

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEITH W. PEARS,

COMPLAINANT

v.

SHARON STEEL CORPORATION,

RESPONDENT

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DOCKET NO. E-24211

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT \*

1. Mr. Pears began working for Sharon Steel in the mid 1950's as an electrician's helper and was promoted several times. (C.E. M, pp. 6-9)
2. In March of 1982, Mr. Pears suffered a heart attack and missed approximately two months of work. (C.E. M, p. 9)
3. Prior to becoming area foreman for the blast furnace, Thomas Sagenich had been a turn foreman in the blooming mill. (C.E. K, p. 23)
4. Complainant's direct supervisor, Donald Cipriano, was advised that Sharon Steel would be reducing the number of supervisors it employed because of economic problems; Mr. Cipriano was to make a recommendation for the reduction, to be reviewed by his superiors, Andy Stefanak and Charles Jacoby. (N.T. 31, 61; Stipulation Exhibits E, F, G)
5. Three of the seven turn foremen positions supervised by Mr. Cipriano were eliminated in August of 1982, including Mr. Pears'. (N.T. 31-32)
6. In August of 1982, Mr. Pears was given a choice between indefinite layoff and early retirement; he chose early retirement. (C.E. M, pp. 12-13)
7. Mr. Pears was qualified to perform the duties of turn foreman. (N.T. 41)
8. Of the four retained turn foremen, three were younger than forty in August of 1982. (N.T. 33, C.E. P, Q, R)
9. Mr. Cipriano considered three factors in making his recommendations as to which foremen should be retained: attitude, initiative, and experience. (N.T. 33)

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\*The foregoing Stipulations are hereby incorporated herein as if fully set forth.

To the extent that the opinion which follows recites facts in addition to those set forth here, they shall be deemed to be additional Findings of Fact.

10. Complainant testified that employees younger than he and about his own age were retained at the time he was terminated, as was an employee of about his age who had also had a heart attack. (C.E. M, pp. 17-20)

11. Mr. Jacoby, who was ultimately responsible for the decision to terminate Mr. Pears, relied on his own knowledge and Mr. Cipriano's recommendations. (N.T. 80-83)

12. After Mr. Pears returned from sick leave he advised Mr. Cipriano that he intended to perform his job mainly from his office; this concerned both Mr. Cipriano and Mr. Jacoby. (N.T. 28-30, 87)

13. Following his transfer Mr. Pears expressed dissatisfaction with his new position and said he was considering retirement. (N.T. 49)

14. Complainant was never evaluated by Mr. Cipriano as a turn foreman. (N.T. 39)

### CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
3. Complainant is an individual within the meaning of the Act.
4. Respondent is an employer within the meaning of the Act.
5. Complainant's estate may properly proceed as the aggrieved party in this case.
6. Complainant's job functions continued to be performed by employees who were retained, most of whom were younger than he.
7. Respondent has met its burden of proof and rebutted Complainant's prima facie case by introducing admissible evidence of legitimate, nondiscriminatory reasons for its conduct.
8. Complainant has not proved that the reasons given by Respondent for its actions were pretextual.

## O P I N I O N

This case arises on a complaint filed by Keith W. Pears ("Complainant")<sup>1</sup> against Sharon Steel Corporation ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about November 24, 1982, at Docket No. E-24211. In his complaint Mr. Pears alleged that Respondent laid him off because of his age, fifty-five, 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. ("Act"). Respondent has consistently denied violating the Act.

After the complaint was filed, Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. The parties and the Commission then attempted to resolve the situation through conference, conciliation and persuasion. When these attempts were unsuccessful, a public hearing was approved and was held on June 26, 1986, in Pittsburgh, Pennsylvania, before Hearing Examiner Edith E. Cox.

Mr. Pears was born on May 13, 1927. He went to work for Sharon Steel in the mid 1950's, beginning as an electrician's helper. He was promoted several times. In 1982, when the events which ultimately lead to this case began, he was working as an area foreman for the Blast Furnace, the position he had held for some fourteen years.

