IN THE COURT OF COMMON PLEAS

TUSCARAWAS COUNTY, OHIO

GENERAL TRIAL DIVISION

WILKSHIRE DAY CARE, INC., dba THROUGH THE YEARS CHILD CENTER,	:	CASE NO. 2017 AA 03 0210
	:	**JUDGE EDWARD EMMETT O'FARRELL**
PETITIONER (RESPONDENT BELOW)	:	
	:	
vs.		
	:	**DECISION**
OHIO CIVIL RIGHTS COMMISSION,	:	
RESPONDENT	:	

INTRODUCTION AND PROCEDURAL HISTORY

This matter is an appeal under R.C. 4112.06 from a Cease and Desist Order issued by the Ohio Civil Rights Commission (hereafter "Commission") in Complaint Nos. 15-EMP-AKR-37534 and 15-EMP-AKR-41423 on 2/23/2017.

Complainant Theresa S. Cordero, n.k.a. Petrullo (hereafter "Cordero") filed a sworn charge affidavit with the Commission on 7/9/2014, alleging that she was terminated by Wilkshire Day Care, Inc., dba Through The Years Child Center (hereafter "Wilkshire") based on her disability.

Cordero filed another sworn charge affidavit with the Commission on 11/14/2014, alleging that Wilkshire retaliated against her for filing the previous charge with the Commission.

On 2/19/2015, the Ohio Civil Rights Commission issued a Letter of Determination finding that it was probable that Wilkshire engaged in an unlawful discriminatory practice under Ohio Revised Code Section 4112 and ordered the matter scheduled for conciliation. However, conciliation was unsuccessful and the Commission issued complaints on 4/23/2015.

A public hearing was held on 1/20/2016 and 1/21/2016 before Chief Administrative Law Judge Denise Johnson on the complaints.

On 9/8/2016, the Chief Administrative Law Judge issued Findings of Fact, Conclusions of Law, and Recommendations. Wilkshire filed timely objections.

The Commission reviewed the Administrative Law Judge's report and recommendation at a meeting on 1/12/2017.

On 2/23/2017, the Commission issued a **Cease and Desist Order**, which adopted the Chief Administrative Law Judge's Findings of Fact, Conclusions of Law and Recommendations and ordered Wilkshire Day Care, Inc. to do the following:

(1) Cease and Desist from all discriminatory practices in violation of R.C. Chapter 4112;

(2) Offer Complainant a full-time Teacher's Aide position, and if Complainant accepts this offer, pay her the same wage she would have earned had she not been terminated, and instead become employed as a full-time Teacher's Aide a year after her start date;

(3) Within 10 days of the Commission's Final Order, submit to the Commission a certified check payable to the Complainant in the amount that Complainant would have earned had she not been terminated from her position as Teacher's Aide.

(a) Based on Addendum A and the record in this matter, this back pay amount is $19,427.73 through January 13, 2017. This amount will continue to increase by $123.00 a week until July 1, 2017. At that time, and at every July 1st thereafter, the amount will increase by $10.00 a week, pursuant to the annual increases for Teacher's Aide as set forth in the record

(b) Accrual of back pay shall continue until Respondent offers Complainant a full-time Teacher's Aide position, which she either rejects or accepts and begins working as a Teacher's Aide at full-time hours;

(4) Ensure all staff shall receive training on Ohio's anti-discrimination laws within six months of the date of the Commission's Final Order, and as proof of participation, submit certification from the trainer or provider of services that Respondent's employees have successfully completed the training. The letter of certification shall be submitted to the Commission's Compliance Department within seven months of the date of the Commission's Final Order; and

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

An **Oral Hearing** was held on 10/27/2017. Cordero was present in the Courtroom and was represented by **William G. Puckett**, Attorney at Law, Columbus, Ohio. Petitioner, Wilkshire, was represented by **Dan Guinn**, Attorney at Law, New Philadelphia, Ohio. The Commission was represented by Senior Assistant Ohio Attorney General **David A. Oppenheimer**, Cleveland, Ohio.

