[Cite as *Jennings v. Indus. Comm. of Ohio,* 2009-Ohio-2350.]

Court of Claims of Ohio
The Ohio Judicial Center
65 South Front Street, Third Floor
Columbus, OH 43215
614.387.9800 or 1.800.824.8263
www.cco.state.oh.us

SUPRIX JENNINGS

Plaintiff

v.

THE INDUSTRIAL COMMISSION OF OHIO, et al.

Defendants
Case No. 2006-03788

Judge Clark B. Weaver Sr.

DECISION

{¶ 1} Plaintiff brought this action against defendant, the Industrial Commission of Ohio (ICO), alleging that she was terminated from her position of Claims Examiner 2 on the basis of her race in violation of R.C. 4112.02. The issues of liability and damages were bifurcated and the case proceeded to trial on the issue of liability.[1]

{¶ 2} Plaintiff, an African American, testified that she began working for ICO on November 30, 1992, as a clerk, and that she was promoted to customer service representative, then word processor, and finally to claims examiner. She stated that she learned how to perform her duties by watching and training with Shirley Balser and Ed Kozarevic. Plaintiff's supervisor, Gloria Pope, is also an African American. Plaintiff was terminated after Pope notified defendant's department of Human Resources (HR) that plaintiff had performed work on her husband's workers' compensation claim.

[1]At the close of plaintiff's case, defendant moved the court to dismiss the case pursuant to Civ.R. 41(B)(2). The court denied the motion as to Count One of plaintiff's complaint; however, Count Two was dismissed for want of subject matter jurisdiction.

Specifically, plaintiff was found to have violated the "Code of Ethics, Proper Handling of Claims Policy and the policies and procedures regarding COEMP claims." (Defendants' Exhibit J.) Although the parties dispute the exact definition of the term, several current and former employees testified that the term "COEMP" referred to a compensation claim that was filed on behalf of an injured employee or a relative of an employee of the Bureau of Workers' Compensation (BWC) or of ICO.

{¶ 3} On the day she worked on her husband's file, plaintiff was updating files in order that they could be placed on the docket and set for hearing. Plaintiff admits that she performed some routine data entry procedures in reference to her husband's file; however, she maintains that she was unaware of defendant's Code of Ethics or of any policy prohibiting her from working on her husband's claim.

{¶ 4} Defendant's Code of Ethics states, in part:

{¶ 5} "(A) It is essential that the public has confidence in the administration of the (ICO) and the (BWC). This public confidence depends in a large degree on whether the public trusts that employees of these agencies are impartial, fair, and act only in the interest of the people, uninfluenced by any consideration of self-interest * * *

{¶ 6} "(B) * * * [Employees] must avoid not only impropriety, but the appearance of impropriety.

{¶ 7} "* * *

{¶ 8} "(G) It is understood that standards of ethical conduct may involve a myriad of situations. * * * The overall intent of this code of ethics is that employees avoid any action, whether or not prohibited by the preceding provisions, which result in, or create the appearance of:

{¶ 9} "(1) Using public office for private gain, or

{¶ 10} "(2) Giving preferential treatment to any person, entity, or group."

{¶ 11} Plaintiff denies having had any specific intent to promote or to assert influence over her husband's claim; rather, she stated that she inadvertently worked on the file when she was temporarily assigned to another area to fill in for an absent co-worker. Plaintiff further maintains that she never received training on the Code of Ethics and that she never received or read the employee handbook which contains the proper handling of claims policy.

{¶ 12} Defendant's Proper Handling of Claims Policy states, as follows:

{¶ 13} "We, as public employees, are always under the close scrutiny of the public. We must, therefore not only avoid improper handling of claims but also avoid the appearance of impropriety.

{¶ 14} "Some examples of this type of handling would be handling one's own claim, or handling a relative's claim, both of which would give the appearance of impropriety. No claim should receive any partial treatment or treatment different from the norm unless there is a proven hardship or to correct some undue delay. **Actions on claims such as those described above require Section Manager approval.**

{¶ 15} "Employees need to be impartial in the handling of claims and avoid all favoritism. Employees are informed of the Code of Ethics during orientation and are expected to abide by it." (Emphasis in original.) (Defendants' Exhibit C.)

