainant,	:	
vs.	:	
Feet First, Inc., P.C.,	:	
Respondent.	:	

OHIO ATTORNEY GENERAL'S RESPONSE TO RESPONDENT'S OBJECTIONS

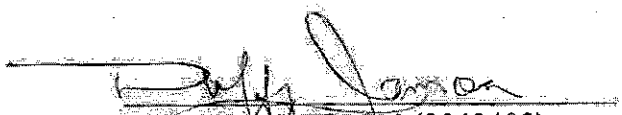
The reason why Dr. Keane fired Paulette Neer was because her attorney wrote a letter complaining about pregnancy discrimination. (Exhibit 10). Dr. Keane made his retaliatory intent clear in his termination letter, by stating that he had never received a [pregnancy discrimination] complaint which contained such "slanderous, libelous and defamatory written evidence" and which "may necessitate legal action" against Ms. Neer. (Exhibit 12, ¶4). His retaliatory animus magnified when he wrote that Ms. Neer was "no longer welcome on the premises of Feet First, Inc. PC." (Exhibit 12, ¶6). If she returned to the office, Dr. Keane threatened to call security and to file a legal action to restrain her. (Id). Instead of allowing Ms. Neer to pick up her belongings, Dr. Keane wrote that her personal effects and last pay check would be sent to her attorney's office. (Id). Dr. Keane concluded his letter by "thanking" Ms. Neer's attorney "in advance" for notifying his client that she was terminated. (Exhibit 12, ¶7). Such extreme actions were not taken against Ms. Neer because she was allegedly insubordinate – it was taken against her because she complained about pregnancy discrimination.

Despite this "smoking gun" evidence of retaliatory intent, Respondent objects to the Administrative Law Judge's Report (ALJ Report) because Ms. Neer allegedly had a record of insubordination. However, all of Respondent's arguments have already been fully considered and rejected by the ALJ at two separate hearings. In direct response to Respondent's objections, the ALJ found that there was "not a scintilla of credible evidence in the record to support Respondent's reasons for Complainant's termination." (ALJ Report pg. 27, ¶37). The ALJ supported this conclusion with her findings that Ms. Neer received a raise (partially based on merit), that she had never been disciplined, and that Dr. Keane was prepared to give her a letter of recommendation. (ALJ Report pg. 27, ¶38-40). These findings establish pretext.

In short, the Commission should reject the Respondent's objections. The attached termination letter demonstrates that Dr. Keane fired Ms. Neer because she complained about pregnancy discrimination. As the ALJ found, the letter does not discuss insubordination, it assails her pregnancy discrimination complaint. Therefore, the Commission should not only order the remedies recommended by the ALJ, it should also order that a certified copy of the cease and desist order be sent to the State Medical Board pursuant to O.A.C. 4112-3-10(B)(1)(b).

Respectfully submitted,

MIKE DEWINE
ATTORNEY GENERAL OF OHIO



DUFFY JAMIESON (0042408)
Assistant Chief, Civil Rights Section
30 East Broad Street, 15th Floor
Columbus, Ohio 43215-3428
Telephone: (614) 466-7900
duffy.jamieson@ohioattorneygeneral.gov

Certificate of Service

This is to certify that a true copy of the Ohio Attorney General's Response to Respondent's Objections was served by placing copies in the United States Mail, postage prepaid, on this 26th day of November, 2013, upon the following:

Jeffrey M. Silverstein and Associates
Jason Matthews, Esq.
627 Edwin Moses Blvd., Suite 2-C
Dayton, OH 45408
Counsel for Complainant; and

Michael P. McNamee, Esq.
McNamee & McNamee, PLL
2625 Commons Boulevard
Beavercreek, OH 45431
Counsel for Respondent

