

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1311 C.D. 1976

CANON-McMILLAN SCHOOL DISTRICT,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION,

Respondent

BRIEF FOR RESPONDENT

Petition for Review of the  
Final Order of the Pennsylvania  
Human Relations Commission,  
dated June 27, 1976 at  
Docket No. E-4562-P

Katherine H. Fein  
Assistant General Counsel

Sanford Kahn  
General Counsel

ATTORNEYS FOR RESPONDENT

PENNSYLVANIA HUMAN RELATIONS COMMISSION  
Suite 1210 - 355 Fifth Avenue  
Pittsburgh, Pennsylvania 15222  
(412) 565-7977

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COUNTER-STATEMENT OF THE  
QUESTIONS INVOLVED

A. Whether the Commission's Findings of Fact and Conclusions of Law are in accordance with Law and are supported by substantial evidence?

(Answered in the affirmative below)

B. Whether the Commission's award of back pay to the Complainant and to all females who were aggrieved by Canon-McMillan's unlawful discriminatory practice was within its authority?

(Answered in the affirmative below)

COUNTER STATEMENT OF THE CASE

This is an appeal from the Final Order of the Pennsylvania Human Relations Commission (hereinafter "the Commission"), dated June 27, 1976, at Docket No. E-4562-P, finding that Canon-McMillan School District (hereinafter "Canon-McMillan") discriminated against Complainant Virginia Davis and other female employees on the basis of sex, by paying only part of their premium for Blue Cross-Blue Shield family coverage, while paying the total premium for family coverage for males.

Between 1971 and 1973, Blue Cross-Blue Shield and Major Medical (Plan U) coverage was available under a group policy to all employees of Canon-McMillan, at premiums ranging from \$11.15 per month for single coverage to \$33.92 per month for family coverage, including maternity.<sup>1</sup> (R. 52a, 53a, 231a, 232a) The type of coverage available (single, dependent or family) and the premium for each type were established by Blue Cross-Blue Shield and are not herein at issue. However, the amount of Canon-McMillan's contribution to the premium varied according to a system of employee categories, and is the gravamen of this Complaint. These categories were not established by Blue Cross-Blue Shield, nor required, except in part, by the union contract, but were formulated by Canon-McMillan. (R. 32a-35a, 102a, 144a, 146a-163a)

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<sup>1</sup>Rates are for the 1971-1972 school year. In 1972-1973, the premiums ranged from \$11.46 to \$34.78. (R. 244a, 245a)

Under this system of employee categories, Canon-McMillan paid the total premium for single coverage (\$11.15 per month) for 167 employees, both male and female, who requested such coverage. (R. 144a, 150a-153a, 157a, 163a) Canon McMillan also paid the total premium for dependent (\$24.20 to \$26.27 per month) and family coverage (\$32.92 per month) for 11 females who were divorced, widowed, or whose husbands were disabled, unemployed or over 65. (R. 144a, 154a, 155a, 156a) Canon-McMillan paid the total premium for family coverage (\$31.85 to \$33.92 per month) for all 126 married males who requested such coverage. (R. 144a, 158a-161a) However, Canon-McMillan refused to pay the total premium for family coverage for the Complainant and 39 married females who requested such coverage. Canon-McMillan paid only the cost of single coverage for these female employees, and deducted the difference (\$22.77 per month) from their salaries. (R. 142a-144a, 162a)

Those males who were provided family coverage without any additional cost to them were classified in the category "M<sup>4</sup> - Married and head of household and spouse with and without children." Those females, including the Complainant, who were required to pay the additional cost to receive family coverage were classified "M<sup>5</sup> - Married and not head of household and not covered by spouse's health program." (R. 33a, 34a, 144a) The only distinguishing feature between the two categories was whether the employee was "head of household" (R. 55a, 56a) Canon-McMillan paid the total family premium for employees who identified them selves as "head of household,"

but paid only the single premium for employees who did not list themselves as "head of household" and deducted the difference from their salaries. The employees were never informed that Canon-McMillan's rate of contribution depended upon this "head of household" classification. (R. 19a)

Canon-McMillan refused to pay the total premium for those employees who were not "head of household" because it allegedly did not want to pay a premium for an employee when coverage was already being provided under a spouse's health program, thereby resulting in duplicate payments to Blue Cross-Blue Shield for which only a single recovery could be made. (R. 62a, 63a) However, the Complainant and other female employees who were classified "M<sup>5</sup>" specifically informed Canon-McMillan that they needed family coverage because their husbands were not covered by other insurance plans. (R. 142a, 166a, 167a, 177a, 182a, 186a, 191a)

