

**COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

VERLETTE ORE, Complainant

v.

ALBERT EINSTEIN MEDICAL CENTER, NORTHERN DIVISION, Respondent

DOCKET NO. E-19935

FINDINGS OF FACT

EXPLANATION OF ABBREVIATIONS

S.F. Stipulation of Fact
N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
J.E. Joint Exhibit

1. The Complainant herein is Verlette Ore, (Ore, Complainant) an adult female, who resides at 6444 North Eleventh Street, Philadelphia, Pennsylvania 19126. (S.F. #1)
2. The Respondent herein is the Albert Einstein Medical Center, (hereinafter AEMC) Northern Division, located at York and Tabor Roads, Philadelphia, PA 19141. (S.F. #2)
3. The Respondent employs four or more employees in the Commonwealth of Pennsylvania. (S.F. #3)
4. The Complainant, on March 18, 1981, filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at docket number E-19935. (S.F. #4)
5. On or about March 27, 1981, Commission staff duly served a copy of the complaint on Respondent in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S. F. 115)
6. In correspondence, dated November 12, 1981, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the above referenced complaint. (S. F. #6)
7. After the determination of Probable Cause, the Commission and the Respondent attempted to resolve the matter in dispute between Complainant and Respondent through conference, conciliation and persuasion, but were unable to do so. (S.F. #7)
8. In correspondence, dated June 25, 1982, the Commission notified the Respondent that a Public Hearing had been approved in this matter. (S. F. #8)

9. Public Hearings were held on January 25, 1983 and March 17, 1983 in Philadelphia, Pennsylvania before hearing Commissioners Benjamin Loewenstein, Esquire (Chair); Thomas McGill, Esquire; and Rita Clark.
10. Complainant was employed by Respondent as a General Duty Staff Nurse from September, 1974 until August, 1975. (S.F. #9)
11. In August, 1977, Complainant was re-employed by the Respondent as a part-time Patient Care Coordinator (P.C.C.) on the 12 a.m. to 8 a.m. shift. Complainant remained in this position until January, 1979. (S.F. #10)
12. In January, 1979, Complainant assumed the position of full-time Patient Care Coordinator, Ambulatory Services, Outpatient Department on the 8 a.m. to 4 p.m. shift. (S. F. #11)
13. When Complainant assumed this position in January 1979, she became the first Black PCC to work the day shift (N.T. 54, 407; C.E. #8)
14. The PCC position is a management level, supervisory position which is administrative in nature and is designed to facilitate the efficient and effective provision of nursing services and patient care. (N.T. 18-20, 142, 372, 373; C. E. #1 and #4)
15. In January, 1979, the Department of Nursing Service at AEMC was headed by an Assistant General Director/Director of Nursing William Warfel. Four assistant directors of nursing in the following areas reported directly to the Director: Surgery and critical care, medicine, maternal-child health, out-patient and psychiatry and staff development. Reporting directly to the Assistant Directors of Nursing were day patient care coordinators and night patient care coordinators. Reporting directly or indirectly to the day patient care coordinators were head nurses, assistant head nurses, registered nurses, licensed graduate practical nurses and nurses' aides. (J.E. #1, N.T. 345)
16. The Complainant was selected as PCC for the day shift by Marilyn Frush, White female, who was assistant director of nursing at AEMC.
17. Complainant was given a written evaluation by Marilyn Frush on May 30, 1979. Her summary rating was a 7, which is considered "commendable". (C. E. #6)
18. Again Complainant was evaluated by Frush on January 17, 1980. Her overall rating was above 7 and below 8. Thus both numbers were circled with a line drawn between them. (C.E. #7)
19. Complainant took exception to this rating. (N.T.)
20. Soon thereafter Ore spoke to William Warfel, remarking that she no longer felt she could work under Marilyn Frush, for a number of reasons. One of these was that she viewed Frush as a racist. (N.T. 65-75)
21. Meetings were held by Warfel in attempts to reconcile the differences. (N.T. 72)
22. Various temporary solutions were proposed during this meeting. Two of these were a "facilitator" and a tape recorder. Ore rejected these alternatives. (N.T. 72-73, 240, 365, 439-440)
23. During the course of the meetings with Warfel, Ore stated that she was unwilling to continue to report to Frush, and the only alternative acceptable to her was a new supervisor. (N.T. 72, 240)
24. Ore filed a grievance.
25. In accordance with Hospital procedure, the grievance hearings were conducted by William J. Schwabe, Director of Personnel. (N.T. 264-266)

