OHIO CIVIL RIGHTS COMMISSION

IN THE MATTER OF:

KARLEY T. WALKER

Complainant

v.

CARR'S CORNER RESTAURANT

Respondent

Complaint No. 08–EMP–DAY–19925
(DAY) 76 (19925) 04092008
22A–2008–03157–C

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

Karley T. Walker (Complainant) filed a sworn charge affidavit with the Ohio Civil Rights Commission (the Commission) on April 9, 2008.

The Commission investigated the charge and found probable cause that Carr's Corner Restaurant, c/o Connie Carr, Owner (Respondent) engaged in unlawful employment practices in violation of Revised Code Section (R.C.) 4112.02(A).

The Commission attempted, but failed to resolve this matter by informal methods of conciliation. The Commission subsequently issued a Complaint on February 4, 2009.

The Complaint alleged that Respondent subjected Complainant to different terms, conditions, and privileges of employment, based on her sex in violation of R.C. 4112.02(A).

Respondent filed an Answer to the Complaint on May 29, 2009. Respondent admitted certain procedural allegations, but denied that it engaged in any unlawful discriminatory practices. Respondent also pled affirmative defenses.[1]

A public hearing was held on October 1, 2009 at the City of Xenia Council Chambers Conference Room, 101 North Detroit Street, Xenia, Ohio.

The record consists of the previously described pleadings, a transcript of the hearing consisting of 44 pages, exhibits admitted into evidence during the hearing, and a post-hearing brief filed by the Commission on October 13, 2009. Respondent did not attend the hearing.

[1] On July 10, 2009, Respondent's counsel filed a Motion to Withdraw as Counsel. The Motion was granted on October 29, 2009. On July 19, 2009, Respondent filed for bankruptcy protection under Chapter 13 in the United States Bankruptcy Court, Southern District of Ohio, Western Division at Dayton. The Commission was served with a Notice of Filing In Bankruptcy on July 27, 2009.

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 or her testimony appeared to consist of subjective opinion rather than factual recitation. She further considered the opportunity each witness had to observe and know the things discussed, each witness's strength of memory, frankness or lack of frankness, and the bias, prejudice, and interest of each witness. Finally, the ALJ considered the extent to which each witness's testimony was supported or contradicted by reliable documentary evidence.

1. Complainant filed a sworn charge affidavit with the Commission on April 9, 2008.

2. The Commission determined that it was probable that Respondent engaged in unlawful discrimination in violation of R.C. 4112.02(A).

3. The Commission attempted to resolve this matter by informal methods of conciliation. The Commission issued the Complaint on February 4, 2009 after conciliation failed.

4. Complainant started working for Respondent in March of 2006 when she was fifteen (15) years old.

5. When she was first hired she washed dishes and later bussed tables. (Tr. 8, 10)

6. Michael Thornton (Thornton) was re-employed by Respondent as the head cook in 2007 after he was released from jail. (Tr. 12-13)

7. Thornton rented the house next door to the restaurant from Connie Carr, the owner of Respondent.

8. Thornton worked at the restaurant nearly every day. (Tr. 13-14)

9. At the beginning of their work relationship Complainant and Thornton were congenial toward one another even though he would greet her in the morning by saying “good morning, beautiful”. (Tr. 15-16)

10. However, after a few months Thornton hit Complainant on the butt when she was bent over. (Tr. 15-16)

11. Complainant found Thornton’s conduct to be weird. She asked him why he did that and he kind of laughed and did not say anything. (Tr. 16)

12. Thornton hit Complainant on the butt at least once a week, and then started saying things to her that Complainant described as “nasty”:

> (…) I’d do you until your eyes pop out of your head, (…)
> (Tr. 16)

(…) I remember one time he just was talking about my private parts and just like saying I'd bet you taste so good (…) (Tr. 17)

(…) he didn't say private – he'd say like pussy (…) (Tr. 17)

13. Thornton made these types of comments to Complainant at least once or twice a week. (Tr. 17)

14. Complainant responded to Thornton by walking away, or cussing at him, or telling him to leave her alone. (Tr. 17)

15. On the last time that Thornton grabbed Complainant's buttocks, November 27, 2007, she started crying. She told the main waitress what happened. Shortly after when Carr came into the restaurant Complainant told her.

