

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

CHARLES B. WALKER, Complainant

v.

METROPOLITAN EDISON COMPANY, Respondent:

DOCKET NOS. E-10469 and E-13511

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

FINDINGS OF FACT

Explanation of Abbreviations:

S.F. Stipulation of Fact
N.T. Note of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
F.F. Finding of Fact

1. Complainant herein is Charles B. Walker, an adult male, who resides at 215 W. College Avenue, York, Pennsylvania 17403 (S.F. 1).
2. Respondent herein is Metropolitan Edison Company, a subsidiary of General Public Utilities Corporation, with a place of business at Parkway Boulevard, York, Pennsylvania 17404 (S.F. 2).
3. Respondent employs four or more employees in the Commonwealth of Pennsylvania (S.F. 3).

4. Complainant, on April 29, 1976, filed a notarized complaint with the Pennsylvania Human Relations Commission (Commission) at Docket No. E-10469 (S.F.)
5. On June 1, 1976, Commission staff duly served all parties to this action with a copy of the complaint described in Item #4 above in a manner which satisfies the requisites of 1 Pa. Code §33.32 (S.F. 7).
6. Complainant, on February 23, 1978, filed a notarized complaint with the Commission at Docket No. E-13511 (S.F. 6).
7. On March 14, 1978, Commission staff duly served all parties to this action with a copy of the complaint described in Item #6 above in a manner which satisfies the requisites of 1 Pa. Code §33.32 (S.F. 7).
8. In correspondence dated November 29, 1979, the Commission notified Respondent that Probable Cause existed to credit the allegations contained in the above referenced complaints (S.F. 8).
9. Subsequent to the determination of Probable Cause, the Commission and Respondent attempted to resolve the matters in dispute between Complainant and Respondent through conference, conciliation, and persuasion but were not able to do so (S.F. 9).
10. Complainant was hired by Respondent on September 19, 1966, and worked as a clerk in the Dispatching Department of Respondent's Western Division from July 1, 1968, until November 20, 1974 (C.E. 1).
11. The Dispatching Department contained only nine employees, including Complainant (N.T. 17).
12. Complainant was the only clerk in the Dispatching Department (N.T. 174).
13. The workload in the Dispatching Department was light, Complainant did not have much responsibility, and he was given flexibility to come and go largely as he pleased (N.T. 173-74, 310-11).
14. On October 21, 1974, Complainant transferred from the position of Clerk in the Dispatching Department to the position of Clerk in the Line Department of Respondent's Western Division, due to a company-wide reduction in the work force, in accordance with the collective bargaining agreement in existence between Respondent and the Union representing Complainant. This transfer is not alleged to have been unlawfully discriminatory (S.F. 10; C.E. 1).
15. Complainant replaced Mary Fillmore Snyder (White), as clerk in the Line Department (S.F. 11).
16. Mary Fillmore Snyder was initially assigned as a Clerk in the Line Department on October 20, 1969 (S.F. 13).
17. During the years 1973 and 1974, Respondent first encountered severe financial problems, and was compelled to drastically reduce operating costs and expenses (R.E. 1, 2; N.T. 131-32, 164-65, 310).
18. Respondent is divided into four divisions, each of which had flexibility in the cost reduction techniques employed within that division (R.E. 1, 2; N.T. 144, 165).
19. The chain of command within Respondent's Western Division at the times relevant to this case consisted of John R. Clugston, Division Manager, who was responsible for the operation of the entire division; William Scharadin, Operating Superintendent, who reported to Clugston; Fred Wentzel, Supervisor of Construction and Maintenance, who reported to Scharadin; Philip Houck, Line Department Supervisor, who reported to Wentzel; Charles Leicht, General Line Foreman in the Line Department, and Paul

Sabold, Project Coordinator in the Line Department, both of whom reported to Houck; and James Furey, Clerk-Senior in the Line Department, and Complainant, Clerk-Junior in the Line Department, each of whom reported within the Line Department to Leicht and Sabold and ultimately to Houck (N.T. 124-25).

20. One method of cost reduction within Respondent's Western Division, implemented by the Division Manager, John R. Clugston, was the elimination of all upgrading, except for that deemed absolutely necessary (R.E. 1, 2; N.T. 127-29, 142-43, 165-66, 205, 215-16, 274-75).
21. The Collective Bargaining Agreement in effect at all times relevant to the instant action provides, in relation to upgrading:

4.7(a) If an employee, other than a regular relief employee, be temporarily assigned to a higher grade job for four (4) consecutive, but not necessarily continuous, hours, or more, he/she shall be paid for the entire period of his/her temporary assignment, either the regular or probationary rate for the job.