{¶ 16} Plaintiff contends that her husband's file was not marked COEMP when it came to ICO for processing. In addition, plaintiff contends that she did not act in any improper manner inasmuch as her husband's claim was uncontested by the employer and she did not attempt to use her position to influence the outcome of the claim. Plaintiff relates that she understood the term COEMP to mean that the claimant was an employee of either BWC or ICO, and she maintains that was unaware that the term also was used to designate claims filed by relatives of employees, including spouses. Plaintiff also alleges that other employees were not disciplined for similar conduct. Thus, plaintiff concludes that she was treated differently than other employees in that she was subjected to more severe discipline than others who committed the same or a similar infraction of defendant's internal policies.

{¶ 17} According to defendant, when a claim of an employee or a relative of an employee comes from BWC to ICO already marked COEMP, the file is then routed immediately to the nearest regional office for processing. Defendant contends that even if the file were not stamped COEMP, as soon as plaintiff became aware that her husband's file was at the Canton office, she had a responsibility to notify her supervisor in order that the file could be transferred. Defendant maintains that there are several policies in place to prevent any preferential treatment and to ensure that all claims are treated in a fair and impartial manner. Further, defendant asserts that the Code of

Ethics is strictly enforced such that all employees are expected to perform their job duties in a professional manner without any impropriety or even the appearance of impropriety. Indeed, defendant notes that the disciplinary grid mandates either suspension or termination for the first offense that constitutes a violation of the Code of Ethics. (Plaintiff's Exhibit 9, Defendants' Exhibit F.) Defendant argues that plaintiff was discharged for the stated violations and that race was not a factor in the termination.

{¶ 18} Former R.C. 4112.02(A) states: "It shall be an unlawful discriminatory practice: (A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry 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."

{¶ 19} Disparate treatment discrimination has been described as "the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin." *Teamsters v. United States* (1977), 431 U.S. 324, 335-336, fn. 15. In a disparate treatment case, liability depends upon whether the protected trait actually motivated the employer's decision. *Hazen Paper Co. v. Biggins* (1993), 507 U.S. 604, 610. For example, the "employer may have relied upon a formal, facially discriminatory policy that required adverse treatment" of protected employees, or the "employer may have been motivated by the protected trait on an ad hoc, informal basis." Id. "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Id.

{¶ 20} Plaintiff did not present direct evidence of racial discrimination in this case. In addition, both Pope and Laurie Worcester, the pre-disciplinary hearing officer, testified quite credibly that plaintiff's race was not a factor throughout the entire investigation of the matter and that plaintiff was not terminated on the basis of her race. In order to establish discrimination in a disparate treatment case, plaintiff initially has the burden of proving a prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 252-253. Without direct evidence of racial

discrimination, plaintiff was required to show: 1) that she was a member of a protected class; 2) that she suffered an adverse employment action; 3) that she was qualified for the position she lost; and 4) either that she was replaced by a person outside the class or that a comparable non-protected person was treated more favorably after engaging in the same or similar conduct. See, e.g., *McDonell Douglas Corp. v. Green* (1972), 411 U.S. 792, 802; *Mitchell v. Toledo Hosp.* (C.A.6, 1992), 964 F.2d 577, 582.

{¶ 21} Plaintiff satisfies the first two factors of a prima facie case. She is a member of a protected class and she was terminated from her position. Although defendant contends that plaintiff did not fulfill the third element, the court disagrees. Defendant argues that plaintiff was not performing her job duties satisfactorily and as support for this contention, defendant references plaintiff's disciplinary history. Plaintiff received both verbal and written reprimands for tardiness and a written reprimand for violating the workplace violence policy when she allegedly engaged in a heated discussion in the office with a co-worker. Plaintiff denies that she committed a violation of the workplace violence policy and insists that Pope accused her unjustly. The testimony of plaintiff's co-worker, Stephanie Henderson, corroborated plaintiff's version of the events. In addition, the court finds that nearly all of the tardiness infractions involve plaintiff arriving from one to eight minutes late for work. The court further finds that plaintiff worked in the claims office for several years, that she had learned how to perform tasks associated with the various aspects of claims processing, and that she was called upon to fill in for other co-workers when they were absent. Upon review of the testimony and evidence presented, the court finds that plaintiff has met her burden with respect to the third factor.

{¶ 22} As for the fourth element, plaintiff alleges that other employees committed violations of ICO policies and either were not disciplined at all or were disciplined less severely than plaintiff. Plaintiff first identifies Gwen Jones, an African American employed as a customer service representative in the Canton office, who allegedly worked on her own husband's claim but was not disciplined. Pope avers that Gwen Jones informed her that her husband's claim had been sent to the Canton office and the claim was transferred to and processed at the Cleveland office. Pope maintains that

Jones was not disciplined because she did not work on the claim and she notified her supervisor in a timely manner.