26. Hearings on the grievance were conducted on October 6, 1980 and October 10, 1980 in the presence of Frush, Ore, Schwabe and a stenographer who took notes which were transcribed. (Exhibit "C-18")
27. At the end of the grievance hearings, both Ore and Frush agreed that reconciliation was impossible between them. (N.T. 242, 283, 440-442, Exhibit "C-18")
28. By letter dated October 16, 1980, from Schwabe to Ore, Schwabe concluded that Frush was not guilty of willfully not supporting Ore, that Ore's accusations were implausible and rejected Ore's intimations with respect to certain occurrences Ore attempted to link to Frush. Schwabe recommended that Ore no longer be supervised by Frush and suggested options to resolve the issue. (Exhibit "C-10")
29. In written conclusions and recommendations sent to Warfel, Schwabe recommended implementation of one of three options: have Ore revert to a night patient care coordinator job, assign Ore to the supervision of another assistant director of nursing, or ask for Ore's voluntary resignation. (Exhibit "C-18")
30. Upon receipt of Schwabe's recommendations, Warfel discussed the options with Ore. It was agreed that there were no budgeted positions available for a night patient care coordinator (N.T. 92, 365). He rejected Ore's suggestion that her reporting relationship and that of the recruiter be switched. (N.T. 367-369, 443)
31. Ore reported directly to Warfel from August, 1980 to her termination. (N.T. 91)
32. On February 6, 1981, Warfel having lost confidence that he could find an amicable solution to the problem asked for Ore's resignation. She refused and was discharged on the same day. (S.F. #12, N.T. 97, 370)
33. Joan Celikiz, a White female R.N., who was in her probationary period as a death and dying counselor, filed a grievance against her supervisor after receiving a performance evaluation with which she was dissatisfied. (C-19)
34. Celikiz was moved (because of this conflict with her supervisor) to her former position as staff development instructor. (C-19)
35. Celikiz had a right to make this transfer under a hospital policy that permitted such reversion in the event that an employee did not qualify in a new position during the probationary period. (N.T. 291-292, 303, 326-329, C.E. 19, 20 and 21)
36. However, rather than treat the transfer as a failure in her probationary position, Celikiz and the Respondent entered into an agreement. (C.E. 19)
37. This agreement was entitled "memorandum of agreement and agreed inter alia that Celikiz's transfer will be considered to be the result of her requesting the change in assignment due to her disagreement with Dr. Gideon's (her supervisor) evaluations and her realization that it would be impossible to continue working with Dr. Gideon." (C.E.19)
38. This move resulted in no loss of pay to Celikiz (C.E. 20) and therefore by the Respondent's definition was a TRANSFER rather than a demotion:
Transfer -Lateral movement of an employee from one position to another position, both positions being at the same level of authority and responsibility, resulting in no increase in the employee's compensation. In order to be eligible for transfer, an employee shall have successfully completed the probationary period. (C.E. 21)
39. Joan Celikiz was treated differently and more favorably than the Complainant, though the situations were similar.

