

IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

LITTLE YORK TAVERN,
Appellant,

CASE NO.: 2015 CV 03066

JUDGE TIMOTHY N. O'CONNELL

-vs-

MELANIE LANE et al.,
Appellee(s).

**DECISION, ORDER AND ENTRY
AFFIRMING THE ALJ'S AMENDED
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND RECOMMENDATION
AND THE FINAL ORDER OF THE
OHIO CIVIL RIGHTS COMMISSION**

This matter is before the Court on Appellant Little York Tavern's ("Little York") Brief, which was filed on November 16, 2015. On December 2, 2015, Appellee Ohio Civil Rights Commission ("OCRC") filed its Brief. On December 16, 2015, Little York filed its Reply Brief.

I. STATEMENT OF THE CASE

Defendant/Appellee Melanie Lane ("Lane") filed a charge of discrimination with the Ohio Civil Rights Commission against Plaintiff/Appellant Little York Tavern ("LYT") on December 13, 2011. On September 27, 2012 the OCRC determined that it was probable that LYT engaged in unlawful discriminatory practices. The OCRC alleges that LTY terminated Lane in retaliation for complaining about discrimination (sexual harassment), in violation of R.C. 4112.02(I).

A hearing was held on October 24, 2013 in Dayton, Ohio before an Administrative Law Judge ("ALJ"). The OCRC filed a post-hearing brief on January 23, 2014. LYT filed a post-hearing brief on February 13, 2014. The OCRC filed a reply brief on February 21, 2014. The ALJ

issued her Report and Recommendation on December 8, 2014. Both the OCRC and LYT filed objections to said Report.

The Ohio Civil Rights Commission heard oral arguments on the objections on March 12, 2015. The Commissioners adopted the OCRC's objections and remanded the matter back to the ALJ to issue an amended report. On March 26, 2015 the ALJ issued an Amended Findings of Fact, Conclusions of Law, and Recommendation, which was adopted by the Commission on April 23, 2015. A Cease and Desist Order (the Commission's final "Order") was issued by the Commission to LYT on May 14, 2015.

LYT filed its' *Petition for Review of the Ohio Civil Rights Commission Order* with this Court on June 11, 2015. The Court has reviewed the Briefs and the transcript. For the reasons stated herein, the Commission's final Order is AFFIRMED. The ALJ's Amended Findings of Fact, Conclusions of Law, and Recommendation is AFFIRMED.

II. FINDINGS OF FACT

LYT is owned by Tom Hentrick ("Hentrick"). Lane worked for LYT as a server from July, 2010 until her discharge on October 8, 2011. At all relevant times, Mark Rothwell ("Rothwell") was and currently is the General Manager of LYT and Kelly Severs ("Severs") was and currently is the Assistant General Manager.

On January 16, 2011 Lane worked her shift at LYT. Lane remained at the bar of LYT after her shift ended. She sat with a friend/co-worker who was having a drink with Rothwell. Rothwell was not on duty and had drunk approximately 8 to 10 beers throughout the evening. Lane claims Rothwell made inappropriate comments to her and made inappropriate contact with her person on January 16, 2011 ("the incident"). Lane discussed Rothwell's actions with Hentrick the next day. She was informed by Hentrick that Rothwell would not be fired unless he was found guilty. Lane was offered to work a different shift at LYT during the day, but was unable to do so because of childcare. Lane also filed a police report with the Vandalia police regarding the incident. Rothwell

was arrested by the Vandalia Police Department while at work at LYT. Lane filed a charge of sexual harassment with the Ohio Civil Rights Commission based on the incident.

Lane informed Severs of the incident when she saw her at a restaurant shortly after January 16, 2011. After reporting the incident, Lane complained to Rothwell and Severs that several of her co-workers were being antagonistic towards her and that her orders were being delayed by the kitchen and also the bartenders. Lane also began to receive disciplinary write-ups from Rothwell and Severs after reporting the incident. Lane had not received any write-ups prior to reporting the incident.