{¶ 23} Another example offered by plaintiff involves the allegation that an employee at the Akron office worked on the file of the son of a former employee and was not subjected to discipline. The file was eventually transferred to another office. The former employee is mixed race and the Akron office employee, Althea Daniels, is African American. Pope testified that she does not supervise Daniels.

{¶ 24} Finally, plaintiff asserts that another claims examiner, Dawn McQueen, openly worked on the claim of Rochelle Steiner, McQueen's son's fiancee. According to plaintiff, McQueen most certainly handled the claim file and allegedly attempted to influence the outcome of the case by supplementing the file with additional documentation. The claim was heard in the Canton office and McQueen was not disciplined.[2] Pope testified that she did not learn of McQueen's involvement with Steiner's claim until her deposition in February 2007. Notwithstanding, Pope contends that Steiner was not McQueen's relative and thus the claim file would not have been marked COEMP. In addition, Pope claims that McQueen did not attempt to influence the hearing officer, rather she merely placed a note in the file alerting the hearing officer that an additional document had been added to the file. (Plaintiff's Exhibit 11.)

{¶ 25} As stated above, there are two methods available to satisfy the fourth element necessary to prove a prima facie case of discrimination. Defendant contends that plaintiff has failed to meet her burden with respect to either one. According to defendant, plaintiff failed to prove that she was replaced by a non-protected person. Pope testified that plaintiff was replaced by Charles Jamison, an African American. Upon cross-examination, Pope admitted that Jamison now works in the Columbus regional office. Plaintiff cites to *Smith v. Goodwill Industries of the Miami Valley, Inc.* (1998), 130 Ohio App.3d 437, wherein the court held that the short-term replacement of a protected-class employee did not break the chain of events sufficiently to defeat a race discrimination claim. In that case, the employer had appealed the trial court's ruling that upheld the hearing officer's determination of race discrimination. The court referenced the hearing officer's conclusion that "'the installation of an untrained

[replacement] for a minuscule period of time did not break the chain of events sufficiently to conclude that [the employee] was replaced by someone within the protected class.' The hearing examiner found that the *McDonnell Douglas/Burdine* test was not intended to be rigid, mechanized or ritualistic such that [the replacement's] five-day employment as Janitorial Contracts Coordinator compelled the conclusion that [the employee] had been replaced by someone of her own race or prohibited looking further into Goodwill's employment patterns. Applying these standards, the hearing examiner concluded that [the employee] had made a prima facie showing that she had been replaced by someone outside the protected class notwithstanding [the replacement's] very brief employment as Janitorial Contracts Coordinator." Id. at 442-443.

{¶ 26} Upon review of the testimony and evidence, the court finds that plaintiff failed to submit sufficient probative evidence for the court to determine the length of time that Jamison remained in the position and whether the duration of time was so brief as to compel further investigation regarding whether Jamison was replaced by a non-protected person.

{¶ 27} Turning to the alternate method to evidence the fourth element necessary to prove a prima facie case of racial discrimination, the court notes that the law in Ohio is clear that it is not enough for plaintiff to show that comparable non-protected persons engaged in conduct of equal seriousness and received more lenient treatment. Rather, "plaintiff must show that the 'comparables' are similarly-situated in all respects. *Stotts v. Memphis Fire Department*, (C.A. 6, 1988), 858 F.2d 289. Thus, to be deemed 'similarly-situated,' the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." (Citations omitted.) *Mitchell*, supra, at 583.

{¶ 28} With the exception of McQueen, none of the examples offered by plaintiff qualify as similarly-situated employees who engaged in like conduct inasmuch as the named individuals either did not have the same supervisor, were not in the same job

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[2]Plaintiff did not identify McQueen's race during the presentation of her case-in-chief. Pope testified upon cross-examination during defendant's case presentation that McQueen is a Caucasian.

classification as plaintiff, or did not work on a relative's claim in violation of ICO's claims-handling policy and the Code of Ethics.

{¶ 29} McQueen did not testify at trial, nor did the hearing officer whom she allegedly attempted to influence. The court did not permit plaintiff to introduce hearsay evidence and, as such, plaintiff failed to produce credible testimony or evidence to substantiate her allegation that McQueen actually engaged in improper conduct or attempted to influence the outcome of Steiner's claim. The court notes that if such acts had occurred, such conduct clearly constitutes a violation of ICO's Code of Ethics by the appearance of impropriety and the lack of impartiality mandated by ICO's policies.