As a result of Canon-McMillan classification system, 100% of those male employees who requested family coverage were provided such coverage without any additional cost to them, while only 12% of the females who requested dependent or family coverage received those benefits without additional cost. The Complainant and 78% of those females who requested family coverage were required to pay the additional cost, in excess of the single rate, to receive such coverage. (R. 88a, 89a)

The Commission found that Canon-McMillan's system of employee categories, based upon the "head of household" classification, operated to deny the Complainant and other married females the same benefits as provided to similarly situated males and constituted unlawful discrimination on the basis of sex, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 951 et seq. (1974-1975 Supp.) (hereinafter "the Act") The Commission awarded back pay to the Complainant and all other females similarly aggrieved in the amount of the additional cost deducted from their salaries for family coverage. This appeal followed.



## SUMMARY OF ARGUMENT

This case involves the interpretation and application of Section 5(a) of the Act which prohibits discrimination in the compensation, terms, conditions or privileges of employment on the basis of sex.

The Commission found that Canon-McMillan's policy of refusing to pay the total premium for Blue Cross-Blue Shield family coverage for employees who were not the "head of household" had the effect of denying females the same benefits as were afforded to males, in violation of Section 5(a) of the Act. The Commission's decision is fully in accord with established principles of employment discrimination law and the findings upon which this decision was based are supported by substantial evidence.

The Commission awarded back pay to the Complainant and to all those female employees who were denied payment of the total premium for family coverage under Canon-McMillan's discriminatory policy. The award of back pay to individuals who were aggrieved by the unlawful discriminatory practice but did not file complaints with the Commission is well within its authority as enunciated in Pennsylvania Human Relations Commission v. Freeport Area School District, \_\_\_\_\_ Pa. \_\_\_\_\_, 359 A.2d 724 (1976).

ARGUMENT FOR RESPONDENT

A. The Commission's Findings of Fact and Conclusions of Law are in accordance with law and are supported by substantial evidence.

An adjudication of the Commission may be set aside or modified only if such adjudication is in violation of the constitutional rights of the petitioner, or is not in accordance with law, or where the findings of fact necessary to support the adjudication are "not supported by substantial evidence." Administrative Agency Law, Act of June 4, 1945, P.L. 1388, 71 P.S. §1710.44; Pennsylvania Human Relations Commission v. Chester Housing Authority, 458 Pa. 67, 327 A.2d 335 (1974). The Commission's findings in the instant case are well supported by competent evidence and should be sustained.

It should be emphasized at the outset that the payment of different premium rates for different types of medical coverage is not herein at issue. Those rates varied according to the type of coverage provided (single, dependent or family, including maternity) and the number of individuals covered, and were established by Blue Cross-Blue Shield. At issue in this case is Canon-McMillan's policy of paying the total premium for family coverage for some employees, but only part of the premium for others.

The Commission found that Canon-McMillan calculated its rate of contribution according to a system of employee categories, based upon the type of coverage requested and the employee's status as "head of household." Each employee completed a hospital question-

naire form, indicating the coverage desired and whether the employee was the "head of household." Employees were placed in the various categories according to the information provided on these forms. (R. 53a, 142a, 166a-230a) The categories were not established by Blue Cross-Blue Shield, rather, some were contained in the union contract and others were designated by Canon-McMillan. (R. 54a, 55a, 102a, 144a, 146a)

Under this system of employee categories, Canon-McMillan paid the total premium for the coverage requested (whether single, dependent or family) for all categories of employees, except one. (R. 144a-142a) It is significant to note that Canon-McMillan voluntarily paid the total premium for dependent and family coverage for 126 males in category "M<sup>4</sup> - Married and head of household and spouse with and without children," and two females in category "M - Married and husband is over 65 and covered by Medicare." (R. 102a, 144a) According to Dr. Ralph Castafero, then Superintendent, Canon-McMillan "condescended" and covered these additional categories, even though they were not contained in the union contract. (R. 146a)

Canon-McMillan refused to pay the total premium for family coverage for one category of employees, "M<sup>5</sup> - Married and not head of household and not covered by spouse's health program," which included Complainant and the majority of females who requested such coverage. (R. 102a, 144a) Canon-McMillan contributed only the cost of single coverage for these employees and deducted the remainder of the premium for family coverage from their salaries. (R. 142a) The Complainant and other females in category "M<sup>5</sup>"

were required to pay extra to receive family coverage because they did not declare themselves "head of household." (R. 56a, 60a)

The application of this "head of household classification to determine the employer's rate of contribution toward Blue Cross-Blue Shield premiums resulted in 100% of the males receiving full family coverage without any additional cost to them, while only 12% of the females were provided such coverage without additional cost; 78% of the females who requested family coverage were required to pay extra for it. (R. 88a, 89a, 144a) These percentages were calculated from figures submitted by Canon-McMillan and entered into evidence at hearing. (R. 88a, 89a, 144a) The identification of other females who were also required to pay extra for family coverage suggests that the percentage may have been even greater than 78%. . See, discussion, supra, at p.