On October 8, 2011 Lane noticed that one of her tickets was missing a pizza and salad when she went to cash out that ticket. Only a manager can delete a food item from a ticket once the order had gone to the kitchen. The manager has a swipe card to do this, or a code can be entered manually if the card is not available. Lane rang in the missing pizza and salad to correct the ticket and she went into the kitchen to notify the staff that a pizza and salad did not need to be made, that she was just correcting the missing items. Severs and Rothwell were in the kitchen when Lane entered and spoke to her about the deleted items. Rothwell then left the kitchen and went into the office. Severs and Lane cashed out the order with the missing items while Rothwell was gone. Lane went back to work and Rothwell informed Severs that she needed to prepare a termination form for Lane. On October 8, 2011 Rothwell informed Hentrick of the alleged theft by Lane. At the end of Lane's shift on October 8, 2011 Rothwell told her she needed to meet with Hentrick. At the meeting Hentrick told Lane she was being terminated for theft. Lane would not sign the termination form admitting to the theft. The police were called and Hentrick threatened to have Lane arrested if she did not sign the form stating she was being fired for stealing. Lane then signed the form in front of a Vandalia Police Officer and Hentrick which stated she was being terminated for theft.

III. STANDARD OF REVIEW

The standard of review when considering appeals of decisions rendered by the Ohio Civil Rights Commission is set forth in R.C. 4112.06. R.C. 4112.06(E) states:

“The 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.”

“The findings and orders of the Ohio Civil Rights Commission must be supported by reliable, probative, and substantial evidence. ‘Reliable, probative, and substantial evidence’ in an employment discrimination case brought pursuant to Ohio Rev. Code § 4112 means evidence sufficient to support a finding of discrimination under Title VII of the United States Code. In conducting its review under Ohio Rev. Code § 4112.06, the trial court is not free to independently determine the facts of the underlying controversy; instead, the 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. Section 4112.06(E). Where such evidence exists, it is improper for a court to substitute its judgment for that of the administrative agency. ‘Reliable’ evidence is dependable or trustworthy; ‘probative’ evidence tends to prove the issue in question and is relevant to the issue presented; and ‘substantial’ evidence carries some weight or value.”¹

“The court must give due deference to the Commission's resolution of evidentiary conflicts because the Commission has the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the court may reverse the Commission's judgment where the Commission's determination rests upon inferences improperly drawn from the evidence adduced.”²

¹ *Jeters v. Spectra-Physics Laserplane*, Montgomery App. No. CA 16150, 1997 Ohio App. LEXIS 2623 (May 16, 1997).

² *HLS Bonding v. Ohio Civ. Rights Comm'n*, Franklin App. No. 07AP-1071, 2008-Ohio-4107, P1 (Aug. 14, 2008)

III. CONCLUSIONS OF LAW

LYT asserts that it is entitled to a reversal of the decision of the Ohio Civil Rights Commission. The OCRC argues to the contrary.

APPELLANT'S ASSIGNMENT OF ERROR NO. 1: The Administrative Law Judge wrongfully excluded from evidence Exhibit A.

LYT argues that proffered Exhibit A, an official letter of Determination from the OCRC dated December 15, 2011, was wrongfully excluded from evidence by the Administrative Law Judge. LYT argues that this exhibit establishes that Lane did not complain of any further problems at LYT after she filed the sexual harassment charge. Lane testified that she encountered problems with co-workers and her managers after reporting the incident and this exhibit could have been used to impeach Lane's testimony. LYT argues that the failure to allow this exhibit into evidence is clear error since it goes to the essential issue of the case.

The OCRC argues that the ALJ appropriately excluded Exhibit A from the record. The letter of determination is authored by a Commission representative. The information contained in the document was not sworn to by Lane, nor did she approve of the information contained in said document. The OCRC argues this document was irrelevant and could not be used to impeach Lane. The letter was an out of court statement, written by someone other than Lane, which LYT offered for the alleged truth of the matter asserted. It is not a prior inconsistent statement of Lane.

