[Cite as *Ohio Civ. Rights Comm. v. Triangle Invest. Co.*, 2012-Ohio-1069.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Civil Rights Commission,	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1117 (C.P.C. No. 05CVH-07-8005)
Triangle Investment Co. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on March 15, 2012

Michael DeWine, Attorney General, *Duffy Jamieson* and *Stefan J. Schmidt*, for appellant.

Zeiger, Tigges & Little LLP, *Marion H. Little, Jr.* and *Matthew S. Zeiger*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Appellant, Ohio Civil Rights Commission ("commission"), appeals from the summary judgment granted by the Franklin County Court of Common Pleas in favor of appellees, Triangle Investment Company, Triangle Properties, Inc., Triangle Real Estate Services, Inc., and Albany Club Condominiums Association (collectively "Triangle"). For the reasons that follow, we reverse.

{¶ 2} This is the second time this matter has presented to this court. *See Ohio Civ. Rights Comm. v. Triangle Invest. Co.*, 10th Dist. No. 06AP-1009, 2007-Ohio-2937. As we previously outlined, an apartment complex known as the Albany Club Apartments was constructed in Columbus, Ohio. *Id.* at ¶ 2. Based upon the design and construction of the complex, Fair Housing Contact Service filed a charge with the commission alleging

that appellees had engaged in unlawful discriminatory practices in violation of R.C. 4112.02(H). *Id*. The commission conducted a preliminary investigation and determined that it was probable that Triangle had engaged in unlawful discriminatory practices. *Id*. The commission then assigned Gwendolyn Renae Wallace to resolve the matter via conciliation. Eventually, it was determined that conciliation had failed. Consequently, the commission filed an administrative complaint and set the matter for a hearing. The commission notified the complainant and Triangle of their right to either proceed with the administrative hearing or elect to remove the matter as a civil action in the trial court. Triangle elected to remove the matter to the trial court.

{¶ 3} On December 14, 2005, Triangle filed a motion for summary judgment and argued that the commission had failed to meet the jurisdictional prerequisite of completing an unsuccessful conciliation attempt prior to filing suit. The motion was opposed and was eventually scheduled for an evidentiary hearing. Following the hearing, the trial court granted summary judgment in favor of Triangle. The commission timely appealed, and we reversed after concluding that the trial court relied upon impermissible evidence in granting summary judgment. *Id*. at ¶ 14, 17. Upon remand, Triangle again sought summary judgment, which was again granted. The commission has timely appealed and presents the following assignments of error:

> **First Assignment of Error**: The Trial Court erred when it held that the Commission did not fulfill its statutory duties.
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> **Second Assignment of Error**: The Trial Court erred when it failed to determine whether the "errors" in the proposed agreement caused Triangle to reject the Commission's attempts to conciliate, and when it refused to allow the Commission to conduct discovery on this issue.
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> **Third Assignment of Error**: The Trial Court erred when it held that the Commission too quickly shifted the burden to Triangle to present a counteroffer.
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> **Fourth Assignment of Error**: The Trial Court erred when it found that the Commission's conciliation process was flawed from the beginning.

> **Fifth Assignment of Error**: The Trial Court erred when it dismissed the case rather than staying the matter to allow additional conciliation to take place.
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> **Sixth Assignment of Error**: The Trial Court erred when it refused to allow the case to proceed on the additional causes of action the Commission asserted in its Amended Complaint.

{¶ 4} The first, third, and fourth assignments of error all regard the substantive basis for granting summary judgment in favor of Triangle. For purposes of clarity, we will address these assignments of error together.

{¶ 5} An appellate court's review of summary judgment is de novo. *Helton v. Scioto Cty. Bd. Of Commrs.*, 123 Ohio App.3d 158, 162 (4th Dist.1997). Under such a review, an appellate court stands in the shoes of the trial court and conducts an independent review of the record. *Jones v. Shelly Co.*, 106 Ohio App.3d 440, 445 (5th Dist.1995). Summary judgment is proper only when the party moving for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in that party's favor. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd.*, 78 Ohio St.3d 181, 183 (1997).

