



**Bob Taft  
Governor**

DR. ROBERT LIPSET,	)	
	)	COMPLAINT NO. 9516
Complainant,	)	
	)	
vs.	)	<b>FINAL ORDER</b>
	)	
OHIO UNIVERSITY,	)	
	)	
Respondent.	)	

This matter came before the Commission at its regular meeting on December 15, 2005. At this meeting, the Commission's considered its Administrative Law Judge's Report and Recommendation, as well as Objections filed by Complainant Dr. Robert Lipset, and a Response to those Objections filed by Respondent Ohio University. The Commission hereby includes in the record the Objections filed by Dr. Lipset, and Ohio University's Response to those Objections.

Dr. Lipset filed a charge affidavit with the Ohio Civil Rights Commission (Commission) on July 3, 2002. After the Commission received the charge, it conducted an investigation, ultimately finding that it was probable that Ohio University unlawfully denied Dr. Lipset promotion and tenure due to his age. On June 12, 2003, after conciliation efforts failed, the Commission issued Complaint No. 9516.

A public hearing in this matter was held on January 22, 2004, before Denise Johnson, the Commission's Administrative Law Judge ("ALJ"). The record consists of documents admitted into evidence at the hearing, as well as the 210-page transcript of the hearing and a deposition

transcript of Dr. Richard Gerth. On October 4, 2005, the ALJ issued her Report and Recommendation, which recommended that the Commission dismiss the case.

Dr. Lipset filed Objections to the Report and Recommendation, and Ohio University filed a Response. Oral argument was held before the Commission at its December 15, 2005, meeting. After carefully considering the ALJ's Report and Recommendation, and after reviewing the entire record, testimony, and exhibits introduced into evidence at the hearing, as well as reviewing the information presented during oral argument, the Commission has decided to disapprove the ALJ's Report and Recommendation. Based upon the reliable, probative, and substantial evidence in the record, the Commission hereby determines that Dr. Lipset was denied promotion and tenure due to his age.

The Commission does not take this action lightly. However, the Commission has determined that the ALJ did not take notice of reliable, probative, and substantial evidence in the record which establishes that unlawful discrimination occurred. As the Commission has the ability to disapprove the written Report and Recommendation of the ALJ, and to issue a Final Order accordingly, the Commission hereby determines that Dr. Lipset was denied promotion and tenure due to his age. O.R.C. 4112.05(G)(1); O.A.C. 4112-3-09(A), (B), & (C); O.A.C. 4112-3-10; *Board of Edn. v. Ohio Civil Rights Comm.* (1981), 66 Ohio St. 2d 252, 257-258; *Jackson. et al. v. Franklin Cty Animal Control Dept.* (10<sup>th</sup> C.A., 1987), 1987 Ohio App. LEXIS 9144, \*6.

## **FINDINGS OF FACT**

### ***Dr. Lipset's performance at Ohio University***

Dr. Lipset was denied tenure and promotion to Associate Professor in Ohio University's Industrial & Manufacturing Systems Engineering ("IMSE") Department on January 23, 2001.

(Tr. 49; Commission Exhibit 12). At the time of this denial, Dr. Lipset was 51 years old.<sup>1</sup>

Ohio University awards tenure to professors that have demonstrated ability in three categories – teaching, service, and research. (Tr. 27, 46; Commission Exhibit 9) It is undisputed by Ohio University that Dr. Lipset was an “excellent” teacher.<sup>2</sup> (Tr. 49; Commission Exhibit 4, 12). Likewise, Ohio University admits that Dr. Lipset was “excellent” in the service category.<sup>3</sup> (Tr. 49; Commission Exhibit 4, 12).

### ***Research***

The only category in which Ohio University alleged a deficiency, and the only reason raised by Ohio University for denying tenure and promotion, was Dr. Lipset’s research. However, in the year prior to his tenure application, Dr. Lipset was awarded the IMSE Department Research Award. (Tr. 33; Commission Exhibit 2, 3). Before that, Dr. Lipset was awarded the Engineering College’s “Outstanding Research Paper Award.” (Tr. 30, 32; Commission Exhibit 2). In addition, Dr. Lipset published numerous research papers in some of the most highly respected journals in engineering, and presented papers at numerous conferences. (Tr. 57, 189-190; Commission Exhibit 3). Dr. Lipset also received grants as a result of his research proposals. (Tr. 50; Commission Exhibit 3). The Commission ALJ failed to note this reliable, probative, and substantial evidence in her Report and Recommendation.