Dr. Castafero testified that Canon-McMillan's rationale for conditioning total premium payment upon an employee's status as "head of household" was to avoid paying premiums for duplicate coverage. (R. 62a, 63a) However, Canon-McMillan made no inquiry of its employees to determine if any had coverage from another source. Neither did the definition of the term "head of household" -- "the IRS definition" -- bear any relationship to this purpose. (R. 56a, 57a) Moreover, the Complainant and several other females specifically noted on their hospital questionnaire forms that their husbands had no insurance and they needed family coverage. (R. 142a, 166a, 167a, 177a, 182a, 186a, 191a) Finally, Canon-McMillan did not inform

its employees that the rate of contribution would depend upon whether the employee was the "head of household." (R. 19a) Thus, the suggestion that Complainant and other females who did not list themselves as "head of household" chose their own category and rate of contribution is without merit.

On the basis of the foregoing, the Commission concluded that Canon-McMillan had engaged in an unlawful discriminatory practice in violation of Section 5(a) of the Act, which prohibits discrimination on the basis of sex in the compensation, terms, conditions or privileges of employment. The Commission found that the use of the classification "head of household," although neutral on its fact, had a grossly disparate effect upon females and operated to deprive them of the same benefits as were afforded to similarly situated males. The Commission further found that there was no justifiable business necessity for refusing to pay the total premium for family coverage for the Complainant and other females who requested and needed such coverage. The Commission concluded that Canon-McMillan's policy discriminated against females because of their sex. The Commission's decision is in accord with applicable principles of employment discrimination law.

Federal courts have consistently held that the unintended discriminatory impact of an employment policy violates Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), (hereinafter "Title VII") unless that policy can be justified by business

necessity. Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Title VII prohibits not only overt or intentional discrimination, but practices that are fair in form but discriminatory in operation. This principle of "disparate effect" has been applied to employment criteria which operate to exclude females and minorities from employment opportunities at a substantially higher rate than males or non-minorities, and requires that such criteria be shown to be essential to the safe and efficient operation of the enterprise.

Employment policies which have been declared unlawful under the "disparate effect" theory include: exclusions because of arrest and criminal records, Gregory v. Litton Systems, Inc., 472 F.2d 631, (9th Cir. 1972), Green v. Missouri Pacific R.R. Co., 523 F.2d 1290 (8th Cir. 1975); bad credit rating, Wallace v. Debron Corp., 494 F.2d 674 (8th Cir. 1974); unwed parenthood, Andrews v. Drew Municipal Separate School District, 507 F.2d 611 (5th Cir. 1975); and height requirements, Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir. 1975); as well as the achievement test and high school diploma requirements found to be discriminatory in Griggs v. Duke Power, supra. While no court has specifically held that a "head of household" criterion is unlawful, the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex provide:

Section 1604.9 Fringe Benefits. --

(c) Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the "head of household" or principle wage earner"

in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that "head of household" or "principle wage earner" status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the Act. 29 C.F.R. 1609(c).

See, also, 29 C.F.R. 1609(d). The Equal Employment Opportunity Commission has found that insurance plans which condition the provision of benefits upon "head of household" status discriminate against females in violation of Title VII. EEOC Decision No. CL 7-6-694, May 19, 1969, C.C.H. EEOC Decisions §6009; EEOC Decision No. 70-495, January 29, 1970, C.C.H. EEOC Decisions §6110.

It is now clear that these principles established under Title VII govern the interpretation and application of Section 5(a) of the Act. General Electric Corporation v. Pennsylvania Human Relations Commission, No. 185 March Term, 1975 (Opinion filed, October 20, 1976) Section 5(a) of the Act, like its federal analogue, Title VII, is designed and intended to eliminate those employment practices which have a discriminatory impact and are not justified by business necessity, regardless of the employer's intent.