{¶ 6} In its first, third, and fourth assignments of error, the commission argues that summary judgment was improperly granted. It argues that it met its statutory obligations by completing an unsuccessful conciliation attempt. Thus, it argues that it had jurisdiction to file the complaint underlying this matter.

{¶ 7} Whether the commission has jurisdiction to file an administrative complaint under R.C. 4112.05(B) presents an issue of law that appellate courts review de novo. *Voiers Ent., Inc. v. Ohio Civ. Rights Comm.*, 156 Ohio App.3d 195, 2004-Ohio-738, ¶ 25 (4th Dist.), citing *McClure v. McClure*, 119 Ohio App.3d 76, 79 (4th Dist.1997), citing *Burns v. Daily*, 114 Ohio App.3d 693, 702 (11th Dist.1996). No deference is afforded to the trial court's resolution of this issue. *Id.*

{¶ 8} The commission is an administrative agency established by statute. *See* R.C. 4112.03; *see also State ex rel. Cincinnati v. Ohio Civ. Rights Comm.*, 2 Ohio App.3d 287 (10th Dist.1981), paragraph one of the syllabus; *see also McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744. Its authority and duties are similarly established. Indeed, an administrative agency has no authority beyond that which is conferred by statute. *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency*, 88 Ohio St.3d 166, 171 (2000).

{¶ 9} R.C. Chapter 4112 is remedial legislation that must be construed liberally. R.C. 4112.08. The overall purpose of R.C. Chapter 4112 is to prevent and eliminate discrimination. *Helmick v. Cincinnati Word Processing, Inc.*, 45 Ohio St.3d 131, 133-34 (1989); *see also Dworning v. Euclid*, 119 Ohio St.3d 83, 2008-Ohio-3318, ¶ 27. To this end, R.C. Chapter 4112 provides a statutory scheme through which allegations of discrimination are guided towards a resolution. *Id.* at ¶ 28; *see* also *Transky v. Ohio Civ. Rights Comm.*, 193 Ohio App.3d 354, 2011-Ohio-1865, ¶ 35 (11th Dist.).

{¶ 10} "Any person may file a charge with the commission alleging that another person has engaged or is engaging in an unlawful discriminatory practice." R.C. 4112.05(B)(1). Upon receiving such a charge, the commission may conduct a preliminary investigation into the allegations. *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, ¶ 9, citing R.C. 4112.05(B)(2). The goal of this preliminary investigation is to determine whether it is probable that discrimination has occurred or is occurring. *Id.* If the investigation results in an affirmative finding, then the commission must attempt "to eliminate the practice by informal methods of conference, conciliation, and persuasion." R.C. 4112.05(B)(4); *Id.;* and *Harbor Park Marinas, Inc. v. Ohio Civ. Rights Comm.*, 64 Ohio App.2d 120 (6th Dist.1978), paragraph two of the syllabus. If informal methods fail to achieve voluntary compliance on the part of the respondent, then the commission must issue an administrative complaint. R.C. 4112.05(B)(5). Upon the issuance of an administrative complaint, either the complainant or the respondent may elect to proceed administratively before the commission or have the allegations addressed in a civil action before a common pleas court in accordance with R.C. 4112.051(A)(1) and (A)(2)(b). R.C. 4112.051(A)(2)(a).

{¶ 11} With respect to the statutory scheme established in R.C. Chapter 4112, Ohio's statutes resemble their federal counterparts.[1] *See Genaro v. Cent. Transp., Inc.*, 84 Ohio St.3d 293, 298 (1999), citing *State ex rel. Republic Steel Corp. v. Ohio Civ. Rights Comm.*, 44 Ohio St.2d 178, 182-84 (1975); *see also Reid v. Plainsboro Partners, III*, 10th Dist. No. 09AP-442, 2010-Ohio-4373, ¶ 42. (Internal citations omitted.) Consequently, Ohio courts may consider and rely upon federal case law in analyzing cases of discrimination. *Id.*; *see also Plumbers & Steamfitters Joint Apprenticeship Comm. v. Ohio Civ. Rights Comm.*, 66 Ohio St.2d 192, 196 (1981) ("federal case law interpreting Title VII * * * Section 2000e et seq., Title 42, U.S.Code, is generally applicable to cases involving alleged violations of R.C. Chapter 4112").