Further, Department Chair Charles Parks wrote an evaluation for Dr. Lipset each year of his employment and, in the same year of his application for tenure, Chairman Parks informed Dr. Lipset that his “areas of special strength are clearly scholarship, teaching and service to the

---

1 Dr. Lipset’s date of birth is January 2, 1949. (Tr. 20).

2 In fact, Dr. Lipset received the College’s “Outstanding Undergraduate Teacher Award” in 1996-1997. (Tr. 30; Commission Exhibit 2)

3 Dr. Lipset acted as the Assistant Department Chair, the Undergraduate Program Chair, a member of the Graduate Committee for his Department, and served on numerous committees within the college and the university. (Tr. 28-29; Commission Exhibit 3).

College and Department.” (Tr. 31; Commission Exhibit 4).

***Dr. Lipset's merit raise***

Quite significantly, just prior to the denial of his tenure and promotion, Dr. Lipset was recommended for the largest merit raise in his department. The amount of the increase for each faculty was based upon merit in “teaching, research, and service” for that faculty member. (Tr. 70-72; Commission Exhibit 18). These three areas (teaching, research, and service) are the *exact same criteria* by which a professor is evaluated for promotion and tenure. (Tr. 27). In other words, just prior to his denial of tenure and promotion, Dr. Lipset’s performance was rated *higher than every other professor in his department*, including professors who had already been tenured. The ALJ failed to note this reliable, probative, and substantial evidence in her Report.

***Substantially younger professors were treated better***

In the recent past, substantially younger professors in the IMSE Department have been awarded promotion and tenure despite having markedly lower performance ratings than Dr. Lipset in the categories of teaching, service, and research. For example, Dr. Richard Gerth was recommended for tenure at the age of 38.<sup>4</sup> Overall, Dr. Gerth’s teaching was rated to be “at the most” below average to average. (Tr. 130-131; Commission Exhibit 24) Likewise, Dr. Parks’ annual evaluations of Dr. Gerth repeatedly cited his poor teaching skills. (Commission Exhibit 23) Dr. Gerth’s scholarly research was also ranked as “below average” to “average” due to his low number of actual publications, and his annual evaluation letters repeatedly pointed out his “serious deficiency” in publications. (Id.) Nevertheless, Dr. Gerth was granted tenure on January 29, 1998. (Gerth deposition Tr. 8; Commission Exhibit 24)

Dr. David Koonce also had severe performance deficiencies, and yet he was

---

<sup>4</sup> Dr. Gerth's date of birth is December 1, 1959. (Gerth depo Tr. 8; Commission Exhibit 24)

recommended for tenure at the age of 32.<sup>5</sup> Dr. Koonce was rated as “below average” to “average” with regard to his teaching. Dr. Koonce’s research efforts were noted to have been “only published in one journal of low quality,” with several other negative comments. Dr. Koonce was also rated “below average” to “average” in the service category. Dr. Koonce was rated, to some degree, as “below average” in each category of “teaching, service, and research,” and yet he was recommended for tenure on January 8, 1999. (Tr. 148; Commission Exhibit 22) The ALJ failed to note this evidence in her Report and Recommendation.

*Evidence of age discrimination*

Several persons involved in the ultimate decision to deny tenure and promotion to Dr. Lipset demonstrated a troubling animus against older persons. (Tr. 62) In fact, Dr. Gerth, who was involved in the decision to deny tenure and promotion to Dr. Lipset, documented his feelings regarding Dr. Lipset’s age when he wrote that Dr. Lipset was “too old” for the job. (Tr. 26; Commission Exhibit 1). Although this comment was written by Dr. Gerth during the hiring process, the fact that the comment referenced Dr. Lipset’s *overall qualifications* to be a professor, combined with the fact that the comment was made *in writing*, is reliable, probative, and substantial evidence demonstrating that Dr. Gerth denied Dr. Lipset tenure due to his age.

Dr. Gerth also made it known to Dr. Lipset that he felt Dr. Lipset’s years of industrial experience before he came to Ohio University would taint his ability to succeed as a professor. (Tr. 40). Dr. Gerth stated that Dr. Lipset had spent “way too many years” working on industrial problems to succeed. (Id.).