In the instant case, Canon-McMillan's use of the classification "head of household" in calculating its rate of contribution toward Blue Cross Blue Shield premiums resulted in 0% of male employees being denied payment of the total premium for family coverage, while 78% of female employees were denied such payment. Clearly, a 78% differential amounts to a substantially higher rate of exclusion,

and the Commission properly concluded that the use of this criterion had a "grossly disparate effect" upon females. This finding is not "so vague as to preclude discussion," as asserted by Canon-McMillan, but is a sound legal conclusion based on the facts in this case.

Canon-McMillan offered no adequate justification for applying this criterion to determine its rate of contribution. While the avoidance of payment of premiums for duplicate coverage may be a reasonable purpose, the classification utilized did not achieve this purpose. On the contrary, Complainant and other similarly situated females were required to pay extra for needed coverage, while male employees were provided such coverage free of charge, without regard to their actual need and without inquiry into the availability of duplicate coverage. As a result of Canon-McMillan's policy, the wives of male employees were provided hospital insurance benefits which the Complainant and other female employees were required to pay for.

Finally, Canon-McMillan cannot justify its practice on the grounds that employees were not overtly categorized by sex, or on the grounds that some females received the benefits in question. What is controlling in this case is the fact that the vast majority of females were denied those benefits which were provided to all males. The Commission did not err in its finding of unlawful sex discrimination in this case. Its decision should be affirmed.



B. The Commission's award of back pay to the Complainant and to all females who were aggrieved by Canon-McMillan's unlawful discriminatory practice was well within its authority.

In Pennsylvania Human Relations Commission v. Freeport Area School District, \_\_\_\_\_ Pa. \_\_\_\_\_, 359 A.2d 724 (1976), the Pennsylvania Supreme Court upheld the Commission's authority to award affirmative relief to persons who were victims of an unlawful discriminatory practice but who were not named in the Complaint and did not file individual complaints before the Commission. The Court held that the Commission may order affirmative relief to persons other than the named Complainant when:

- 1) the Complainant alleges that such other persons have been affected by the alleged discriminatory practice; and
- 2) such other persons entitled to relief may be described with specificity. 359 A.2d 724, 728.

The Court noted that the second requirement may be satisfied by the employer supplying to the Commission, upon request, the names of those affected by the alleged discriminatory action.

The instant case conforms to the requirements enunciated by the Court. Virginia Davis alleged in her Complaint that Canon-McMillan "discriminates in the terms and conditions of employment by denying female employees the same or equal hospitalization and medical insurance protection granted to male employees because of their sex." (R.2a)

This language clearly expresses a class allegation and was sufficient to inform Canon-McMillan that its policies as to others than the Complainant was at issue.

In addition, those other persons entitled to relief were identified with requisite specificity. The names of 39 females in category "M<sup>5</sup>", who were required to pay extra for family coverage, were supplied to the Commission by Dr. Castafero, in response to the Commission's request. (R. 162a) Additional persons who suffered salary deductions for the payment of family premiums were identified in the Payroll Deduction Lists, 6/14/72 and 6/15/73 (R. 231a-256a) and the Payroll Deduction Registers, 1971-1972 and 1972-1973 (not reproduced), likewise submitted to the Commission upon its request. Finally, the hospital questionnaire forms completed by each employee identified those females who requested family coverage but did not list themselves as "head of household," and prominently displayed the notation "Deduct for all but single coverage." (R. 166a-230a)<sup>2</sup>

Each of these individuals was a victim of the unlawful practice at issue; each suffered a deduction from her salary for family coverage. The suggestion that some of the female employees to whom the Commission awarded back pay might have fit into one of the other

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<sup>2</sup>In some cases, names appearing in category "M<sup>5</sup>" on Dr. Castafero's list showed no deductions for hospital insurance in the Payroll Deductions Registers, and the Commission made no award to these individuals. In other cases, deductions for hospital insurance appear in the Payroll Deduction Registers for individuals not named on Dr. Castafero's list and the Commission awarded back pay to these individuals in the amount of the deductions actually recorded.

categories and thus suffered no harm is without foundation. Under Canon-McMillan's stated policy, deductions were made only for females in category "M<sup>5</sup>", who did not declare themselves "head of household."

The Commission's award of back pay to the females named in the Final Order is therefore well within its authority to order affirmative relief for all persons affected by the unlawful discriminatory practice. The Commission did not abuse its discretion, nor exceed its authority, and the Final Order in this case should be affirmed.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests this Honorable Court to affirm the Final Order, dated June 27, 1976.

Respectfully submitted:

Katherine H. Fein

Katherine H. Fein  
Assistant General Counsel

Sanford Kahn

Sanford Kahn  
General Counsel

PENNSYLVANIA HUMAN REALTIONS  
COMMISSION