{¶ 12} Conciliation is a flexible and responsive process involving an interchange amongst multiple participating parties. *See Equal Emp. Opportunity Comm. v. Norvell & Wallace, Inc.*, M.D.Tenn. No. 3:02-0951 (Apr. 18 2003), quoting *Equal Emp. Opportunity Comm. v. Kaiser Foundation Health Plans, Inc.*, N.D.Ohio No. 1:98 CV 2839 (May 12, 1999); *see also Equal Emp. Opportunity Comm. v. One Bratenahl Place Condominium Assn.*, 644 F.Supp. 218, 221 (N.D.Ohio 1986).

{¶ 13} A completed and unsuccessful conciliation attempt is a jurisdictional prerequisite to filing a complaint, unless the commission issues a complaint directly upon knowledge of discrimination. *Republic Steel* at syllabus. Upon our review, however, no Ohio court has set standards for determining whether the jurisdictional prerequisite has been met.

{¶ 14} When the commission's conciliation efforts are challenged in court, the court's only role is to determine "the reasonableness and responsiveness" under the circumstances. *See Dinkins v. Charoen Pokphand USA, Inc.*, 133 F.Supp.2d 1237, 1241-

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[1] "Under Title VII, once an individual files a charge alleging unlawful employment practices, the [Equal Employment Opportunities Commission] must investigate the charge and determine whether there is 'reasonable cause' to believe that it is true. *See* 42 U.S.C. § 2000e-5(b) (1998). * * * If the [Equal Employment Opportunities Commission] finds reasonable cause to believe discrimination occurred, it must 'endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.' [*Equal Emp. Opportunity Comm. v. Shell Oil Co.*, 466 U.S. 54, 68, 104 S.Ct. 1621, 80 L.Ed.2d 41 (1984)]. If the [Equal Employment Opportunities Commission] cannot secure an acceptable conciliation agreement from the employer, it 'may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge.' " *Equal Emp. Opportunity Comm. v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 455 (6th Cir.1999), quoting 42 U.S.C. 2000e-5(f).

42 (M.D.Ala.2001), citing *Equal Emp. Opportunity Comm. v. Kingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir.1981). Indeed, the commission's conciliation efforts must be adjudged in light of the conduct and participation of the respondent. *Equal Emp. Opportunity Comm. v. Prudential Fed. Sav. & Loan Assn.*, 763 F.2d 1166, 1169 (10th Cir.1985), citing *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1335 (5th Cir.1979), and *Marshall v. Hartford Fire Ins. Co.*, 78 F.R.D. 97, 103 (D.C.Conn.1978). Courts should make every effort to refrain from engaging in judicial second guessing with respect to the form and substance of the commission's conciliation efforts. *See Equal Emp. Opportunity Comm. v. Keco Industries, Inc.*, 748 F.2d 1097, 1103 (6th Cir.1984); *see also Equal Emp. Opportunity Comm. v. Wilson Metal Casket Co.*, 24 F.3d 836, 843 (6th Cir.1994).

{¶ 15} As to the circumstances presented herein, on April 1, 2004, the commission issued a probable cause letter to Triangle. The letter described the commission's preliminary investigation, which revealed alleged violations pertaining to the thresholds of doorways, the hardware used on the entrance for the apartment, the height of the thermostat, the floor space between cabinets, the floor space for bathroom doors, and the slope of walkways in the absence of handrails. According to the commission, these alleged violations constituted unlawful discriminatory practices under R.C. Chapter 4112.

{¶ 16} Also on April 1, 2004, the commission sent a formal, written invitation to engage in conciliation. This invitation named Ms. Wallace as the commission's conciliator. It suggested that Triangle contact her in order to schedule a meeting to participate in conciliation. Attached to this letter was a proposed Conciliation Agreement and Consent Order ("CACO").

{¶ 17} Also on April 1, 2004, Ms. Wallace obtained the commission's file related to the charges. At that point, she became aware of the identities of the complainant, the respondent, and the respondent's counsel.