Dr. Koonce, who also was involved in the decision to deny promotion and tenure to Dr. Lipset, made his own comments exhibiting a bias against age. Dr. Koonce referred to Dr. Lipset

---

<sup>5</sup> Dr. Koonce’s date of birth is October 21, 1966. (Tr. 148; Commission Exhibit 22)

and other older (and already retired) faculty members as “legacies,” a term that was used to refer to “old and outdated” computer equipment. (Tr. 36-37). Dr. Koonce further told Dr. Lipset that several female Masters candidates picked Dr. Lipset as their advisor because they felt safe with him due to the fact that he is “old enough to be their father.” (Tr. 37-39).

The Chair of the IMSE Department, Dr. Parks, also documented his preference for younger workers. Dr. Parks sent several letters, including letters to Dr. Lipset, praising other professors in the department as an “exciting group of young faculty” and stating that, with the addition of two new professors “we are so fortunate to have two bright and young faculty to start the fall quarter.” (Tr. 41, 43, 124-125, 127-128; Commission Exhibit 5, 6, 20)

Dr. Lipset was denied tenure and promotion on January 23, 2001. (Tr. 49; Commission Exhibit 12) Dr. Lipset appealed the decision within the University, but his appeals were ultimately denied. (Tr. 68) Dr. Lipset then filed his Charge with the Commission.

## **CONCLUSIONS OF LAW**

The reliable, probative, and substantial evidence, as introduced at the hearing and at the December 15, 2005, meeting, and as reviewed by the Commission, demonstrates that Dr. Lipset was denied promotion and tenure, and was subsequently terminated from his faculty position at Ohio University, due to his age.

Ohio Revised Code 4112.02(A) specifically prohibits an employer from denying tenure to any person due to that person’s age. A violation of R.C. 4112.02(A) must be established by reliable, probative, and substantial evidence presented at the hearing. In making its determination, the Commission is not bound by the Rules of Evidence. R.C. 4112.05(E), (G).

To prove a violation under Chapter 4112, other than a case involving direct evidence of

discrimination, the Commission must prove a prima facie case of discrimination. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248.<sup>6</sup> Once the Commission establishes its prima facie case, a rebuttable presumption of discrimination is created. *Burdine*, at 254.

A prima facie case of illegal discrimination in this case has been established. The prima facie case was established by the following reliable, probative, and substantial evidence:

- 1) Dr. Lipset is in the protected age class, as he was 51 at the time of his denial of tenure. (Tr. 20). See R.C. 4112.01(A)(14);
- 2) An adverse employment action was taken against Dr. Lipset, as he was denied promotion and tenure, and subsequently terminated. (Tr. 49);
- 3) Dr. Lipset was qualified for his position, as he received positive evaluations for all five years he was employed by Respondent and was awarded the highest merit raise in his Department. (Commission Exhibit 4, 18);
- 4) People substantially younger than Dr. Lipset were granted promotion and tenure, as is evidenced by the promotion and tenure of Dr. Koonce (d.o.b. 10/21/66) and Dr. Gerth (d.o.b. 12/1/59). (Tr. 148, Gerth deposition Tr. 8)

See *Coryell v. Bank One Trust Co. N.A.* (2004), 101 Ohio St.3d 175.

Once the Commission establishes a prima facie case of discrimination, the burden of production shifts to Ohio University to articulate some legitimate, nondiscriminatory reason for its action. *Burdine*, at 250. Once that is articulated, then the burden reverts back to the Commission to establish that Ohio University's offered reason is pretextual, and that the real reason is illegal discrimination. *Griffiths v. Cigna Corp.* (3<sup>rd</sup> Cir. 1993), 988 F.2d 457.

Ohio University has articulated a nondiscriminatory reason for Dr. Lipset's denial of tenure. Ohio University alleged that Dr. Lipset was denied promotion and tenure because his research was inadequate. (Tr. 49; Commission Exhibit 12)

The Commission disbelieves Respondent's articulated reason, and finds it to be

---

<sup>6</sup> In proving a violation under R.C. 4112, federal case law may be used, as the analytical framework is the

pretextual. The reliable, probative, and substantial evidence presented at the hearing demonstrates that Dr. Lipset's research, and indeed his entire performance, compared favorably to the other, substantially younger, professors who were granted tenure and promotion by Ohio University. *St. Mary's Honor Center v. Hicks* (1993), 113 U.S. 2742 [disbelief of an employer's proffered justification, in and of itself, can be sufficient to prove intentional discrimination].