Duffy Jamieson
Civil Rights Section

JEFFREY M. SILVERSTEIN AND ASSOCIATES
Attorneys at Law

Jeffrey M. Silverstein
Jason P. Matthews

Leisyl A. Jackson, Paralegal

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Dayton, OH 45408
(937) 228-3731
(937) 228-2252 FAX

jeff@silversteinlaw.com
jason@silversteinlaw.com
leisyl@silversteinlaw.com

February 15, 2006

Daniel Keane, DPM
Feet First, Inc.
Sycamore Hospital Doctors Bldg.
2130 Leiter Road, Suite 201
Miamisburg, OH 45342

RE: Paulette Neer

Dear Dr. Keane,

Paulette Neer has retained our office to represent her in matters relating to her employment with Feet First, Inc. ("Feet First") Ms. Neer has sought legal counsel from our office as a result of a meeting that was held with her approximately two weeks ago. During that meeting you advised her that if she required more than two weeks off work due to complications relating to her pregnancy she would have to resign from her position and you also informed her that Feet First had no maternity leave policy and she will be required to resign from her employment prior to giving birth.

Ohio law prohibits discrimination in the workplace on the basis of sex. Ohio Revised Code Section 4112 applies to all employers employing at least four persons. Pregnancy discrimination is recognized as a form of sex discrimination under O.R.C. § 4112 against females. It is apparent to Ms. Neer that she is being unlawfully discriminated against due to her pregnancy in that Feet First does not maintain a maternity leave policy and non-pregnant employees have been afforded extended leaves absence whereas she is not being provided the same opportunity to remain employed with the company.

It is Ms. Neer's desire to continue her employment with Feet First following her pregnancy. On behalf of Ms. Neer, I respectfully request that Feet First comply with

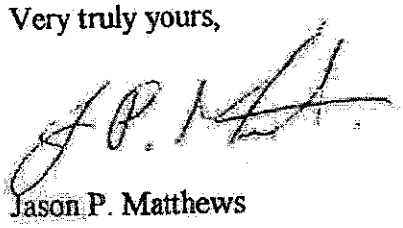
COMMISSION EXHIBIT

10

F

Ohio law and not take any adverse employment action against her due to her pregnancy. If you have any questions or would like to discuss this matter please contact me.

Very truly yours,



Jason P. Matthews

JPM:laj
C: Paulette Neer

F

FEET FIRST, INC. P.C.

DANIEL J. KEANE, D.P.M.
Diplomate, American Board of Podiatric Surgery
Board Certified in Foot Surgery

Sycamore Hospital
Doctor's Building, Suite 201
2130 Leiter Road
Miamisburg, Ohio 45432

(937) 847-5551
Fax (937) 847-8635
www.feetfirstincpc.com

February 16, 2006

Jeffrey M. Silverstein and Associates
627 S. Edwin C. Moses Blvd.
Suite 2-C
Dayton, Ohio 45408

RE: Ms. Paulette Neer

Dear Mr. Jeffrey M. Silverstein and Associates:

I want to thank you for your letter dated February 15, 2006 regarding the above referenced individual.

As you are aware, Ohio is an "at-will" State. At-will employees may be terminated for any reason, so long as it's not illegal.

As of February 14, 2006, Ms. Neer, had been terminated from Feet First, PC, Inc.. I assure you that Ms. Neer's termination was legal and in accordance with local, state and federal law.

I have been in practice for over fifteen years, and have had at least four employees who have had pregnancies over that time. One of them is presently my Office Manager. In fact when my present office manager left the practice due to pregnancy she held the position of receptionist, the same as your client, Ms. Neer. Upon her return after two and one half years she was re-hired and is now Certified Medical Office Manager. Feet First, Inc., PC has never had a leave of absence policy, for any reason, which I am certain as an Attorney you should know is perfectly legal and not required by law. Additionally, Feet First, Inc.,PC, nor any of its employees or representatives have ever been in violation of O.R.C. 4112 or discriminated against any person. I have never received a complaint such as yours which in my opinion contain slanderous, libelous and defamatory written evidence which at my discretion may necessitate legal action against the party whom you represent in your letter and also against your legal association under O.R.C. 2739.