{¶ 30} The court also relies, in part, upon the testimony of Michael Jones, a staff hearing officer in the Canton region. Jones testified quite candidly and convincingly that a violation of the Code of Ethics was a very serious offense that could result in termination inasmuch as no hint of impropriety was tolerated by the ICO. Jones explained that it was his understanding that employees were never permitted to work on a relative's or close friend's case. Even though there is no written prohibition against working on a friend's case, he explained that he would not do so because such would appear to be improper. Nevertheless, upon review of all the testimony and the exhibits submitted, the court is compelled to conclude that plaintiff has not presented sufficient evidence to prove that a similarly-situated employee who was not a member of plaintiff's protected class was treated more favorably after engaging in like misconduct.

{¶ 31} Even assuming that plaintiff had proven a prima facie claim of race discrimination, defendant may avoid liability by producing evidence of a legitimate, nondiscriminatory reason for its action. *Burdine*, supra, at 253.

{¶ 32} Pope denies having any animosity toward plaintiff and denied that race was a factor in plaintiff's termination. Pope testified that in regard to tardiness of employees, all time slips went to HR and HR tracks tardiness and sends a report to the supervisor. She explained that as part of her normal duties, she also reviews the draft copies of orders and any subsequent edited copies to ascertain the quality of work performed by the word processors she supervises. During one such review, she noticed a claim for Richard Jennings had been processed in the Canton office and that plaintiff had completed some data entry functions in relation to the claim. Pope then

questioned plaintiff whether this was indeed a relative's claim since, if so, plaintiff should not have worked on it and the claim should never have been heard in the Canton office. Indeed, Pope insisted that she had never before had an instance made known to her where an employee worked on a relative's claim. Pope asserted that after confirming Jennings' relationship with plaintiff, she then informed the regional manager, George Oryshkewych, of the matter and communicated with employees of ICO's HR department, including Sue Newell and Laurie Worcester. (Defendants' Exhibits I, O, and P.)

{¶ 33} Plaintiff received notice that a recommendation for discipline (including termination) had been made and that she would be granted an opportunity to refute the allegations made against her. Plaintiff argued that her husband's claim was uncontested by the employer and that she did not exert any influence or alter the outcome of his case in any way. Plaintiff testified that she had never received an employee handbook, that she was not familiar with the Code of Ethics and that she believed COEMP was used only to denote claims of employees. According to defendant, plaintiff received an employee handbook prior to orientation and that the Code of Ethics and other policies were provided to plaintiff during orientation. (Defendants' Exhibits G and S.) Pope testified that plaintiff turned in her copy of the handbook when she was terminated. (Defendants' Exhibit U.) Pope also stated that if an employee did not have an identification badge or an employee handbook to turn in, she would note that on the form.

{¶ 34} Laurie Worcester testified that she served as the pre-disciplinary hearing officer and that plaintiff was present along with Pope and a union representative, Laverna Styles. She related that such a meeting is held to determine if just cause exists to impose discipline more severe than a verbal or written warning. Worcester prepared a report and concluded that discipline should be imposed. (Defendants' Exhibit B.) According to Worcester, her report along with plaintiff's history of disciplinary actions was reviewed by the appointing authority for the purpose of deciding the extent and severity of the discipline to be imposed. (Defendants' Exhibit J.) Finally, Worcester asserted that she held no personal or professional animosity toward plaintiff and that, in her opinion, plaintiff's race was not a factor in her termination.

{¶ 35} Based upon the testimony and evidence presented, the court finds that defendant clearly established a legitimate, nondiscriminatory basis for termination of plaintiff's employment. To the extent that plaintiff argues that she should have received a suspension rather than termination, the court has previously acknowledged that it may not substitute its judgment for that of an employer and may not second-guess the business judgments of employers making personnel decisions. *Dodson v. Wright State Univ*. (1997), 91 Ohio Misc.2d 57. Plaintiff acknowledged that a violation of the Code of Ethics was punishable by either suspension or removal for the first offense. Plaintiff did not present any evidence that the appointing authority's decision was based upon plaintiff's race. In short, defendant has met its burden.

{¶ 36} Having so found, the court must next determine whether plaintiff demonstrated by a preponderance of the evidence that the reasons offered by defendant were not its true reasons, but were a pretext for discrimination. *McDonnell Douglas,* supra, at 804. The court must find either: "'(1) that the proffered reason had no basis in fact, (2) that the proffered reason did not actually motivate the discharge, or (3) that the proffered reason was insufficient to motivate the discharge.'" *Owens v. Boulevard Motel Corp*. (Nov. 5, 1998), Franklin App. No. 97APE12-1728, quoting *Frantz v. Beechmont Pet Hosp.* (1996), 117 Ohio App.3d 351, 359.