16. Carr attempted to console Complainant by giving her a "big hug" and telling her that it was no big deal and that it happened all the time. (Tr. 20)

17. Carr told Complainant that Thornton had tried to do the same thing to her eighteen (18) year old granddaughter. (Tr. 20)

18. Because Complainant was upset Carr let her go home.

19. When Complainant told her father, he called Carr and asked her what she was going to do about Thornton.

20. Carr told Complainant's father that if it ever happened again she would take action but that she was not going to do anything. (Tr. 21)

21. Complainant did not return to work because she felt uncomfortable working in the same environment with Thornton.

22. In December of 2007 Complainant went to the police and filed a complaint against Thornton. Thornton pled guilty and spent two days in jail. Thornton is now registered as a sexual offender. (Tr. 23)

23. When Complainant worked at Respondent's restaurant she earned $6.00 per hour, plus tips. She worked 35-40 hours per week. (Tr. 24-25)

CONCLUSIONS OF LAW AND DISCUSSION

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

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

1. The Commission alleged in the Complaint that Respondent subjected Complainant to different terms, conditions, and privileges of employment, based on her sex and in violation of R.C. 4112.02(A).

2. 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:
>
> (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.

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

4. Federal case law generally applies to alleged violations of R.C. Chapter 4112. Columbus Civ. Serv. Comm. v. McGlone (1998), 82 Ohio St.3d 569. Therefore, reliable, probative, and substantial evidence means evidence sufficient to support a finding of unlawful discrimination under Title VII of the Civil Rights Act of 1964 (Title VII).

5. Sexual harassment is sex discrimination and prohibited by R.C. Chapter 4112. Ohio Adm. Code (O.A.C.) 4112-5-05(J)(1); *Cf. Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) (sexual harassment is sex discrimination under Title VII). There are two forms of sexual harassment: *quid pro quo* and hostile work environment. *Id.*, at 65. The latter form of sexual harassment, which the Commission alleges in this case, recognizes that employees have the "right to work in an environment free of discriminatory intimidation, ridicule, and insult." *Id.*

6. O.A.C. 4112-5-05 defines sexual harassment based on a hostile work environment, in pertinent part:

(J) Sexual harassment.

(1) Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

(c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Whether the alleged conduct constitutes sexual harassment is determined on a case-by-case basis by examining the record as a whole and the totality of the circumstances. O.A.C. 4112-5-05(J)(2).

7. In order to create a hostile work environment, the conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *quoting Meritor*, *supra* at 67. The conduct must be unwelcome. *Meritor*, *supra* at 68. The victim must perceive the work environment to be hostile or abusive, and the work environment must be one that a reasonable person would find hostile or abusive. *Harris*, *supra* at 21-22.

8. In examining the work environment from both subjective and objective viewpoints, the fact-finder must examine "all the circumstances" including the employee's psychological harm and other relevant factors such as:

> ... the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.
>
> *Id.*, at 23.

This inquiry also requires "careful consideration of the social context" in which the particular behavior occurred since the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships." *Oncale v. Sundowner Offshores Services, Inc.*, 118 S.Ct. 998 (1998).

9. A hostile work environment is usually "characterized by multiple and varied combinations and frequencies of offensive exposures." *Rose v. Figgie International*, 56 FEP Cases 41, 44 (8th Cir. 1990).

10. I find Thornton's conduct toward Complainant to have been unwelcome verbal and physical contact of a sexual nature that was severe and pervasive. Thornton's conduct unreasonably interfered with Complainant's work performance and created an intimidating, hostile and offensive work environment.