Dr. Lipset's overall performance can be gleaned from the merit raise he received from the ISME Department just prior to the denial of tenure and promotion. Using the exact same "teaching, service, and research" criteria that was allegedly utilized for the tenure and promotion decision, Dr. Lipset received the highest score in his department. Dr. Lipset's "teaching, service, and research" score was even higher than those substantially younger professors who had recently been granted promotion and tenure – Dr. Koonce and Dr. Gerth. (Tr. 27, 70-72; Commission Exhibit 18). The Commission finds this to be reliable, probative, and substantial evidence indicating that the reason given for the subsequent denial of promotion and tenure to Dr. Lipset was not based upon inadequate performance or, specifically, inadequate research. The Commission ALJ failed to note this evidence in her Report and Recommendation.

There is further evidence of pretext. In the year just prior to his tenure application, Dr. Lipset was awarded the IMSE Department Research Award. (Tr. 33; Commission Exhibit 2, 3). Dr. Lipset was also awarded the Engineering College's "Outstanding Research Paper Award." (Tr. 30, 32; Commission Exhibit 2). Dr. Lipset also published numerous research papers in highly respected journals in engineering, and presented at numerous conferences, and also received grants as a result of his research proposals. (Tr. 50, 57, 189-190; Commission Exhibit 3). The Commission finds this to be reliable, probative, and substantial evidence indicating that

---

same as Title VII. *Little Forest Med. Ctr. of Akron v. Ohio Civil Rights Comm.* (1991), 61 Ohio St.3d 607.

Ohio University's reason of inadequate research is pretextual. The Commission ALJ failed to note this evidence in her Report and Recommendation.

Finally, other professors in Dr. Lipset's department were awarded promotion and tenure despite having markedly lower performance records in the categories of teaching, service, and research. Dr. Richard Gerth was recommended for tenure despite having ratings of "at the most" below average to average. (Tr. 130-131; Commission Exhibit 24), and having annual evaluations that repeatedly cited his poor teaching skills. (Commission Exhibit 23) Likewise, Dr. David Koonce was recommended for tenure despite being rated, to some degree, as "below average" in each category. (Tr. 148; Commission Exhibit 22) The Commission finds this to be reliable, probative, and substantial evidence indicating that the reason given for the denial of promotion and tenure to Dr. Lipset was not applied to other, substantially younger professors, and was pretextual. The ALJ failed to note this evidence in her Report and Recommendation.

In addition to the evidence of pretext, there is also evidence demonstrating that the real reason for the denial of promotion and tenure is Dr. Lipset's age. To begin with, Dr. Koonce (age 32) and Dr. Gerth (age 38) are substantially younger than Dr. Lipset (age 51). See, *Hartley v. Wisconsin Bell, Inc.* (C.A.7, 1997), 124 F.3d 887, 893, ("We consider a ten-year difference in ages (between the plaintiff and her replacement) to be presumptively 'substantial'"). The ratings which resulted in promotion and tenure for Dr. Koonce and Dr. Gerth are *inferior* to Dr. Lipset's rating, and yet they were granted tenure and promotion while he was denied. This reliable, probative, and substantial evidence was not noted by the ALJ.

Chairman Parks, as well as Dr. Gerth and Dr. Koonce, all demonstrated a disturbing history of praising youthful faculty, while being critical of older faculty. Most disturbing of all is

Dr. Gerth's assessment that Dr. Lipset was, in his own words, "too old" to be a successful professor. (Tr. 26; Commission Exhibit 1). While this comment was made at the time of Dr. Lipset's hire, it was *written*, and lends credence to Dr. Lipset's other allegations of age-related comments. Further, the written comment provides remarkable insight into Dr. Gerth's view that age was a barricade to Dr. Lipset's career goal of becoming a professor.

This evidence, along with Dr. Gerth's further comments that Dr. Lipset's years of industrial experience would taint his ability to succeed as a professor, and that Dr. Lipset had spent "way too many years" working on industrial problems to succeed (Tr. 40), coupled with Dr. Koonce's comments comparing Dr. Lipset to "old and outdated" computer equipment (Tr. 36-39), and Chairman Parks repeated written preferences for "young faculty" in the ISME Department (Tr. 41, 43, 124-125, 127-128; Commission Exhibit 5, 6, 20), are all examples of reliable, probative, and substantial evidence that age was the reason for Dr. Lipset's denial of tenure and promotion.