In your letter you claim that non-pregnant employees have been afforded extended leaves of abscence. This is simply not true. I re-iterate, Feet First, Inc., PC has never had a leave of absence policy for any reason, pregnancy or not. Additionally in your letter you claim that I advised Ms. Neer that she would be required to resign her position , this is not true. In fact, Ms. Neer's claims have no basis in fact or law.

My office will forward Ms. Neer's personal effects and last paycheck to your office. Additionally, as Ms. Neer's representative, I am informing you that she is no longer welcome on the premises of Feet First, Inc. PC. If she happens to violate this policy Sycamore Hospital Security will be notified and civil actions will be considered to restrain your client.

I wish you a pleasant day, and thank you in advance for your notifying your client, Ms. Neer, of her termination and our office's policy regarding her presence on our premises.

Cordially,

Dr. Daniel J. Keane II

COMMISSION EXHIBIT

12

Ohio Civil Rights Commission

Governor
John Kasich

April 9, 2014

Corrected Letter

Jason Matthews
Jason P. Matthews, LLC
130 W. Second Street, Suite 924
Dayton, Ohio 45402

RE: Paulette R. Neer v. Feet First, Inc. PC
Complaint No. 06-EMP-DAY-17651

This corrected letter replaces the previous letter that was mailed on April 4, 2014. Due to a typographical error, the previous letter erroneously contained language stating it was a Dismissal Order as opposed to a Cease and Desist Order. Therefore, the previous letter issued is VACATED.

Enclosed is a certified copy of the Commission Order issued in this matter. This Order requires Respondent to **Cease & Desist** from any and all practices involving the violation of Chapter 4112 of the Ohio Revised Code.

Respondent is herewith notified of its right to obtain judicial review of this Order, as set forth in Revised Code § 4112.06.

FOR THE COMMISSION

Desmon Martin/pjw
Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section
Compliance [Martin – Kanney – Woods]

Certified No. 7003 1010 0000 4149 4691

Ohio Civil Rights Commission

Governor
John Kasich

April 9, 2014

Corrected Letter

Feet First, Inc. PC
c/o Michael P. McNamee, Esq.
Gregory B. O'Connor, Esq.
McNamee & McNamee, PLL
2625 Commons Boulevard
Beavercreek, Ohio 45431

RE: Paulette R. Neer v. Feet First, Inc. PC
Complaint No. 06-EMP-DAY-17651

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FOR THE COMMISSION

Desmon Martin/pjw
Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section
Compliance [Martin – Kanney – Woods]

Certified No. 7003 1010 0000 4149 4707

Ohio Civil Rights Commission

Governor
John Kasich

April 9, 2014

Corrected Letter

Daniel Keane
Feet First, Inc. PC
4000 Miamisburg-Centerville Road, Suite 201
Miamisburg, Ohio 45342

RE: Paulette R. Neer v. Feet First, Inc. PC
Complaint No. 06-EMP-DAY-17651

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FOR THE COMMISSION

Desmon Martin/pjw
Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

cc: Denise M. Johnson, Chief Administrative Law Judge
Lori A. Anthony, Esq., Chief – Civil Rights Section
Compliance [Martin – Kanney – Woods]

Certified No. 7003 1010 0000 4149 4714

Ohio Civil Rights Commission

Governor
John Kasich

April 4, 2014

Jason Matthews
Jason P. Matthews, LLC
130 W. Second Street, Suite 924
Dayton, Ohio 45402

RE: Paulette R. Neer v. Feet First, Inc. PC
DAYE602210(17651)030206
22A-2006-19657
Complaint No. 06-EMP-DAY-17651

The enclosed Order dismissing Complaint No. 06-EMP-DAY-17651 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting April 3, 2014.

This case is closed.