In March of 1982, Mr. Pears suffered a heart attack and remained out of work for approximately two months. During this time his position was filled by Tom Sagenich, who had been working for Sharon as a turn foreman in the 44" blooming mill. Mr. Pears returned from sick leave in June of 1982, and functioned as area foreman in the blast furnace for about two weeks; he was then reassigned to the position of turn foreman in the 44" blooming mill, Mr. Sagenich's former position. Mr. Sagenich at the same time was made permanent area foreman in the blast furnace. Mr. Pears' salary was not changed as a result of the transfer.

Sharon Steel in the meantime was experiencing serious economic difficulties; sales and profits dropped dramatically between 1981 and 1982. In August of 1982, Mr. Pears' direct supervisor, Donald Cipriano, was advised that there was to be a reduction in supervisory personnel. He was instructed by his own superior, Andy Stefanak, to develop a plan for reduction, which would be reviewed by Mr. Stefanak and Mr. Stefanak's boss, Charles Jacoby.

Prior to the August, 1982, reduction, Mr. Cipriano supervised seven turn foremen, including Mr. Pears. The reduction eliminated three of those positions. Mr. Cipriano's recommendation, which was approved by Mr. Stefanak and Mr. Jacoby, was that Mr. Pears be one of the three. Pursuant to that recommendation, Mr. Pears was advised that he had to choose between early retirement or being placed on layoff for an indefinite period. He chose early retirement. His complaint to the Commission followed. The only question to be determined here is whether the decision to eliminate Mr. Pears' position discriminated against him on the basis of his age.

Prior to the hearing in this case Mr. Pears became seriously ill; he died on February 24, 1986. A videotaped deposition taken on October 16, 1985, for the purpose of preserving his testimony was admitted to the record as Complainant's Exhibit M. This action went forward on behalf of the estate. Respondent did not object to proceeding in this fashion.

The respective burdens of proof of the parties in disparate treatment cases brought under the Act are well settled. Complainant bears the initial burden of making out a prima facie case. Should he do so, Respondent must rebut the inference of discrimination thus created by setting forth through the introduction of admissible evidence the legitimate, nondiscriminatory reason(s) for the action being challenged. Complainant may then prevail

by proving that the proffered reasons were pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649 (1976).

The prima facie case is based on evidence introduced by the Complainant. Should a Respondent remain silent in the face of that evidence, judgment must be entered for the Complainant. Where evidence of a Respondent's reason for its action is received, the Complainant's burden of establishing a prima facie case merges with his ultimate burden of persuading the trier of fact that there was intentional discrimination. Burdine, supra. In that situation, where a Respondent has done all that would have been required of it had the Complainant properly made out a prima facie case, it is no longer relevant whether the Complainant did so; the trier of fact should then decide the ultimate question of whether or not discrimination occurred. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

McDonnell-Douglas, setting out the elements of a prima facie case of refusal to hire, noted that differing factual situations would call for variation in the elements. 411 U.S. at 802, n. 13. Pennsylvania courts have similarly recognized the need for flexibility. Reed v. Miller Printing Equipment Division, 75 Pa. Commonwealth 360, 462 A.2d 292 (1983). In this case Mr. Pears has made out a prima facie case by proving that:

1. At the time of the challenged action he belonged to a protected class;
2. He was performing duties which he was qualified to perform;
3. He suffered an adverse employment consequence, termination, and

4. Complainant's job functions continued to be performed by employees who were retained, most of whom were younger than he.<sup>2</sup>

In August of 1982, Mr. Pears was fifty-five years old, and therefore protected by the Act from discrimination on the basis of his age. Respondent does not contest that he was qualified to perform his duties, nor that his termination from employment was involuntary and as such was an adverse employment consequence. Finally, it is not contested that three of the four turn foremen who were retained after the August, 1982, reduction were younger than forty when the decision was made to retain them. It is therefore necessary to consider Respondent's explanation of events.

Mr. Cipriano testified that he considered three factors when deciding which turn foremen should be retained: initiative, experience in the area to be operated, and attitude. Positive attitude, initiative, and relevant experience are of course desirable qualities in an employee. By his testimony that the retained turn foremen possessed these attributes to a greater degree than did Mr. Pears, Mr. Cipriano articulated legitimate and nondiscriminatory reasons for deciding to eliminate Mr. Pears' position. Respondent has thus met its burden of proof as set out above, and Complainant to prevail must show that these articulated reasons were pretextual. For the reasons which follow, I find that Complainant has failed to do this.