The Court has reviewed and considered the following filings of the parties:

- 3/24/2017 **Petition for Judicial Review** filed by Wilkshire against the Commission, seeking judicial review as provided in R.C. 4112.06.
- 7/17/2017 **Petitioner's Brief in Support of Appeal**
- 8/15/2017 **Appellate Brief of the Ohio Civil Rights Commission**
- 9/11/2017 **Petitioner's Rebuttal Brief**

Wilkshire urges the Court to conclude that:

- The Cease and Desist Order issued by the Commission should be overturned.
- Cordero was not a qualified disabled person as there was no evidence presented that Cordero could safely perform the job without supervision.
- Cordero's visual impairment was a direct threat to the safety of the children at Wilkshire's child care center.
- Cordero failed to meet her burden regarding accommodations, and she was not unlawfully terminated because she did not properly request accommodations for her visual impairment from Wilkshire.
- The amount of past wages allegedly owed to Cordero is speculative and not properly calculated because she was never promised that she would be made a full-time employee nor that she would make anything higher than minimum wage.
- The Order to make Wilkshire offer Cordero a full-time position is improper as well as a violation of Wilkshire's right to run its business as it sees fit.

The Commission urges the Court to conclude that:

- The Commission's Final Order should be upheld because it is supported by reliable, probative and substantial evidence in the record.
- There is reliable, probative and substantial evidence that Wilkshire violated the law when it terminated Cordero due to her disability.
- Wilkshire did not engage in a required individual assessment of Cordero or interact with her to determine if she could safely perform the teacher's aide position prior to terminating her.

- Licensing rules did not call for Cordero's termination.
- Cordero asked for accommodations when she faced obstacles at work, but she was not given a chance to do so when she was terminated.
- Cordero was the subject of unlawful retaliation.
- Wilkshire is responsible for its attorney's conduct.
- The record supports the Commission's determination as to the amount of back pay and its determination that Wilkshire must hire Cordero as a full-time teacher's aide.

The Court reviewed the complete 982-page Record of the Administrative Proceedings filed in this matter, including the Transcript of the Hearing held on 1/20/2016 and 1/21/2016, Commission's Exhibits Nos. 1 to 37, and Wilkshire's Exhibits A and B.

CONCLUSIONS OF LAW

1. It shall be an unlawful discriminatory practice for an employer to discharge any person without just cause because of his or her disability. R.C. 4112.02(A).

2. "The elements necessary to prove both a claim under ADA and Section 4112.02(A) of the Ohio Revised Code are the same." *Allen v. Deerfield Mfg.*, 424 F. Supp. 2d 987, 998 (S.D. Ohio Mar. 28, 2006), citing *Rosso v. A.I. Root Co.*, 97 Fed. Appx. 517, 521 (6th Cir.), cert. denied, 543 U.S. 1001, 125 S. Ct. 617 (2004). "To establish a claim under the ADA [or R.C.4112.02(A)], a plaintiff must show (1) that she is disabled within the meaning of the Act; (2) that she is qualified to perform the essential functions of the job either with or without accommodation; and (3) that she has suffered adverse employment action because of the disability." *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 948 (8th Cir. 1999), citing *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995).

3. R.C. 4112.01(A)(13) provides that "'[d]isability' means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment."

4. R.C. 4112.02(E)(1) provides that it shall be an unlawful discriminatory practice for any employer to elicit or attempt to elicit any information concerning the disability of an applicant for employment prior to employment except if based on a bona fide

occupational qualification certified in advance by the commission.

5. R.C. 4112.05(G)(1)(a) provides as follows:

(a) If, upon all reliable, probative, and substantial evidence presented at a hearing under division (B) of this section, the commission determines that the respondent has engaged in, or is engaging in, any unlawful discriminatory practice, whether against the complainant or others, the commission shall state its findings of fact and conclusions of law and shall issue and, subject to the provisions of Chapter 119. of the Revised Code, cause to be served on the respondent an order requiring the respondent to do all of the following:

(I) Cease and desist from the unlawful discriminatory practice;

(ii) Take any further affirmative or other action that will effectuate the purposes of this chapter, including, but not limited to, hiring, reinstatement, or upgrading of employees with or without back pay, or admission or restoration to union membership;

(iii) Report to the commission the manner of compliance.

If the commission directs payment of back pay, it shall make allowance for interim earnings.