FOR THE COMMISSION

Desmon Martin/pjw

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

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

Ohio Civil Rights Commission

Governor
John Kasich

G. Michael Payton, Executive Director

April 4, 2014

Feet First, Inc. PC
c/o Michael P. McNamee, Esq.
Gregory B. O'Connor, Esq.
McNamee & McNamee, PLL
2625 Commons Boulevard
Beavercreek, Ohio 45431

RE: Paulette R. Neer v. Feet First, Inc. PC
DAYE602210(17651)030206
22A-2006-19657
Complaint No. 06-EMP-DAY-17651

The enclosed Order dismissing Complaint No. 06-EMP-DAY-17651 the above captioned matter was issued by the Ohio Civil Rights Commission at its meeting April 3, 2014.

This case is closed.

FOR THE COMMISSION

Desmon Martin/pjw

Director of Enforcement & Compliance
Ohio Civil Rights Commission

DM/pjw
Enclosure

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

Ohio Civil Rights Commission

Governor
John Kasich

April 4, 2014

Daniel Keane
Feet First, Inc. PC
4000 Miamisburg-Centerville Road, Suite 201
Miamisburg, Ohio 45342

RE: Paulette R. Neer v. Feet first, Inc. PC
DAYE602210(17651)030206
22A-2006-19657
Complaint No. 06-EMP-DAY-17651

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Enclosure

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

John Kasich, Governor

IN THE MATTER OF:	)	
	)	
Paulette R. Neer,	)	COMPLAINT NO. 06-EMP-DAY-17651
	)	
Complainant,	)	
	)	
vs.	)	
	)	
Feet First, Inc. P.C.	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

This matter came before the Commission at its March 13, 2014 meeting. The record in this case consists of Complaint and Notice of Hearing No. 06-EMP-DAY-17651; the official record of the evidentiary hearings held on June 17, 2008, and June 26, 2012, and all pleadings and exhibits thereto; the post-hearing briefs filed by the Commission on June 1, 2009 and August 27, 2012; the post hearing brief filed by Respondent on October 23, 2012; the Commission's reply brief filed on November 2, 2012; the objections filed by Respondent on November 16, 2013; the responses to those objections filed by the Attorney General's Office on November 27, 2013; and the Chief Administrative Law Judge's Report and Recommendations dated April 21, 2011 and October 25, 2013.

The complaint alleges that Respondent discharged Ms. Neer for reasons not equally applied to all persons without regard to their sex (pregnancy) and in retaliation for having engaged in activity protected R.C. 4112.02(I). After the evidentiary hearings, the Chief Administrative Law Judge recommended that the Commission dismiss the allegation as it related to pregnancy discrimination and issue a cease and desist as it related to retaliation.

After careful consideration of the entire record, the Commission hereby adopts the Administrative Law Judge's Recommendations. Therefore, the Commission incorporates the findings of fact, conclusions of law, and the recommendations for relief contained in the Administrative Law Judge's reports as if fully rewritten herein.

The Commission orders the following relief:

1. Respondent shall cease and desist from all discriminatory practices in violation of R.C. Chapter 4112.
2. Respondent shall make an offer of employment to Complainant within 10 days of the Commission's Final Order for the position of receptionist.
3. Respondent shall pay Ms. Neer damages for lost wages in the amount of $24,868.21, including any raises and benefits she would have received, less her interim earnings, plus interest at the maximum rate allowed by law, from February 14, 2006 to the date of Respondent's offer of employment, which shall be submitted to the Commission via certified check, payable to Complainant, within 10 days of the offer of employment.
4. Respondent shall receive training regarding the anti-discrimination laws of the State of Ohio. Respondent shall submit certification from the trainer or provider of services to show that Respondent has successfully completed the training. The

letter of certification shall be submitted to the Commission's Compliance Department within seven (7) months of the date of the Commission's Final Order.

This ORDER issued by the Ohio Civil Rights Commission this 3rd day of April, 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 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: 4/4/2014

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Desmon Martin
Director of Enforcement and Compliance
Ohio Civil Rights Commission

DATE: 4/9/2014