40. Betty Weil, a White female R.N., was the FCC who preceded the Complainant in the same position. (N.T. 105, 305-309, 328, 469)
41. Weil was then supervised by Marilyn Frush. (N.T. 305-309)
42. Weil was disciplined by Frush for not getting along with Black patients. (C.E. 23)
43. Weil was not discharged; she was moved to another position with less authority, (I.V. Nurse) without loss of pay. (C.E. 22 and 23)
44. In effect Weil's wages were red circled, but she was not actually demoted according to the Respondent's definition:
Demotion -Movement of an employee from a higher graded or evaluated position to a lower graded or evaluated position, resulting in a decrease in authority and responsibility and a decrease in the employee's compensation. This movement may occur before or after completion of the probationary period. (C-21)
45. Weil had an erratic history with the hospital.
46. Complainant had a spotless history with the hospital.
47. Weil, Celikiz and Ore, all had conflicts with their supervisors.
48. In both the Weil and Celikiz situations the Respondent resorted to alternatives short of discharge to resolve the conflict.
49. Complainant is Black, Weil and Celikiz are White.
50. At the time of the Complainant's termination a vacant FCC position existed in the division of medicine. Respondent did not offer or even discuss the position with the Complainant. (N.T. 338-339)

CONCLUSIONS OF LAW

1. Complainant is an adult individual within the meaning of Sections 4, 5 and 9 of the Human Relations Act.
2. Respondent is an employer within the meaning of Sections 4, 5 and 9 of the Act.
3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
4. All jurisdictional and procedural prerequisites to a public hearing under the Act have been met.
5. To prevail in this matter, Complainant must initially show that:
 - a. She is a member of a protected class or classes; and
 - b. She was terminated from her position; and
 - c. Similarly situated employees who did not belong to the protected class or classes were treated differently.
6. Complainant has established that she belongs to a protected class or classes and that she was terminated by Respondent.
7. Complainant has also established that other similarly situated employees, not within the protected class were treated differently.
8. Therefore, a prima facie case of discrimination has been made out.
9. Respondent's effort to distinguish the White females' transfers from the Complainant's discharge was pretextual.
10. The evidence in the record does not support Respondent's defense that the Complainant was discharged for a legitimate non-discriminatory reason.

OPINION

On March 18, 1981, the Complainant filed a complaint with the Commission alleging that Respondent had unlawfully discriminated against her in violation of Section 5(a) and (d) of the Act. 43 P.S. 955(a) and (d). More specifically, the Complainant alleged that the Respondent had discharged her from her position as a Patient Care Coordinator (a management level, administrative position) on February 6, 1981 because of her race (Black) and in retaliation for her having challenged the racially discriminatory attitude of her immediate supervisor, Marilyn Frush. The Complainant further alleged that Frush's attitude manifested itself in a lack of support and assistance, and necessitated the filing of a grievance by the Complainant. Lastly, the Complainant alleged that Respondent had treated White employees differently than it had treated her.

This is an unequal treatment case. The question is simply whether or not Verlette Ore was treated differently and less favorably than others. The standard formula for establishing a prima facie case in a disparate treatment situation is:

1. Membership of a protected class or classes.
2. Termination from her employment position.
3. Similarly situated employees who did not belong to the protected class treated differently.

This test is a derivation of the widely used test in McDonald Douglas Corp. v. Green, 411 U.S. 792, (1973). By establishing a prima facie case the plaintiff creates a rebuttable presumption that the employer unlawfully discriminated against her. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). To rebut this presumption the Respondent must clearly set forth through introduction of admissible evidence the reasons for the Complainant's termination, Burdine. In other words, the defendant must produce evidence that the Complainant was rejected for a legitimate non-discriminatory reason. The final step in this progression comes also from the Burdine case. Once the Complainant has made out a prima facie case and the Respondent employer has articulated a legitimate non-discriminatory reason for the employment decision, the Complainant bears the burden of demonstrating that the reason is pretextual, i.e., it is not the true reason for the employment decision. This formula was bolstered recently in the case of United States Postal Service Board of Governors v. Aikens, ___ U.S. ___, 103 S.Ct. 1478 (1983) and by our Commonwealth Court in Caterpillar Tractor Co., v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission, 2330 C.D. 1982 (October 26, 1983). Now in the case at hand, did Complainant, Verlette Ore establish a prima facie case; if so, did the Respondent rebut it with a legitimate non-discriminatory reason? Certainly Mrs. Ore established that 1) she was a member of the protected class and 2) that she suffered an adverse employment action (termination). The remaining question is only, were there comparison persons not in her class who were treated differently?