LYT, in its Brief filed on November 16, 2015, cites no code sections or case law to support its contention that it was clear error for the ALJ not to allow Exhibit A into evidence. In LYT's Reply Brief filed on December 16, 2015 LYT tries to argue that Exhibit A was an official document of the Commission and cites O.A.C. 4112-3-03(B) and (F) in support.

O.A.C. 4112-3-03(B) states:

"Probable cause determination. Where the facts indicate that it is probable that any unlawful discriminatory practices have been or are being engaged in, the director or the director's designee may refer the matter to the commission and recommend that the commission approve a finding of probable cause and authorize proceeding

with conciliation. The commission may delegate authority to the director or the director's designee to make a finding of probable cause and issue a letter of determination and serve a copy upon the parties.”

O.A.C. 4112-3-03(F) states:

“**No probable cause determination and dismissal.** Where the facts, as determined during the preliminary investigation indicate that it is not probable that any unlawful discriminatory practices have been or are being engaged in, the director or the director's designee shall refer the charge to the commission with a recommendation of dismissal. The commission may thereupon dismiss the charge and serve on the complainant and other parties notification of its action. The commission may delegate authority to the director or the director's designee to make a finding of no probable cause and issue a letter of determination and serve a copy upon the parties.”

The Court has reviewed the hearing transcript and it appears from the record that the ALJ did not find a proper foundation had been laid by LYT for the introduction of Exhibit A and also found that Exhibit A was irrelevant to the issue before the ALJ. LYT was attempting to use Exhibit A to impeach the testimony of Lane. The objection to Exhibit A from counsel for the OCRC, Ms. Hudson, was based on the fact that it was not Lane’s sworn testimony in said document and Lane couldn’t testify why the Commission made a particular determination or statement in the document.³ The ALJ asked counsel for LYT if he had witnesses to support the document.⁴ The Court notes that no witness from the OCRC was called as a witness at the hearing to authenticate Exhibit A nor was the person who authored Exhibit A called as a witness to testify as to the statements contained in Exhibit A. The statements contained in Exhibit A were not sworn to statements of Lane. LYT failed to show any exceptions to the hearsay rule existed and failed to lay a proper foundation for the introduction of Exhibit A. The Court does not find that it was error for the ALJ to exclude Exhibit A from evidence. The decision of the ALJ to exclude Exhibit A was not unreasonable, arbitrary or unconscionable. LYT’s assignment of error is OVERRULED.

³ Transcript of hearing on October 24, 2013 pg. 111.

⁴ Transcript pg. 111 line 5.

APPELLANT'S ASSIGNMENT OF ERROR No. 2: The ALJ's amended decision was not supported by reliable, probative, and substantial evidence.

The ALJ, in her amended decision, made several findings of fact. Specifically, the ALJ found that the OCRC established a prima facie case of retaliation, that LYT articulated that it terminated Lane because Lane engaged in theft and the OCRC showed by a preponderance of the evidence that LYT's articulated reason for Lane's discharge was not its true reason but was a pretext for unlawful retaliation.

LYT disputes the findings of fact on which the ALJ relied in her reasoning and decision. LYT asserts that Lane was not issued any formal disciplinary action prior to her termination, that the entries in the employee book merely reflected when Lane was late and when she called off work, that they were verbal written notices. Therefore, Lane's testimony that she received discipline from Rothwell after reporting the incident is incorrect. Further, LYT argues that the evidence before the ALJ clearly establishes that Lane engaged in theft and that this was the true reason for her termination. The ALJ made an improper inference that Rothwell fabricated incidents and laid groundwork to manufacture reasons for Hentrick to terminate Lane. LYT states that there is no presumption of retaliation with a seven month gap between the protected activity and Lane's termination. If retaliation were truly the motivating factor in Lane's termination, Rothwell would have had Lane fired closer to the alleged incident. The testimony of both Severs and Rothwell establishes that they believed Lane was engaging in acts of dishonesty on October 7th and 8th of 2011. Lane was terminated based on this. Both Servers and Rothwell felt Lane should be disciplined for these actions, not just Rothwell. LYT argues it would have been physically impossible for Rothwell to use Severs pass code to delete the items on October 8, 2011 because the testimony clearly establishes that both he and Severs were standing together in the kitchen when the items were deleted and neither of them did it.