6. R.C. 4112.06(E) provides that "[t]he findings of the commission as to the facts shall be conclusive **if supported by reliable, probative, and substantial evidence** on the record and such additional evidence as the court has admitted considered as a whole." (Emphasis added)

7. "Pursuant to R.C. 4112.06(E), a trial court must affirm a finding of discrimination under R.C. Chapter 4112, if the finding is supported by reliable, probative and substantial evidence on the entire record." *Ohio Civ. Rights Comm. v. Case W. Res. Univ.*, 76 Ohio St.3d 168, 177, 1996-Ohio-53, 666 N.E.2d 1376, citing *Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 421 N.E.2d 128 (1981); *See also T. Marzetti Co. v. Doyle*, 37 Ohio App.3d 25, 29, 523 N.E.2d 347 (10th Dist.1987).

8. "[D]etermining whether an agency order is supported by reliable, probative and substantial evidence essentially is a question of the absence or presence of the requisite quantum of evidence. Although this in essence is a legal question, inevitably it involves a consideration of the evidence, and to a limited extent would permit a substitution of judgment by the reviewing Common Pleas Court. In undertaking this hybrid form of review, the Court of Common Pleas must give due deference to the administrative resolution of evidentiary conflicts." *Univ. of Cincinnati v. Conrad*, 63 Ohio St.2d 108, 111, 407 N.E.2d 1265 (1980).

9. The federal Americans with Disabilities Act ("ADA") is similar to Ohio's law, and Ohio courts have looked to regulations and cases interpreting the federal Act for guidance in interpreting the Ohio law. *City of Columbus Civ. Serv. Comm'n v. McGlone,* 82 Ohio St.3d 569, 573, 1998-Ohio-410, 697 N.E.2d 204.

10. R.C. 4112.02(K) provides that "[n]othing in divisions (A) to (E) of this section shall be construed to require a person with a disability to be employed or trained under circumstances that would significantly increase the occupational hazards affecting either the person with a disability, other employees, the general public, or the facilities in which the work is to be performed, or to require the employment or training of a person with a disability in a job that requires the person with a disability routinely to undertake any task, the performance of which is substantially and inherently impaired by the person's disability."

11. If R.C. 4112.02(K) is "relied upon to refuse to hire or train a disabled person, it is the employer's burden to establish the manner and degree to which such occupational hazards would be increased. Objective standards must be used to evaluate any such increased hazards. Only 'significant' increases in hazards justify refusal to hire or train. Thus, the hazard must be reasonably foreseeable with a significant probability of happening." O.A.C. 4112-5-08(D)(3)(a).

12. "An employee who is a direct threat is not a qualified individual with a disability." *Rizzo v. Children's World Learning Ctr.,* 84 F.3d 758, 764 (5th Cir. 1996). However, "[t]he direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job,' reached after considering, among other things, the imminence of the risk and the severity of the harm portended." *Chevron U.S.A. v. Echazabal,* 536 U.S. 73, 86, 122 S.Ct. 2045 (2002). The employer bears the burden of proof on a direct threat defense. *Nichols v. City of Mitchell*, 914 F.Supp.2d 1052, 1063 (D.S.D.2012); *Rizzo,* at 764.

13. However, an employer may not refuse to employ or train a person with a disability if through reasonable accommodation, the significantly increased occupational hazards could be avoided. OAC 4112-5-08(D)(3)(c).

14. OAC 4112-5-08(D)(4) provides, in relevant part, as follows:

(4) Ability to perform the job.

(a) Division "[(L)] of section 4112.02 of the Revised Code further provides that a disabled person need not be employed or trained in a job that requires him or her routinely to undertake any task, the performance of which is substantially and inherently impaired by his or her disability. The determination of whether a disabled

person is substantially unable to perform a job must be made on an individual basis, taking into consideration the specific job requirements and the individual disabled person's capabilities.

(b) An employer cannot rely on division (L) of section 4112.02 of the Revised Code to exclude a disabled person unless the job requires him or her to routinely undertake a task which such person cannot substantially perform. A task which is an infrequent, irregular or nonessential element of a job cannot be used to exclude a disabled person.

(c) An employer cannot rely on division (L) of section 4112.02 of the Revised Code to exclude a disabled person if, through reasonable accommodation pursuant to paragraph (E) of this rule, the disabled person can substantially perform the essential elements of the job.

(d) The performance of a job by a disabled person is not substantially and inherently impaired by his or her disability within the meaning of division (L) of section 4112.02 of the Revised Code, if such person is capable of performing the job, with reasonable accommodation to his or her disability, at the minimum acceptable level of productivity applicable to a non-disabled incumbent employee or applicant for employment.