{¶ 18} Ms. Wallace testified about the typical role conciliators play in attempting to resolve discrimination charges. According to Ms. Wallace, conciliators act as intermediaries between the complainants and respondents. They attempt to eliminate the discriminatory practices and facilitate settlements. Usually, upon being assigned as a conciliator, Ms. Wallace first contacts a respondent's counsel in order to determine its

willingness to sign a proposed CACO. If the respondent is unwilling to sign a proposed CACO, Ms. Wallace requests a counter proposal. Upon receiving such a counter proposal, she informs her supervisor of its details, and, if agreeable to her supervisor, forwards the counter proposal to the complainant. According to Ms. Wallace, if a respondent is unwilling to sign a proposed CACO and is unwilling to provide a counter proposal, then there is no reason to engage in further conciliation efforts. In these circumstances, she believes conciliation has failed.

{¶ 19} With regard to the specific facts underlying this matter, on April 5, 2004, Ms. Wallace called Marion Little, Triangle's counsel. She asked if Triangle was interested in signing the proposed CACO. According to Mr. Little, Triangle had no such interest. Ms. Wallace then asked if Triangle had any counter proposals to resolve the charges. Mr. Little again said no. Instead of discussing conciliation, Mr. Little inquired about the process of requesting reconsideration of the commission's probable cause determination.

{¶ 20} Following the April 5, 2004 telephone call, a "notice of failure to conciliate" was mailed to Triangle's counsel. This notice reflected the content of the telephone call and referenced the fact that Triangle refused to sign the proposed CACO and refused to engage in other negotiations. It also indicated that the commission would receive notice of the failure to conciliate within seven days. Finally, the notice indicated that any further settlement offers would need to be made within seven days.

{¶ 21} On April 15, 2004, another attorney representing Triangle, Matthew Zeiger, sent a facsimile to Ms. Wallace requesting reconsideration of the commission's probable cause determination. According to Ms. Wallace, she had no role in the request for reconsideration process. However, she indicated that Triangle's request for reconsideration had been deemed untimely by the commission. Nevertheless, she used her April 15, 2004 conversation with Triangle's counsel to again inquire about Triangle's willingness to engage in conciliation. Mr. Zeiger refused and instead expressed frustration with the fact that Triangle's request for reconsideration had been deemed untimely.

{¶ 22} On August 26, 2004, another notice of failure to conciliate letter was sent to Triangle's counsel. It mirrored the April 5, 2004 letter by indicating that the commission would receive notice of the failure to conciliate within seven days and that any proposed

settlement offers would need to be made within that time. The commission received no further contact from Triangle.

{¶ 23} On September 17, 2004, the commission issued its administrative complaint.[2] The matter was removed to the trial court by way of an election in accordance with R.C. 4112.051(A)(2)(a). When it arrived before the trial court, Triangle argued that the commission had failed to attempt conciliation prior to filing its complaint. The trial court agreed on two separate occasions.

{¶ 24} The determinative issue, therefore, is whether conciliation was attempted by the commission. Again, a completed and unsuccessful conciliation attempt is a jurisdictional prerequisite to filing a complaint. *Republic Steel,* 44 Ohio St.2d at syllabus. Thus, an attempt must be made to undertake the flexible and responsive process to resolve the charges and eliminate the discrimination. *See Norvell & Wallace*, M.D.Tenn. No. 3:02-0951, quoting *Kaiser*, N.D.Ohio No. 1:98 CV 2839.

{¶ 25} Under R.C. 4112.04(A)(4), the commission has the duty to promulgate rules to give effect to the provisions of R.C. Chapter 4112. In accordance with this statutory authority, the commission adopted Ohio Adm.Code 4112-3-03(E), which provides:

> Failure by a respondent to agree to a proposed conciliation agreement or to submit a counter proposal acceptable to the commission, shall constitute prima facie evidence of a failure, within the meaning of division (A) of section 4112.05 of the Revised Code, of informal methods of conference, conciliation and persusasion

{¶ 26} In this matter, it is undisputed that the commission sent Triangle a proposed conciliation agreement. Triangle twice refused to sign it. Further, Triangle never submitted a counter proposal, despite multiple invitations to do so. According to Ohio Adm.Code 4112-3-03(E), this constitutes prima facie evidence of a failed conciliation attempt.[3]