4.6(a) Except where otherwise specifically provided, an employee, who is fully qualified to perform all the duties of the job to which assigned, under normal supervision, shall be paid the established rate for the job. An employee who is not fully qualified to perform all the duties of the job to which assigned, under normal supervision, shall be paid, for a probationary period not exceeding ninety (90) days, ninety per cent (90%) of the rate for the job. The probationary period may be extended to the extent of any time lost during such period.

An employee who is not fully qualified to perform all the duties of the job to which assigned, under normal supervision, shall be paid, for a probationary period not exceeding ninety (90) days, ninety per cent (90%) of the rate for the job or the rate of his/her present job plus twenty-five percent (25%) of the difference between his/her present rate and the new higher rate, whichever is greater. The probationary period may be extended to the extent of any time lost during such period. (S.F. 16).

22. Not all supervisors immediately curtailed upgrades, including the Line Department Supervisor, Philip Houck (N.T. 126, 129, 167, 215-17, 241-42).
23. From at least January 1, 1973, to the date that Complainant assumed her duties in October, 1974, Snyder was routinely upgraded to the position of Clerk-Senior when Furey was absent from the Department for union business, vacation or illness (S.F. 14).
24. Snyder was an experienced clerk in the Line Department, extremely capable and knowledgeable in the performance of her duties whenever she was upgraded (N.T. 206, 216, 225-26, 258-59, 311).
25. In the Fall of 1974, Respondent was faced with the prospect of a company-wide reduction in its work force, its first ever, as a result of its financial problems (S.F. 10, N.T. 310).
26. Prior to this reduction in force, Clugston, while strongly urging an end to unnecessary clerical upgrades, had never absolutely prohibited them (N.T. 129-30, 142, 190-91, 217).

27. With the impending reduction in force, Clugston put out a firm directive that at the time of the reduction, no further clerical upgrades would occur, except for those absolutely required for the efficient operation of a particular department (N.T. 129-30, 142).
28. Clugston, becoming aware that the reduction in force would affect Snyder's Clerk-Junior position in the Line Department, gave Houck strict instructions that he was absolutely prohibited from upgrading Snyder's successor (N.T. 129-30, 142, 145, 167-69, 189, 216-17, 244, 248).
29. At the time that Houck was absolutely prohibited from upgrading Snyder's replacement, Respondent was unaware of whom that person would ultimately be (N.T. 130, 168-69, 217).
30. Complainant, during the time he spent as Clerk in the Line Department, was never upgraded to the position of Clerk-Senior during absences from the Department of James Furey, the regular Clerk-Senior assigned to the Department, (S.F. 12).
31. The total number of upgrades in the Western Division between 1972 and 1978, expressed in number of man-days, were as follows:

1972 - 3,366
1973 - 2,946
1974 - 2,241
1975 - 634
1976 - 408
1977 - 298
1978 - 289
(R. E. 7).

32. The total number of clerical upgrades in the Western Division between 1972 and 1978, expressed in number of man-days were as follows:

1972 - 65
1973 - 130
1974 - 42
1975 - 0
1976 - 0
1977 - 0
1978 - 0
(R.E. 7).

33. Subsequent to Complainant's transfer into the Line Department, and simultaneously with the reduction in force, there were only ten man-days of clerical to clerical upgrades in the Western Division, involving two employees in the Meter Department, each of whom was upgraded once for five man-days apiece (C.E. 10; R.E. 7).
34. Respondent, upon discovering that its policy against clerical upgrades was being violated in the Meter Department after the reduction in force, promptly and firmly put an end to such upgrading (C.E. 10; R.E. 7; N.T. 169-70).
35. There were no clerical to clerical upgrades anywhere in the Western Division after December 13, 1974 (C.E. 10; R.E. 7).