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

(I) The physician's knowledge of the individual capabilities of the applicant or employee, as opposed to generalizations as to the capabilities of all persons with the same disability, unless the disability is invariable in its disabling effect;

(ii) The physician's knowledge of the actual sensory, mental, and physical qualifications required for substantial performance of the particular job; and

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

(References to former R.C. 4112.02(L) in this section refer to the current version of R.C. 4112.02(K).)

15. An employer "must evaluate an applicant in her actual state. In other words, an employer must focus on whether the particular applicant before it is actually substantially limited by his impairment and on whether the applicant is actually capable of performing the essential functions of the job at issue." *Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 481 (5th Cir.2006)

16. OAC 4112-5-08(E) provides as follows:

(E) Reasonable accommodation.

(1) An employer must make reasonable accommodation to the disability of an employee or applicant, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.

(2) Accommodations may take the form, for example, of providing access to the job, job restructuring, acquisition or modification of equipment or devices or a combination of any of these. Job restructuring may consist, among other things, of realignment of duties, revision of job descriptions or modified and part-time work schedules. Specific examples include:
(a) If a job entails primarily typing duties with some irregular messenger or delivery tasks, the messenger or delivery tasks could be assigned to an ambulatory employee so that a nonambulatory disabled person with satisfactory typing skills could be employed.

(b) If a disabled employee is required to have physical therapy during normal working hours, his or her work schedule could be modified to allow the employee to make up the time lost because of the therapy.
(3) In determining whether an accommodation would result in undue hardship to an employer, the following factors may be considered:
(a) Business necessity;

(b) Financial cost and expense where such costs are unreasonably high in view of the size of the employer's business, the value of the disabled employee's work, whether the cost can be included in planned remodeling or maintenance and the requirements of other laws and contracts; and

(c) Other appropriate considerations which the employer can support with objective evidence.
(4) The exceptions to the prohibition against discrimination because of disability set out in division (E) of section 4112.02 and division (L) of section 4112.02 of the Revised Code, and paragraph (E) of this rule are not applicable where reasonable accommodation would remove the limitation on the disabled person's ability to safely and substantially perform the job.

17. "Federal courts have recognized that the duty of an employer to make a reasonable accommodation also mandates that the employer interact with an employee in a good faith effort to seek a reasonable accommodation." *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 664, 742 N.E.2d 164 (10th Dist.2000), citing *Taylor v. Phoenixville School Dist.*, 184 F.3d 296, 311-312 (3d Cir. 1999). "The determination of a reasonable accommodation is a cooperative process in which both the employer and the employee must make reasonable efforts and exercise good faith." *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7th Cir. 1996), citing *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135-36 (7th Cir. 1996).

18. "To show that an employer failed to participate in this interactive process, the employee

must demonstrate that: '1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.'" *Ballard v. Rubin*, 284 F.3d 957, 960 (8th Cir.2002), citing *Fjellestad v. Pizza Hut of Am., Inc.*, 188 F.3d 944, 952 (8th Cir. 1999).

19. The initial burden rests upon the employee to identify the disability and resulting limitations and to suggest the reasonable accommodations if the disability, resulting limitations and necessary reasonable accommodations are not open, obvious, and apparent to the employer. *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 470 (8th Cir.2007), citing *Wallin v. Minnesota Dep't of Corrections*, 153 F.3d 681, 689 (8th Cir. 1998), cert. denied, 526 U.S. 1004, 119 S.Ct. 1141 (1999).

20. "'[R]easonable accommodation' includes the employer's reasonable efforts to assist the employee and to communicate with the employee in good faith." *Mengine v. Runyon*, 114 F.3d 415, 416 (3d Cir.1997). In some situations, "to determine the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation." *Bultemeyer v. Fort Wayne Community Schools*, 100 F.3d 1281, 1286 (7th Cir.1996), citing *Beck v. University of Wisconsin Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996).