{¶ 27} When a respondent rejects a conciliation attempt, the commission may file its complaint. *See Keco*, 748 F.2d at 1102 ("once the employer rejects the conciliation attempts, the EEOC is free to file suit"); *see also* R.C. 4112.05(B)(5). Indeed, there will

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[2] The complaint was filed on either September 9 or 17, 2004. The specific date is immaterial to our analysis.
[3] No constitutional challenge has been raised with respect to Ohio Adm.Code 4112-3-03(E).

certainly be instances when a respondent is unwilling to conciliate. *Ohio Civ. Rights Comm. v. Papiernik*, 136 Ohio App.3d 233, 241 (11th Dist.1999). Because conciliation requires at least two willing participants, conciliation attempts will occasionally be futile and made in vain. *Id.*

{¶ 28} In this matter, Triangle's arguments all challenge the form and substance of the commission's conciliation efforts. Indeed, Triangle argues that conciliation was not attempted and offers two positions in support. First, Triangle contends that the proposed CACO was defective because: it did not reflect the content of the commission's probable cause determination; it contained discrepancies regarding the parties and the apartment complex at issue; it incorrectly cited remedial actions sought by the commission; and it omitted a dollar amount due as damages as a result of the discrimination. Second, Triangle notes Ms. Wallace had no authority to change the proposed CACO and had not familiarized herself with the charges prior to contacting Triangle's counsel. Triangle notes the fact that Ms. Wallace had no authority to accept a counter proposal. According to Triangle, had it made a counter proposal, Ms. Wallace would have been forced to present it to her supervisor and then to the complainant. Again, based upon these circumstances, Triangle argues that conciliation was never attempted. We disagree.

{¶ 29} Importantly, Triangle's arguments require a consideration of the commission's conciliation efforts in isolation, with no regard for Triangle's own participation in the process. Triangle focuses on the content of the proposed CACO and cavils about the errors and omissions contained therein. Triangle cites Ms. Wallace's limited authority, as if it had some relation to what actually transpired amongst the parties. It did not. Conspicuously omitted from these arguments is any reference to Triangle's own participation in the process. We cannot analyze the commission's conciliation efforts without also considering Triangle's uniform unwillingness to engage in conciliation. Again, in reviewing the commission's conciliation efforts, we must determine only whether the commission's efforts were reasonable and responsive in light of Triangle's conduct and participation. *See Prudential,* 763 F.2d at 1169, citing *Marshall,* 605 F.2d at 1335; *see also Dinkins*, 133 F.Supp.2d 1237 at 1241-42, citing *Kingler*, 636 F.2d at 107. As is clear, the commission's every effort at conciliation was met with uniform resistance.

{¶ 30} In our view, the jurisdictional prerequisite of attempting "informal methods of conference, conciliation, and persuasion" is not an onerous threshold. To permit a respondent to uniformly reject conciliation efforts without explanation and thereafter attack the form and substance of those efforts would undermine the authority of the commission and frustrate the purpose of R.C. Chapter 4112. Such inflexible gamesmanship should neither be incentivized nor rewarded with dismissals. *See Equal Emp. Opportunity Comm. v. Bimbo Bakeries USA, Inc.*, M.D.Pa. No. 1:09-CV-1872, 2010 U.S. Dist. LEXIS 13654, 2010 WL 598641 (Feb. 17, 2010); *see also Equal Emp. Opportunity Comm. v. Crye-Leike, Inc.*, 800 F.Supp.2d 1009 (E.D.Ark.2011).

{¶ 31} Because conciliation requires at least two willing participants and Triangle refused to sign the CACO, refused to offer counter proposals, and otherwise refused to engage in any conciliation negotiations, we conclude that the commission's conciliation efforts were reasonable and responsive under the circumstances of this matter. Thus, we find that the commission satisfied the jurisdictional prerequisite of attempting conciliation prior to filing the complaint underlying this matter. The trial court erred when it concluded to the contrary.

{¶ 32} Based upon the foregoing, we sustain the commission's first, third, and fourth assignments of error, which renders moot the commission's second, fifth, and sixth assignments of error. We accordingly reverse the judgment rendered by the Franklin County Court of Common Pleas and remand this matter for further proceedings in accordance with law and consistent with this decision.

Judgment reversed;
cause remanded.

BRYANT and TYACK, JJ., concur.