{¶ 37} Plaintiff acknowledged that she had received several verbal and written reprimands for tardiness culminating in a one-day, working suspension in July 2002 for continued tardiness. Plaintiff conveyed that she had numerous disagreements with Pope regarding plaintiff's attire and that plaintiff had filed grievances over these matters. Pope testified that on one occasion she witnessed plaintiff and another employee engaged in a heated exchange in the office and that, as a consequence, both employees were given written reprimands inasmuch as ICO maintains a zero tolerance policy for incidents of workplace violence. In addition, Pope testified that the same employee, Dawn McQueen, has been disciplined for tardiness, workplace violence and suspended for ten days for failure to cooperate with an investigation conducted by HR.

{¶ 38} According to plaintiff, Pope also resented the fact that plaintiff aired her complaints about departmental procedures in meetings that were attended by some employees from other regions. Plaintiff listed incidents that she said contributed to the

racial disharmony in that Pope did not allow plaintiff to take her break at the same time as Stephanie Henderson and that Pope admonished plaintiff for placing magazines in the break room that were geared for an African American audience. Pope stated that she denied plaintiff and Henderson the opportunity to take breaks together because such arrangement would compromise maintaining coverage in the office.

{¶ 39} Plaintiff also asserts that there was a vast conspiracy put in place by Pope and McQueen to have plaintiff fired. This testimony is simply not credible.[3] According to plaintiff, Pope and McQueen managed to set in motion a series of events that included falsifying documents and arranging work assignments in order that plaintiff would be placed in the position where she would be confronted with her husband's file. The court finds that plaintiff's entire theory lacks credibility and that her testimony was not believable. Moreover, neither Pope nor Worcester was responsible for making the decision to terminate plaintiff's employment. Further, the court notes that had plaintiff merely taken the file to her supervisor or even notified a supervisor that her husband's claim was in the Canton office, plaintiff would not have been subject to discipline.

{¶ 40} In addition, the court found plaintiff's testimony less than credible in many other areas including her statement that she did not recognize her husband's claim despite the fact that her own address appeared on the computer screen in front of her, that she did not receive or return an employee handbook, that she was unaware of the claims handling policy, that Pope orchestrated the workplace violence reprimand as a means to punish either McQueen or plaintiff, or that she did not know it was improper for her husband's claim to processed in the Canton office.

{¶ 41} Shirley Balser, a retired claims examiner who trained plaintiff, testified that Pope had been her supervisor and that she had worked on files in the Canton office. She verified that files are marked COEMP when the file contains a claim for an employee of ICO or a relative of an employee. She stated that the files usually came to ICO from BWC already marked COEMP and that if a file of a relative or employee came into the office it was to be sent to another office within the state. The court is convinced

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[3]A trier of facts "who hears a witness testify may believe any, any part or none of the testimony given." *Ross v. Biomet-Ross, Inc*., (Dec. 4, 1989) Logan App. No. 8-88-12, citing *Cleveland Heights v. Friedman* (June 15, 1955), Cuyahoga App. No. 23406.

that plaintiff had to have known prior to the day of the hearing that her husband's claim was being heard in the Canton office; however, plaintiff professed to be unaware that this was a violation of ICO policies or of the Code of Ethics.

{¶ 42} Upon review, the court finds that the totality of the evidence demonstrates that defendant's proffered reasons were based in fact, that they were not a pretext, and that they were sufficient to justify plaintiff's termination. In the final analysis, plaintiff failed to prove by a preponderance of the evidence that she was discriminated against on the basis of her race, that she was treated less favorably as a result of her race, or that the decision to terminate her employment was racially motivated. Defendant has provided ample evidence to demonstrate that there was no racial bias involved in the decision to terminate plaintiff's employment, to document that she had been appropriately disciplined, and to substantiate its contentions that plaintiff's actions constituted serious violations of defendant's established policies including the Code of Ethics. Accordingly, judgment shall be rendered in favor of defendants.

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Case No. 2006-03788

Judge Clark B. Weaver Sr.

JUDGMENT ENTRY

This case was tried to the court on the issue of liability. The court has considered the evidence and, for the reasons set forth in the decision filed concurrently herewith, judgment is rendered in favor of defendants. Court costs are assessed against plaintiff. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

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CLARK B. WEAVER SR.
Judge

cc:

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