It is initially noteworthy that Mr. Pears' own testimony tended to suggest that no discrimination based on his age occurred. Asked by his Commission counsel why he felt that either his age or his health had been improperly considered by Respondent, Mr. Pears responded that both younger people and ". . . older people also in around the same age. . ." (Exhibit M,



p. 17) had been retained, as had someone about his age who had also had a heart attack. When pressed, he was unable to explain why this seemed discriminatory to him.

It is also significant that the credible testimony of Mr. Cipriano about the criteria applied by him was not in any way contradicted by Complainant. In addition to Mr. Cipriano, only Mr. Jacoby testified about the reasons for terminating Mr. Pears. He indicated that he was ultimately responsible for the decision, and that, while Mr. Pears had been a good employee, Mr. Sagenich was ". . . more responsive and accomplished things faster. . ." (N.T. 83). He testified that both his personal knowledge of the people involved and his reliance on Mr. Cipriano's recommendations had led to his decision. His testimony was also credible.

Also not contradicted by Complainant was Mr. Cipriano's credible testimony that Mr. Pears had announced upon his return from sick leave his intention to do his job mainly from his office rather than in the field. Both Mr. Cipriano and Mr. Jacoby testified that this plan caused them concern and contributed to the initial decision to retain Mr. Sagenich as area foreman and place Mr. Pears in the turn foreman position from which he was ultimately terminated. While Mr. Pears does not directly attack the transfer decision, he appears to suggest that it too was colored by impermissible concerns; the record does not support that suggestion.

Particularly significant in relation to the termination here challenged was Mr. Cipriano's credible and uncontradicted testimony that following the transfer, Mr. Pears on several occasions expressed dissatisfaction with his position in the blooming mill and said he was considering taking early retirement, even though he had agreed to transfer and never asked to be

returned to his former job. Such dissatisfaction as a manifestation of negative attitude was a legitimate area of concern for Respondent. Nothing in this record suggests that the retained turn foremen, or even Mr. Sagenich, had expressed similar dissatisfaction.

The main thrust of Complainant's attempt to establish pretext is that the turn foremen who were retained were not as well qualified as he. Reliance is placed on the performance evaluations of Messrs. Pears, Anttila, Lambert and Stowers, admitted to the record as Complainant's Exhibits N, P, Q and R. All of these evaluations were performed by Mr. Cipriano.

It is true that, in overall points, the retained foremen had lower scores than Mr. Pears, and that all of them received lower ratings in the "Initiative and Reliability" category. In the context of this case however, these facts fall short of establishing pretext.

Mr. Cipriano testified about the evaluations at some length. Most significant, he testified that the evaluations rated Mr. Pears as an area foreman, prior to his transfer, and the others as turn foremen. He indicated that the positions had different responsibilities and that the evaluations were therefore not comparable, and pointed out that he had never evaluated Mr. Pears' performance as a turn foreman. Finally, both he and Mr. Jacoby testified that their termination decisions were not based on the performance evaluations but on their assessments of the criteria listed above. While the decision to disregard the performance evaluations may appear questionable, it is not sufficient here to establish that the decisions made based on the criteria which Sharon Steel claimed without contradiction to have used instead, were pretextual.

Complainant has therefore failed to prove that the legitimate and nondiscriminatory reasons articulated by Respondent for his termination were pretexts for age discrimination, and his case must be dismissed. An appropriate order follows.

FOOTNOTES

<sup>1</sup>Following Mr. Pears' death, this case went forward on behalf of his estate. The term "Complainant" is used below to refer to Mr. Pears and to his estate as party in this case.

<sup>2</sup>As we have previously decided in Brackbill v. Orweco Frocks, E-28783D, decided October 28, 1986, the critical aspect of the 4th element is the employee's demonstration of a continuing need for services which the Complainant had performed. Here it is not disputed that turn foreman functions continued to be performed. See Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979) and McCuen v. Home Insurance Co., 633 F.2d 1150 (5th Cir. 1981)