36. Of the two people upgraded in the Meter Department, referred to in Finding of Fact No. 32 above, one was White and one was Black (S.F. 11; C.E. 10; N.T. 54, 329-30).
37. Subsequent to Complainant's transfer into the Line Department, other than the upgrades referred to in Finding of Fact No. 33 above, the only upgrades into clerical positions in the Western Division were in the Transportation Department, and were of a non-custodial to clerical nature (C.E. 10).
38. There was only one clerk in the Transportation Department, and when that Clerk was absent it was absolutely necessary to have clerical coverage to dispatch vehicles and receive reports on gasoline deliveries (N.T. 178, 180)
39. After the 1974 reduction in force, it was infeasible for the Transportation Department to borrow a clerk from another department because of lack of personnel (N.T. 178).
40. After the 1974 reduction in force, the only employees Respondent could spare in the Transportation Department to perform clerical duties were mechanic apprentices, who had to be upgraded, and they were upgraded only until they became second class mechanics and therefore available for clerical work without upgrade (N.T. 178-79, 201-202).
41. The non-clerical to clerical upgrades in the Transportation Department, referred to in Finding of Fact No. 36 above, were allowed by Respondent due to business necessity, while there was no business necessity for clerical upgrades in the Line Department (N.T. 180).
42. Respondent did not harass Complainant, due to Complainant's race, nor did it treat Complainant less favorably than any other similarly situated employee, during Complainant's tenure in the Line Department.
43. The Line Department was a much larger Department than the Dispatching Department, with nine or ten times the number of employees (N.T. 17, 226-27, 311).
44. The workload and the duties in the Line Department were different and significantly heavier than in the Dispatching Department (N.T. 17, 226-27, 254-55, 311).
45. Complainant had extreme difficulty with the increased duties and responsibilities in the Line Department, and while performing them well enough to avoid major discipline, was never able to perform them to the satisfaction of Respondent (R.E. 6; N.T. 138-39, 151-52, 226-28, 251-52, 254-56, 259, 297).
46. Complainant, while never allowed to simultaneously perform all the duties of the Clerk-Senior in the Line Department, was not denied the opportunity to learn all of those duties, had he chosen to do so (N.T. 253-54, 258, 260).
47. Shortly after Complainant transferred into the Line Department, he began to exhibit a negative attitude toward his work and his co-workers, resulting in the gradual development of noticeable friction within the department (N.T. 174-75, 228-29, 261-68, 284, 294-95, 302-03).
48. Respondent made repeated good faith efforts to eradicate this friction within the Line Department, counselling and instructing Complainant, his co-workers and his immediate superiors of the necessity of harmonious relationships within the Department (N.T. 132-33; 135, 235-37, 271, 295, 300, 312).
49. James Furey, the Clerk-Senior, as well as other non-custodial Line Department personnel, were required to and did perform janitorial and cleaning duties (N.T. 240, 287).
50. Complainant was not required to ask permission to go to the restroom (N.T. 230-31, 263).

51. Complainant would often leave his office or department, during working hours, without informing anyone of his whereabouts, so that he could not be contacted if he was needed (N.T. 233-34, 263-64, 272).
52. Furey would not leave his office or department without informing someone, normally Paul Sabold, who was his immediate superior, of his whereabouts, even if he was only going to the restroom (N.T. 264).
53. Complainant resented that Furey, who was the President of his union, was permitted to leave the office on union business (N.T. 235-36, 248-49).
54. Furey would not sit at his desk without working, but would routinely try to find some work whenever he had none to do (N.T. 259-60, 287).
55. Complainant would intentionally do things in order to agitate and annoy his co-workers and immediate superiors, particularly Furey and Houck (N.T. 229, 267, 282).
56. Complainant often refused to talk to his co-workers and superiors (N.T. 229, 266-67).
57. Complainant would sometimes call in, only an hour before his shift was scheduled to start, and request leave, requiring Houck to do last minute personnel shuffling in order to accommodate him (N.T. 229).
58. Complainant would sometimes fail to answer the phones or to relay Furey's telephone messages when he received them (N.T. 265).
59. Furey, as a result of Complainant's negative attitude and actions, gradually became cold toward him and purposefully kept his distance whenever possible (N.T. 262, 265-66, 275-76, 284, 302).
60. On April 1, 1976, Paul Sabold, Project Coordinator in the Line Department and one of Complainant's superiors, noticed that Complainant was sitting at his desk, and not working, after his scheduled lunch hour (R.E. 5; N.T. 67).
61. Sabold asked Complainant if he was still on his lunch hour (R.E. 5; N.T. 67).
62. Complainant responded to Sabold's question by swearing at him, calling him a "motherfucker" (R.E. 5; N.T. 67, 296).
63. Philip Houck, summoned to the scene of this incident, attempted to calm Complainant whereupon Complainant proceeded to verbally abuse and threaten him (R.E. 5; N.T. 231-32, 296, 301).
64. As a result of this incident, Complainant threatened not to return to work, but Houck and Wentzel convinced him to stay, because they did not want him to risk losing his job by leaving the work floor (R.E. 5; N.T. 231-32, 296, 301).
65. On April 5, 1976, Complainant received a written disciplinary action letter for the improper swearing and antagonism which he displayed towards his superiors on April 1, 1976 (R.E. 5).
66. Also on April 5, 1976, Complainant was counselled concerning the disciplinary action letter and given the opportunity to respond to it (R.E. 6; N.T. 232-34, 297-98).
67. In January, 1978, at a meeting over a grievance filed by Complainant, Complainant verbally attacked Houck concerning a personal family problem unrelated to the grievance or to work, resulting in Houck becoming extremely distraught (N.T. 136, 238-39, 251).
68. On February 14, 1978, Complainant was involuntarily transferred by John Clugston, the Western Division Manager, from the position of Clerk in the Line Department to the position of Clerk in the Engineering Department; Complainant's hourly pay rate remained the same subsequent to the transfer (S.F. 15; N.T. 132, 137).