21. The Fifth District Court of Appeals has found that "what constitutes reasonable accommodation may vary widely from case to case, and also, the extent of the interactive process will vary from case to case. Nevertheless, at the bare minimum, an employer must engage in an interactive process at least to the extent of evaluating the information about the employee's disability and limitations in order to determine whether the employee can be reasonably accommodated. For example, an employer who refuses to consider the employee for any job, and refuses to review the medical information, is certainly not acting in good faith. If such a review leads the employer to conclude there is no reasonable accommodation which would assist the employee in a job, and no job which the employee could perform with his limitations, then that should be the end of the interactive process. Further interaction and discussions regarding accommodation are required when it appears the employee can be accommodated and restored to employment." *Huberty v. Esber Bev. Co.*, 5th Dist. Stark Case No. 2001-CA-00202, 2001-Ohio-7048, *17.

22. The Fifth District Court of Appeals has further found that "the ADA does not 'require' an employer to locate a different job for a qualified person with a disability, but it does require an analysis of whether a disabled individual can perform a job he or she desires." *Huberty v. Esber Bev. Co.*, 5th Dist. Stark No. 1999CA00346, 2000 Ohio App. LEXIS 3011, at *22 (July 3, 2000).

23. "The direct threat defense must be 'based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence,' and upon an expressly 'individualized assessment of the individual's present ability to safely perform the essential functions of the job,' reached after considering, among other things, the imminence of the risk and the severity of the harm portended." *Chevron U.S.A. v. Echazabal,* 536 U.S. 73, 86, 122 S.Ct. 2045 (2002). The employer bears the burden of proof on a direct threat defense. *Nichols v. City of Mitchell*, 914 F.Supp.2d 1052, 1063 (D.S.D.2012).

24. Former OAC 5101:2-12-25(A), which was in effect in 2014, provided in relevant part that:

> "(A) Every administrator, employee, and child care staff member of a child care center shall be mentally and physically able to carry out their duties. No child care center shall employ as a child care staff member a person whose physical or mental disability would prevent such person from recognizing and acting upon any hazards to a child's safety and well being." (Commission Exhibit No. 7).

25. Former OAC 5101:2-12-20(A), which was in effect in 2014, provided in relevant part that "[s]upervised means that children shall be within sight and hearing of child care staff members at all times. Staff must be able to see and hear children without use of mechanical devices such as baby monitors, video cameras or walkie talkies." (Respondent's Exhibit A).

26. R.C. 4112.02(I) provides that it shall be an unlawful discriminatory practice "[f]or any person to discriminate in any manner against any other person because that person has opposed any unlawfully 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."

27. "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." *Greer-Burger v. Temesi,* 116 Ohio St.3d 324, 2007-Ohio-6442, 879 N.E.2d 174, ¶13, citing *Canitia v. Yellow Freight Sys., Inc.*, 903 F.2d 1064, 1066 (6th Cir. 1990).

28. A lawsuit may be used by an employer as a powerful instrument of coercion or retaliation. *Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 740, 103 S.Ct. 2161 (1983); *See also Rosania v. Taco Bell of Am., Inc.*, 303 F.Supp.2d 878, 885 (N.D. Ohio 2004).

29. Anti-retaliation provisions also prohibit retaliation against former employees. *EEOC v. Outback Steakhouse, Inc.*, 75 F.Supp.2d 756, 757-758 (N.D. Ohio 1999); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843 (1997).

30. "[E]ach party is deemed bound by the acts of his lawyer-agent." *Link v. Wabash R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386 (1962), citing *Smith v. Ayer*, 101 U.S. 320, 326 (1880). "[C]lients must be held accountable for the acts and omissions of their attorneys." *Pioneer Invest. Servs. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 396, 113 S.Ct. 1489, 123 L. Ed.2d 74 (1993).

31. "The purpose of a back-pay award is to make the wrongfully terminated employee whole and to place that employee in the position the employee would have been in absent a violation of the employment contract." *Jordan v. Ohio Civ. Rights Comm.*, 173 Ohio App.3d 87, 2007-Ohio-3830, 877 N.E.2d 693, ¶ 43 (12th Dist.), citing *Stacy v. Batavia Local School Dist. Bd. of Ed.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, ¶26. A plaintiff has a duty to mitigate in order to recover back pay. *Jordan*, at ¶43, citing *Ford Motor Co. v. E.E.O.C*, 458 U.S. 219, 231, 102 S.Ct. 3057 (1982). Back pay shall be reduced by interim earnings or amounts that would have been earnable with reasonable diligence. *Jordan*, at ¶43, citing *Ford Motor Co.*, at 231.