The two comparison persons identified, and about whom testimony was taken, and exhibits received, were Weil and Celikiz, both White female R.N.'s holding responsible, partially administrative positions, much like the Complainant's. In fact, Weil held the identical job as Complainant at an earlier time.

Celikiz, was the death and dying counselor who had a conflict with her supervisor. Celikiz was transferred from death and dying to staff development instructor. A peculiar writing, entitled a "Memorandum of Agreement" C.E. 19) was drafted. This Agreement, according to testimony

was extraordinary and not a normal procedure taken by personnel. However, this Agreement allowed Ms. Celikiz to transfer because of "what appears to be a personality conflict". The hospital maintains that Celikiz is not a comparison person because she was on probation when the transfer took place and because the Memorandum of Agreement was written after Celikiz was moved. This defense is pretextual. The fact that the memorandum was written after the move is meaningless. Furthermore, if they moved Celikiz who was probationary, which implies either new or temporary, then why wouldn't they move the Complainant, who was according to all testimony a stellar, long term and reliable employee?

The second comparison person presented to the Commission was Weil who was a patient care coordinator. Weil was supervised by Marilyn Frush, the same person who supervised Ore. Frush's testimony reveals that Weil had difficulty dealing with Black patients (N.T. 469). Frush disciplined Weil over several years for a number of infractions. The final two were for "inappropriate behavior" and for two incidents which involved rudeness towards patients. The implication was that the patients involved were Black. (See Exhibit C-23)

Weil, however, was moved to a job as an I.V. nurse, which was a job with less responsibility. There was much testimony over what constituted demotion and promotion and transfer. (See Exhibit C-21) However, no matter what it was called, the fact is Weil was moved without loss of pay. In other words, her wages were red circled. No such arrangement was made for Mrs. Ore who had no disciplinary problems. The Weil defense is also pretextual.

Clearly, Weil and Celikiz are similarly situated employees who were treated much better. Complainant was not given an opportunity to return to the night shift, nor was she offered a general duty staff nurse job although there were positions available. The Respondent noted that such a move would have been a "negative career step". As was noted by Commissioner McGill, it was surely not as negative as a discharge.

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RECOMMENDATION OF COMMISSIONER MCGILL

Upon consideration of the entire record in this case it is my opinion that Complainant was discharged from her position because of her race in violation of Section 5(a) of the Pennsylvania Human Relations Act. Accordingly, it is my recommendation that the attached Findings of Fact, Conclusions of Law, Opinion and Order be adopted by the full Pennsylvania Human Relations Commission.

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FINAL ORDER

AND NOW, this 9th day of February, 1984, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion in accordance with the recommendation of Commissioner McGill and therefore orders:

1. That the Respondent shall cease and desist from discrimination against the Complainant because of her race.
2. That the Respondent shall reinstate the Complainant to the position that she held immediately prior to her discharge or to a supervisory position that encompasses comparable skill, effort, responsibility and promotional opportunity. The Complainant's seniority date shall be adjusted to include the period of time after her discharge on February 6, 1981, so that continuous employment during the period of unemployment that is reflected.
3. Respondent shall pay the Complainant the sum of \$40,565.87 less standard deductions. This amount represents one half of what she is entitled to. [78 bi-weekly pays from date of discharge February 6, 1981, to present date, with five \$62.00 increments (the average amount of increments received by Complainant approximately every six months while she was employed by Respondent) added in July of 1981, January 1982, July 1982, January 1983 and July 1983, less \$5,035.00 in total unemployment compensation.] The amount was halved because Complainant failed to mitigate her damages. Added to the halved amount are \$1,050.00 in tuition expenses and \$1,305.00 in dental expenses which would have been paid had she still been employed by the Respondent.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Doris M. Leader
Doris M. Leader, Vice-Chairperson

ATTEST:

BY: Elizabeth M. Scott
Elizabeth M. Scott, Secretary