69. Complainant was transferred out of the Line Department primarily because of the disruption and personality problems that he was engendering within that department, and also because of his poor work performance and the fact that he was the junior employee (N.T. 136-37, 152, 313).
70. Prior to Complainant's involuntary transfer, there had been only one other occasion involving similar problems requiring an involuntary transfer, which occurred in 1966 and involved the transfer of the junior employee, who was White; this transfer was known to Clugston at the time he transferred Complainant (N.T. 134-35, 147, 324-25).
71. No evidence was presented of any employee, White or Black, who was treated more favorably by Respondent than Complainant under similar circumstances; Complainant was not similarly situated with Furey or Houck, as he was significantly more at fault in the problems leading to his involuntary transfer.
72. James Furey, the Clerk-Senior in the Line Department, was an experienced and a good worker, was not responsible for instigating the problems leading to Complainant's involuntary transfer, and was not as much at fault as Complainant in the personality conflict leading to Complainant's transfer. (N.T. 136, 259; F.F. 47, 51, 52, 54, 55, 56, 58, 59).
73. The personality conflict in which Complainant was involved was not racially motivated.
74. No evidence was presented that Respondent treated any of its employees, White or Black, less favorably than it treated Furey, under similar circumstances.
75. There were no discriminatory, racial motivations in Respondent's actions toward Complainant, involved in either the refusal to upgrade, the alleged harassment, or the involuntary transfer of Complainant.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over Complainant and Respondent and the subject matter of the Complaints under the Pennsylvania Human Relations Act, pursuant to Section 9 of the Pennsylvania Human Relations Act (Act), 43 P. S. §959.
2. The parties and the Commission have fully complied with the procedural pre-requisites to a Public Hearing in this matter, pursuant to Section 9 of the Act, 43 P.S. §959.
3. Respondent is an "employer" within the meaning of Section 4(b) and 5(a) of the Act, 43 P.S. §954(b) and §955(a).
4. Complainant is an "individual" within the meaning of Section 5(a) of the Act, 43 P.S. §955(a).
5. Respondent's alleged refusal to upgrade Complainant during each of Furey's absences from the Office of four hours or more that first occurred on or after October 21, 1974, and continued at least until April 29, 1976, constitutes an allegation of a continuing violation of the Act, as defined in appropriate Commission Regulations. 16 Pa. Code 42.11. Complainant's April 29, 1976, complaint was timely filed.
6. Respondent did not unlawfully discriminate against Complainant by not upgrading him, after his transfer into the Line Department, from the position of Clerk-Junior to the position of Clerk-Senior during absences from the Office of James Furey, the regular Clerk-Senior.
7. Complainant has proven a prima facie case of unlawful discrimination due to Respondent's failure to upgrade him after his transfer into the Line Department.

8. Respondent has articulated and established a legitimate non-discriminatory reason for not upgrading Complainant.
9. Complainant has failed to prove that the legitimate, non-discriminatory reason established by Respondent was pretextual.
10. Once Respondent has established a legitimate, non-discriminatory reason for its actions, and Complainant has failed to establish pretext, Complainant has failed to carry his burden of proving unlawful discrimination under the Act.
11. Respondent did not unlawfully discriminate against Complainant by harassing him due to his race, Black.
12. Complainant has not established a prima facie case of unlawful discrimination due to harassment by Respondent on account of his race, Black.
13. In the absence of a prima facie case, Respondent is under no duty to establish a legitimate, non-discriminatory reason for its actions, and Complainant has failed to carry his burden of proving unlawful discrimination under the Act.
14. Respondent did not unlawfully discriminate against Complainant by involuntarily transferring him on February 14, 1978, from the Line Department to the Engineering Department.
15. Complainant has proven a prima facie case of unlawful discrimination due to his involuntary transfer from the Line Department.
16. Respondent has articulated and established a legitimate, non-discriminatory reason for the involuntary transfer.
17. Complainant has failed to prove that the legitimate non-discriminatory reason established by Respondent was pretextual.