32. Federal courts have applied these two principles when computing a back pay award: "(1) unrealistic exactitude is not required, (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer. *Pettway v. Am. Cast Iron Pipe Co.*, 494 F.2d 211, 260-261 (5th Cir.1974), citing *Johnson v. Goodyear Tire & Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1380, at n. 5 (5th Cir. 1974); *Stewart v. Gen. Motors Corp.*, 542 F.2d 445, 452 (7th Cir.1976).

33. "[A]n action for judicial review pursuant to R.C. 4112.06 may be commenced only by proper service through the clerk of courts in accordance with Civ. R. 3 and 4." *Donn, Inc. v. Ohio Civil Rights Commission*, 68 Ohio App.3d 561, 565, 589 N.E.2d 110 (8th Dist. 1991), citing *Cleveland v. Ohio Civil Rights Comm.*, 43 Ohio App.3d 153, 540 N.E.2d 278 (1988). A trial court is deprived of subject-matter jurisdiction to hear an appeal under R.C. Chapter 4112 if the appeal is not served on the civil rights commission as required by R.C. 4112.06. *Ramudit v. Fifth Third Bank*, 1st Dist. Hamilton No. C-030941, 2005-Ohio-374, ¶ 9, citing *Donn, Inc.*, at 564-565.

LEGAL ANALYSIS AND CONCLUSIONS

1. The Court concludes that initially this action was not properly commenced because it was not served on the Commission in accordance with the Civil Rules as required by R.C. 4112.06. However, Wilkshire corrected this error by obtaining proper service on the Commission on 10/18/2017.

2. The Court concludes that the Commission's 2/23/2017 Cease and Desist Order was supported by reliable, probative and substantial evidence, and was compatible with the legal authority cited above.

3. The administrative record contains reliable, probative, and substantial evidence from which the Commission could reasonably conclude that Cordero had a disability as defined by R.C. 4112.01(A)(3), including medical documentation indicating the extent of her visual impairment, which substantially limits her ability to see. Cordero has been diagnosed as having punctuate inner choroidopathy with macular scarring, and she is legally blind and/or borderline legally blind. (See Commission's Exhibits 4 and 5).

4. The administrative record contains reliable, probative, and substantial evidence from which the Commission could reasonably conclude that Cordero was qualified to perform the essential functions of the job in question either with or without accommodation. During her working interviews and employment with Wilkshire, there were no safety concerns, Cordero did not act in an unsafe way with the children, and she did not appear unable to keep track of the children. (Transcript at pages 333, 334, 355, and 356). During Cordero's first day at Wilkshire, she requested small accommodations, such as having the children's cubbies labeled and/or relabeled so that she could read the labels. (Transcript at pgs. 352 and 353). These changes were made the same day, and it only took a few minutes for the labels to be changed to make them easier to read. (Transcript at pg. 400, 431, and 433). Cordero made one or two mistakes on the children's daily sheets, which she corrected after the mistakes were pointed out to her. (Transcript at pg. 334 and 354). To avoid these problems in the future, she asked to take one home at the end of her first day so that she could magnify and memorize the daily sheet. (Transcript at pg. 165, 169, and 171). There were no problems reported during Cordero's first day other than the concerns regarding her vision impairment. (Transcript at pg. 497).

5. Wilkshire did not assess Cordero's actual capabilities before concluding that she was unable to do the job, as required by law. No one at Wilkshire discussed the extent or specifics of Cordero's visual impairment with her to determine how it would affect her actual ability to perform her job. (Transcript at pgs. 402, 435, and 496). Karen Terrigan, the administrator/director of Wilkshire, based her assumptions regarding Cordero's abilities on her experience with her mother-in-law, who also has macular degeneration. (Transcript at pg. 451 and 464).

6. Wilkshire's alleged direct threat defense was also not supported by the record. Wilkshire did not base its safety concerns upon an individual assessment of Cordero's actual ability to safely perform the essential functions of the job. (Transcript at pgs. 402, 435, 451, 464, and 496) Furthermore, a few of the safety concerns raised by Wilkshire were addressed in the record. For example, Wilkshire lists diaper changes as one of its safety concerns; however, Cordero changed diapers on her first day without any safety issues. (Transcript at pg. 165).