11. Even though Complainant was subjected to a hostile work environment, Respondent would not be liable for [the alleged harasser's] conduct unless it knew or should have know of the conduct and failed to take immediate and appropriate remedial action. *Pierce v. Commonwealth Life Ins. Co.*, 66 FEP Cases 600 (6th Cir. 1994). O.A.C. 4112-5-05(J)(4) provides:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the work place where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.

(See also O.A.C. 4112-5-05(J)(3))

12. In the instant case Carr did nothing. In fact she gave tacit consent to Thornton's egregious behavior by telling Complainant that the same thing had happened to her granddaughter, that it was no big deal, and that it happened all the time. (Tr. 20)

13. Although Complainant was the victim of unlawful discrimination, Respondent is not liable for back pay unless she was constructively discharged. Normally, employees who are subjected to unlawful discrimination must remain on the job while they seek legal redress. *Brooms v. Regal Tube Co.*, 50 FEP Cases 1499 (7th Cir. 1989). However, an employee may be compelled to resign when confronted with an "aggravated situation beyond ordinary discrimination." *Id.*, at 1506 (citation omitted); *See also Yates v. AVCO Corp.*, 43 FEP Cases 1595, 1600 (6th Cir. 1987) ("proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors") (citation omitted). This is known as a constructive discharge.

14. When there is an allegation of constructive discharge, the fact-finder must examine "the objective feelings of [the] employee and the intent of the employer." *Wheeler v. Southland Corp.*, 50 FEP Cases 86, 88 (6th Cir. 1989), *quoting Yates*, *supra* at 1600. To meet the objective standard, the Commission must show that the:

> working conditions ... [were] so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.
>
> *Yates*, *supra* at 1600, *quoting Held v. Gulf Oil Co.*, 29 FEP Cases 837, 841 (6th Cir. 1982).

15. To meet the intent requirement, the Commission must show that a "reasonable employer would have foreseen that a reasonable employee (or this employee, if facts peculiar to her are known) would feel constructively discharged." *Wheeler*, *supra* at 89. In other words, an employer "must necessarily be held to intend the reasonably foreseeable consequences of its actions." *Hukkanen v. International Union of Operating Engineers*, 62 FEP Cases 1125 (8th Cir. 1993).

16. Complainant testified about how Thornton's conduct made her feel in the work place:

> Judge Johnson: Okay, I have a question for Complainant. After the first incident when Mr. Thornton touched you, when you had to come to work after that, did you feel anxious about coming to work? Did you – how did that make you feel in terms of –
>
> Ms. Walker: I guess I did feel anxious about coming to work. I just didn't feel comfortable. But after it kept going on, it just kept getting worse. Like it just kind of built up.
>
> Judge Johnson: So would you say that the anxiety sort of distracted you from focusing on your task?
>
> Ms. Walker: Yes, definitely.
>
> Judge Johnson: And that the anxiety sort of created fears that lurking around the corner there might be Mr. Thornton waiting to touch you or to say things to you that you did not want him to say to you?
>
> Ms. Walker: Yeah, definitely.
>
> (Tr. 27)

17. I find that Complainant was constructively discharged. Complainant was fifteen (15) years old at the time the alleged discriminatory conduct occurred. When she finally could not take the verbal and physical sexual conduct continuously directed at her

she attempted to seek corrective action from Carr. Carr did nothing.

RECOMMENDATIONS

For all of the foregoing reasons, it is recommended in Complaint No. 08-EMP-DAY-19925 that:

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

2. On the date of the hearing Complainant testified about her interim earnings, and the Commission calculated her back pay damages at $5,580.00; and

3. Commission order Respondent within 10 days of the Commission's Final order to issue a certified check payable to Complainant for the amount she would have earned had she been employed as a busser on December 1, 2007 and continued to be so employed up to the date of the Commission's Final Order,

including any raises and benefits she would have received, less interim earnings, plus interest at the maximum rate allowed by law.[3]

DENISE M. JOHNSON
CHIEF ADMINISTRATIVE LAW JUDGE

November 4, 2009

[3] 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.