The OCRC argues that the record establishes that there was reliable, probative and substantial evidence to support the finding of liability. LYT terminated Lane because she engaged

in a protected activity. The evidence established that Lane engaged in a protected activity, LYT was aware of it, Lane was terminated, there is a causal connection between Lane's termination and the protected activity and the reason enumerated by LYT for Lane's termination was not credible and merely a pretext. Other employees of LYT had used a manager pass code to benefit from and admitted to using the pass code and they were not terminated or charged with theft. These employees, though, had not engaged in a protected activity prior to using the manager pass code. Lane did engage in a protected activity before she was accused of using the pass code. Lane denies using the pass code to delete items. Lane was not written-up for the alleged infraction but was instead terminated. Rothwell told Hentrick that Lane stole Severs pass code and about the alleged theft despite the fact that Lane disputed taking or using the pass code. No one actually saw Lane use the pass code. Rothwell knew that if an employee stole from LYT, they would be terminated by Hentrick. The OCRC argues that Hentrick was a "cat's paw" for Rothwell to terminate Lane.

"It is unlawful for any person to discriminate in any manner against any other person because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under Ohio Rev. Code §§ 4112.01-4112.07. Ohio Rev. Code § 4112.02(I)."⁵

"In order to establish a prima facie case of retaliation, pursuant to R.C. 4112.02(I), the Ohio Civil Rights Commission, on behalf of a complainant, is required to prove: (1) the complainant engaged in a protected activity; (2) the employer knew of the complainant's participation in the protected activity; (3) the employer engaged in retaliatory conduct; and (4) a causal link exists between the protected activity and the adverse action. If the evidence indicates that an employer would have made the same employment decision regardless of the employee's participation in the protected activity, the employee cannot prevail."⁶

"The establishment of a prima facie case of retaliation under R.C. 4112.02(I) creates a presumption that an employer unlawfully discriminated against a complainant. Further, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action. Once the employer sets forth a nondiscriminatory reason, the presumption raised by the prima facie case is

rebutted and drops from the case. The Ohio Civil Rights Commission, on behalf of the complainant, then must demonstrate that the reason proffered by the employer was not the true reason for the employment decision, but, rather, was a cover-up, or pretext, for a discriminatory decision. The ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the complainant remains on the Commission, on behalf of the complainant.”⁷

“With respect to the Ohio Civil Rights Commission's burden of establishing pretext in a retaliation claim, the factfinder's disbelief of the reasons put forward by a defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. Stated differently, in appropriate circumstances, the trier of fact can reasonably infer from the falsity of the employer's explanation that the employer is dissembling to cover up a discriminatory purpose. As such, a complainant does not always need to introduce independent evidence of discrimination to meet his or her burden of showing pretext when the trier of fact finds sufficient evidence to reject the employer's explanation.”⁸

“Title VII retaliation claims must be proved according to traditional principles of but-for causation. This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.”⁹

“A ‘cat's paw’ is a person used by another to accomplish the other's purposes. In the employment context, an unbiased decisionmaker is a cat's paw in situations where a biased subordinate, who lacks decisionmaking power, uses the unbiased decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory or retaliatory employment action. An employer may be held liable under a cat's paw theory of liability when an adverse decision is made by a supervisor

⁵ *Jetters*, supra.

⁶ *HLS*, supra.

⁷ *HLS*, supra.