The Commission recognizes that none of the above evidence is "direct evidence" of age discrimination. Rather, it is circumstantial evidence of Ohio University's unlawful age discrimination against Dr. Lipset. The Commission finds that the combined circumstantial evidence, together with the pretextual nature of Ohio University's reason for denying Dr. Lipset's tenure and promotion, is reliable, probative, and substantial evidence supporting a finding of unlawful age discrimination.

The Commission does not merely disagree with Ohio University's decision. Rather, the Commission *dishelieves* Ohio University's proffered reasons for the denial of tenure and promotion, and believes that the real reason for the employment decision is unlawful age

discrimination. The United States Supreme Court held in *St. Mary's Honor Center v. Hicks* (1993), 113 U.S. 2742, that disbelief of an employer's proffered justification, in and of itself, can be sufficient to prove intentional discrimination.

The evidence of written and verbal comments of age bias exhibited by Chairman Parks, Dr. Gerth, and Dr. Koonce is competent to support the inference of intentional discrimination. The written and verbal comments are not the sort of "stray remarks" that normally fail to justify a finding of discrimination. Rather, they constitute circumstantial evidence tending to prove that Ohio University, through its agents, engaged in unlawful discrimination. *OCRC v. Kent State Univ.* (1998), 129 Ohio App. 3d 231, 251-252.

As a result of this finding, Dr. Lipset is entitled to a remedy. R.C. 4112.05(G). Therefore, it is **ORDERED** that Ohio University offer a tenured Associate Professor position to Dr. Lipset in the IMSE Department at Ohio University, at a pay rate commensurate with the pay Dr. Lipset would have received had he not been terminated, with all interim merit pay increases and all other benefits included, within 30 days of the issuance of this Final Order.

Dr. Lipset is also entitled to backpay. He was paid \$74,232 per year as an Assistant Professor. (Tr. 69).<sup>7</sup> After his termination, Dr. Lipset attempted to mitigate his damages by applying for work at numerous colleges and universities, but he was not hired by any of them. (Tr. 73-74; Commission Exhibit 19). Dr. Lipset is entitled to the full amount of backpay from his last day of employment (June 8, 2002; Tr. 23) until Ohio University makes the above-ordered offer. Accordingly, it is **ORDERED** that, based upon his pay as an Assistant Professor (\$74,232 per year), and the length of time from June 8, 2002, to the issuance of this Final Order (3 years, 7 months), Ohio University pay Dr. Lipset \$265,998.00, plus all pay differentials corresponding to

---

<sup>7</sup> This includes his nine-month base salary of \$66,832, and his summer contract of \$7,400. (Tr. 69).

a promotion from Assistant Professor to Associate Professor<sup>8</sup>, plus all intervening merit pay increases and all other benefits, within 30 days of the issuance of this Final Order.

This amount will continue to accrue until Ohio University makes the above-ordered offer to Dr. Lipset of a tenured Associate Professor position in the Industrial & Manufacturing Systems Engineering Department at Ohio University.


This ORDER issued by the Ohio Civil Rights Commission on this 21<sup>st</sup> day of Jan, 2006.

  
PASTOR AARON WHEELER, SR., Chairperson

\_\_\_\_\_  
ALTAGRACIA RAMOS, Commissioner

\_\_\_\_\_  
NIRMAL K. SINHA, Commissioner

  
\_\_\_\_\_  
CHARLES WINBURN, Commissioner

  
\_\_\_\_\_  
JEANINE DONALDSON, Commissioner

<sup>8</sup> Presumably, Dr. Lipset's pay would have been increased upon his promotion to Associate Professor.

**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, Mark Kautzmann, Chief of Compliance of the Ohio Civil Rights Commission, do hereby certify that the foregoing is a true and accurate copy of the Order issued in *Dr. Robert Lipset v. Ohio University*, Complaint No. 9516, and filed with the Commission at its Central Office in Columbus, Ohio.

  
\_\_\_\_\_  
MARK KAUTZMANN  
CHIEF OF COMPLIANCE  
OHIO CIVIL RIGHTS COMMISSION

DATE: 1/12/06