7. Nancy Terrigan called a Job and Family Service's child care hot-line before terminating Cordero, and she was told that there were no specific rules regarding employing a person with a visual impairment, and she should use her discretion whether she was comfortable employing someone with that extent of an impairment. (Transcript at pgs. 460-461). However, as addressed above, Terrigan took no steps to assess the actual extent of Cordero's impairment. (Transcript at pgs. 402, 435, and 496). Terrigan made her decision to terminate before calling the hot-line, and she was looking for something to back up her decision. (Transcript at pg. 503). When she called the hot-line, she was not told that she had to terminate Cordero. (Transcript at pg. 504).

8. Although Cordero suggested reasonable accommodations for obstacles she faced in the infant room, such as the cubbies (Transcript at pgs. 352 and 353), Wilkshire terminated Cordero before the parties could engage in any additional discussion regarding what accommodations could be made to address Wilkshire's safety concerns. (Transcript at pgs. 175, 180, 262 and 497).

9. Although Wilkshire felt that Cordero had been dishonest with them regarding her visual impairment, Cordero did tell Karen Terrigan that she had a visual impairment and sometimes has to use a magnifying glass when she was offered the job. (Transcript at pgs. 152, 122, 445, and 483).

10. The administrative record contains reliable, probative, and substantial evidence from which the Commission could reasonably conclude that Cordero suffered an adverse employment action because of her disability. The record clearly reflects that Cordero was terminated because of her visual impairment, and she would not have been terminated if she did not have a visual impairment. (Transcript at pg. 361, 406, 505, and 507).

11. The administrative record also contains reliable, probative, and substantial evidence from which the Commission could reasonably conclude that Wilkshire committed an unlawful discriminatory practice under R.C. 4112.02(I). On 10/10/2014, Attorney Dan Guinn sent a letter to Theresa Cordero, on behalf of Wilkshire, indicating that he believed she filed the complaint with the Commission to attempt to "extort" money from his client and threatening to file a civil action against her. (Commission Exhibit 23).

12. The back pay amount awarded by the Commission was supported by the record. (See Transcript at pg. 363, 364, 376, 379, 386, 473, 488, 490, 492 and Commission's Exhibits Nos. 34 and 35). Although Cordero's actual income and hours would have depended on several factors, the Commission appropriately resolved these uncertainties against Wilkshire, as required by the relevant law cited above. During the interview process, Cordero was told that there was a possibility of future full-time employment. (Transcript at pg. 159, 392). Cordero attempted to mitigate the lost

wages caused by her termination by seeking alternative employment. (See Commission's Exhibits Nos. 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33). Cordero eventually found a job at Hardee's in August 2015, making $8.10 per hour and working approximately 28 hours per week (Transcript at pg. 193-194), and the Commission adjusted their back pay calculation to reflect this income.

13. The Court is not persuaded by Wilkshire's argument that the Commission should have capped the back pay award based on Cordero's Social Security Disability payments. Although Cordero can only make up to $1,080 per month before her disability payments would be lowered (Transcript at pg. 243), Cordero testified that she would not ask to lower her hours if she made more than $1,080 and would take a decrease in her disability payment instead. (Transcript at pg. 244).

14. The Commission's order requiring Wilkshire to rehire Cordero was proper under R.C. 4112.05(G)(1)(a).

15. Upon review of the entire Record of the Administrative Proceedings filed in this matter, the Court concludes that the Commission's 2/23/2017 Cease and Desist Order was supported by reliable, probative and substantial evidence in its entirety, and it should be affirmed in accordance with R.C. 4112.06(E).

SUMMARY OF ORDERS TO BE ISSUED

Based on the foregoing, the Court concludes that:

1. The Commission's 2/23/2017 Cease and Desist Order should be affirmed.

2. All deadlines given in the Commission's Cease and Desist Order should be modified so that the deadlines commence on the file-stamped date of the Judgment Entry adopting this Decision, instead of the date of the Commission's Final Order.

3. The Clerk of Courts should close this case file and remove it from the pending case docket.

4. Court costs should be assessed as follows:

   - Petitioner Wilkshire - 100%
   - Commission - 0%

Edward Emmett O'Farrell, Judge

11/28/2017

Date

cc: Court Administrator's Office
Atty. Dan Guinn
Atty. David A. Oppenheimer, Senior Assistant Ohio Attorney General
Atty. William G. Puckett
Atty. John S. Marshall
Court

EEO'F/lrh