⁸ *HLS*, supra.

who lacks impermissible bias, but that supervisor was influenced by another individual who was motivated by such bias.”¹⁰

As this Court weighs the evidence and reviews the Ohio Civil Rights Commission’s decision, its power is highly circumscribed. This Court does not afford to the parties a trial de novo. The Court finds that in the case sub judice reliable, probative and substantial evidence supports the Ohio Civil Rights Commission finding that Lane engaged or participated in a protected activity. The parties do not dispute that Lane made a complaint with the OCRC regarding her claim of sexual harassment.¹¹ Reliable, probative and substantial evidence supports a finding that Lane’s employer, LYT, knew of her participation in the protected activity.¹² Reliable, probative and substantial evidence supports the finding LYT engaged in retaliatory conduct against Lane. Lane was terminated for allegedly engaging in theft by deleting food items while using a managers pass code to do so. Lane specifically testified that she did not do this. LYT argues that other servers who used a managers pass code did not delete items, but the testimony of Severs contradicts that argument. Severs testified that other employees who did not engage in a protected activity and who used a manager pass code to delete food items were not fired for this behavior.¹³ Finally, reliable, probative and substantial evidence support the finding that a causal link exists between the protected activity and the adverse action. Lane filed a complaint with the Ohio Civil Rights Commission for a claim of sexual harassment against her supervisor Mark Rothwell. Discipline at LYT was at the manager’s discretion.¹⁴ Prior to the alleged incident Lane did not have any disciplinary violations but she received disciplinary violations after the alleged incident.¹⁵ Lane testified that other employees were not given disciplinary violations for the same behavior that she

⁹ *Nebozuk v. Abercrombie & Fitch Co.*, Franklin App. No. 13AP-591, 2014-Ohio-1600 (Apr. 15, 2014).

¹⁰ *Nebozuk*, supra.

¹¹ Transcript of hearing on October 24, 2013 pgs. 7, 22, 33-35, 216.

¹² Transcript of hearing on October 24, 2013 pgs. 7, 22, 33-35, 216.

¹³ Transcript of hearing on October 24, 2013 pgs. 20, 128-130.

¹⁴ Transcript of hearing on October 24, 2013 pg. 123.

¹⁵ Transcript of hearing on October 24, 2013 pgs. 35-37, 77-78, 82, 90-91, 97, 113, 134, 136.

received violations for.¹⁶ Rothwell knew that Lane would be terminated for theft by Hentrick.¹⁷ Other employees had used the managers' code to delete food items from tickets and were not accused of theft, but Lane, who engaged in a protected activity involving Rothwell was.¹⁸ The testimony shows that Mark Rothwell informed Tom Hentrick of the alleged theft by Lane.¹⁹ Hentrick then fired Lane.

LYT argues that the proffered reason for Lane's termination was not pretextual and that there was reliable, probative and substantial evidence that the proffered reason by LYT (theft) was the only reason for Lane's termination. LYT claims the ALJ made improper inferences that weren't supported by the evidence. Further, the long gap of time between the reporting and termination requires Lane to establish other acts of discrimination to show that the reason for her termination was merely pretextual. The Court does not find these arguments well-taken. The ALJ did not solely rely on temporal proximity in reaching her decision that LYT engaged in retaliation. "With respect to the Commission's burden of establishing pretext, the United States Supreme Court has held: 'The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination[.]'"²⁰ "As such, a complainant does not always need to introduce independent evidence of discrimination to meet his or her burden of showing pretext when the trier of fact finds sufficient evidence to reject the employer's explanation."²¹

The ALJ ultimately found that the real reason LYT terminated Lane was unlawful retaliation. The Court finds that reliable, probative, and substantial evidence supports the finding

¹⁶ Transcript of Hearing on October 24, 2013 pgs. 35-37, 77-78, 82, 113, 130, 164, 165, 190.

¹⁷ Transcript of Hearing on October 24, 2013 pg. 247.

¹⁸ Transcript of hearing on October 24, 2013 pgs. 20, 128-130.

¹⁹ Transcript of hearing on October 24, 2013 pgs. 220, 247.

²⁰ *HLS*, supra, citing *St. Mary's Honor Ctr. V. Hicks*, 509 U.S. 502 (1993).

²¹ *HLS*, supra.

that LYT's explanation of its adverse employment action against Lane was pretextual and that retaliation was a determinative factor for her termination. LYT argues that Lane must establish other acts of discrimination/harassment since a long period of time elapsed between the time of the protected activity and the adverse employment action. Though there was a time gap between the protected activity and the termination, the Court finds that the circumstantial evidence established the causal link to support the ALJ's finding without relying on temporal proximity. The Court finds that reliable, probative, and substantial circumstantial evidence supports the finding that LYT's real reason for terminating Lane was to retaliate against her for reporting the alleged sexual harassment to the OCRC. Accordingly, LYT's assignments of error are OVERRULED.

In the record before the Court, at its core the case comes down to a "he said she said" situation. Appellant LYT claims Lane was fired for theft for taking money/deleting items using a manager pass code without permission.²² Lane claims that she did not take or use Severs pass code, that other employees were not fired for using manager pass codes to delete items, that they were not charged with theft, and that she was fired to retaliate against her for reporting her sexual harassment claim.²³

The ALJ had to make a decision based on the testimony before her. In reaching her decision she had to weigh the credibility of that evidence based on the first-hand questioning of the witnesses. This Court, removed as it is from such first-hand questioning of the witnesses, cannot now second-guess the Administrative Law Judge's judgment that Lane's narrative was more credible than Appellant's. The Court finds that the ALJ did not make impermissible inferences. The Court finds that there was reliable, probative and substantial evidence in the testimonial record to support the ALJ's findings. Accordingly, LYT's assignments of error are OVERRULED.

²² Transcript of hearing on October 24, 2013 at 20, 128, 144-145, 169, 220, 247.

²³ Transcript of hearing on October 24, 2013 at 46, 47-48, 60, 64, 67, 77,104-105, 106, 128-130.

APPELLANT'S ASSIGNMENT OF ERROR No. 3: The ALJ's amended decision finding Lane was entitled to back pay was not supported by reliable, probative, and substantial evidence.

LYT argues that the ALJ's findings are in error because they did not reflect Lane's failure to mitigate any damages. Lane did not file for unemployment. Further, it is unbelievable that it took Lane 5 months to find comparable employment. She was working as a server making \$3.70 per hour and it is unreasonable to believe she could not find work as a server on "restaurant row" for five months. Counsel was precluded from questioning Lane and Severs about comparable employment and the possibility of Lane not finding a job for five months. LYT asserts that the award of back pay is erroneous. Finally, LYT claims that the calculation of back pay is erroneous because Lane was only without employment as a minimum wage server for five months, which doesn't support an award of \$62,688.43.

The OCRC argues that the ALJ properly excluded testimony from Lane and Severs about the hiring practices of other employers because it was not something they had personal knowledge of pursuant to Evidence Rule 602. They could testify about LYT but could not speculate about what other restaurants would or would not do. Further, once liability is established there is a presumption of back pay. The OCRC asserts that the decision for back pay was based on reliable, probative and substantial evidence.

Evidence Rule 602 states: "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703."²⁴ The Court does not find that it was erroneous of the ALJ to limit the testimony of Lane and Severs as to what hiring procedures other restaurants may have had. Her rulings relating to this were not unreasonable, arbitrary or unconscionable.

²⁴ USCS Fed Rules Evid R 602.

The Court does not find well-taken LYT's argument that unemployment benefits that Lane should have filed for should be deducted from her back pay award. "Unemployment compensation benefits are not 'interim earnings' and should not be deducted from a back pay award made pursuant to Ohio Rev. Code Ann. § 4112.05(G)."²⁵

The Court will now review the award of back pay and LYT's affirmative defense of mitigation of damages. "To establish that an employee failed to mitigate her damages, an employer needs to show that (1) substantially equivalent positions were available, and (2) she failed to use reasonable care and diligence in seeking those positions."²⁶

"Ohio Rev. Code Ann. § 4112.05(G) states, in part: If the Ohio Civil Rights Commission directs payment of back pay, it shall make allowance for interim earnings. It is noted that this Ohio Rev. Code Ann. § 4112.05(G) does not prohibit the Civil Rights Commission from making allowance for other items, such as welfare payments, federal, state and local taxes, and other payroll deductions."²⁷ "An award of back pay is an integral part of the whole relief which seeks, not to punish the respondents but to compensate the victim of discrimination. The injured workers must be restored to the economic position in which they would have been but for the discrimination."²⁸

LYT is near Miller Lane in Vandalia/Butler Township and there are about 20 to 24 restaurants on Miller Lane.²⁹ This area is known as restaurant row.³⁰ Lane testified that after her termination at LYT she looked for work at TGI Fridays, Red Lobster, BW3s, several different Bob Evans locations, several Fricker's locations, Texas Roadhouse and Applebee's looking for a second shift serving position.³¹ Lane testified she finally found a position as a server at Cracker Barrel in March of 2012 working 25 to 30 hours a week and making the minimum of \$3.70 an hour plus

²⁵ *Ohio Civil Rights Comm'n v. David Richard Ingram, D.C.*, 69 Ohio St. 3d 89, 91 (1994).

²⁶ *Hollingsworth v. Time Warner Cable*, 168 Ohio App. 3d 658, 666 (2006).

²⁷ *Ohio Civil Rights Com v. Lucas County Welfare Dep't*, 6 Ohio App. 3d 14, 14 (1982).

²⁸ *Id.*

²⁹ Transcript pgs. 56-57.

³⁰ Transcript pg. 57.

³¹ Transcript pgs. 50-51.

tips.³² Lane stated that she was unable to find work at any location on Miller Lane until she got her job at Cracker Barrel.³³ Lane testified that she was currently working at BJ's Restaurant 30 hours a week and making \$3.70 plus tips.³⁴ Lane testified that at LYT she made \$3.70 an hour plus tips, and that she received about \$800 to \$900 a week total, including tips.³⁵ Lane also testified that she was only making about \$400 to \$500 total a week total, including tips, at Cracker Barrel.³⁶

The Court has reviewed the transcript. There is reliable, probative and substantial evidence in the transcript that Lane used reasonable care and diligence to find comparable employment. Further, there is no probative or substantial evidence in the transcript that comparative second shift server positions were available during the time in question. The OCRC awarded Lane \$62,688.43 (what her salary would have been had she remained employed at LYT minus her interim earnings, from the date of her termination to the date of the first report and recommendation). The Court finds that the award of back pay was based on reliable, probative and substantial evidence. Accordingly, Appellant's assignments of error are OVERRULED.

IV. CONCLUSION

After duly considering the matter, the ALJ's Amended Findings of Fact, Conclusions of Law, and Recommendation is AFFIRMED. The Final Order of the Ohio Civil Rights Commission is AFFIRMED.

This is a final appealable order, and there is not just cause for delay for the purposes of Civ. R. 54. Pursuant to App. R. 4, the parties shall file a Notice of Appeal within thirty (30) days.

SO ORDERED:

JUDGE TIMOTHY N. O'CONNELL

To the Clerk of Courts:

³² Transcript pg. 51
³³ Transcript pg. 57.
³⁴ Transcript pg. 52.
³⁵ Transcript pg. 53.
³⁶ Transcript pg. 54.

Please serve the attorney for each party and each party not represented by counsel with Notice of Judgment and its date of entry upon the journal.

SO ORDERED:

JUDGE TIMOTHY N. O'CONNELL

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General Division
Montgomery County Common Pleas Court
41 N. Perry Street, Dayton, Ohio 45422

Type: Decision
Case Number: 2015 CV 03066
Case Title: LITTLE YORK TAVERN vs MELANIE LANE

So Ordered

Timothy N. O'Connell