OPINION

I. HISTORY OF THE CASE

This matter arises on two complaints filed by Mr. Charles B. Walker (hereinafter "Complainant") with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Metropolitan Edison Company (hereinafter "Respondent"). The first complaint, filed April 29, 1976, at Docket No. E-10469, alleged that Respondent had refused to upgrade Complainant from the position of Clerk to Clerk-Senior in Respondent's Line Department because of his race, and had subjected him to harassment, also because of his race. The second complaint, filed February 23, 1978, at Docket No. 13511, alleged that Respondent involuntarily transferred Complainant from the position of Clerk in the Line Department to the position of Clerk in the Engineering Department because of his race. The allegations of each complaint alleged violations of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "Act"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq.

Representatives of the Commission conducted an investigation into the allegations of the complaints, and determined that probable cause existed to credit the allegations contained therein. Subsequent to this, the Commission endeavored to eliminate the practices complained of by conference, conciliation, and persuasion. These endeavors were unsuccessful, and the Commission approved both complaints for public hearing.

A Public Hearing on the consolidated complaints was held May 11 and 12, 1982, in York, Pennsylvania, and was conducted at all times by Commissioners Doris M. Leader, Chairperson

of the Hearing Panel, Rita Clark and Raquel Otero de Yiengst, pursuant to Section 9 of the Act. The case in support of the complaint was presented by Michael Hardiman, Esquire, Assistant General Counsel to the Commission. Respondent's position was represented by Anthony A. DeSabato, Esquire, of Kleinbard, Bell & Brecker. Post-hearing briefs were filed by both parties.

II. PRELIMINARY ISSUE OF TIMELINESS

Prior to reaching the merits of this matter, a threshold objection to the Commission's jurisdiction must be decided. Respondent argues that the portion of the complaint, filed on April 29, 1976, at Docket No. E-10469, and concerning Respondent's refusal to upgrade Complainant, was untimely filed. Section 9 of the Act, 43 P.S. §959, requires, inter alia, that a complaint "must be ...filed within ninety days after the alleged act of discrimination." If a complaint is not so filed, and a reason in the nature of waiver, estoppel or equitable tolling does not exist to stop the running of the ninety day period, the complaint must be dismissed. See Zipes v. Trans World Airlines Inc., ___ U. S. ___, 102 S. Ct. 1127, 1132 (1982) .

Complainant has responded to the charge of untimeliness by claiming that Respondent's failure to upgrade him constitutes a continuing violation. The complaint contained allegations of unlawful refusal to upgrade and of unlawful harassment. Paragraph 5 of the complaint affirmatively stated that the unlawful discriminatory practices alleged therein were "of a continuing nature which have persisted up to and including the present time." Respondent has objected to the timeliness of the failure to upgrade charge alone, so no consideration of the timeliness of the harassment charge need be made.

The Commission, pursuant to Section 7 of the Act, 43 P.S. §957, has the power to adopt and promulgate rules to effectuate its statutory mandate to eliminate unlawful discrimination. Rules adopted and promulgated by the Commission in this fashion are legislative in nature, and are "as valid and binding upon a court as a statute." Rankin v. School District of Pittsburgh, et al., 33 Pa. Cmwlth. 12, 381, A.2d 195, 198 (1977), appeal after remand, 39 Pa. Cmwlth. 222, 396 A.2d 856 (1978), citing Pennsylvania Human Relations Commission v. Uniontown Area School District, 455 Pa. 52, 313 A.2d 156, 169-70 (1973).

Pursuant to this legislative rulemaking power, the Commission has duly enacted a set of Special Rules of Administrative Practice and Procedure (hereinafter "Special Rules"). 16 Pa. Code §42.1 et seq. Section 42.11(a) of the Special Rules provides:

- (a) The complaint shall be filed within 90 days from the date of the occurrence of the alleged unlawful discriminatory practice. If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of such practice shall be deemed to be any date subsequent to the occurrence of such practice up to and including the date upon which the unlawful discriminatory practice shall have ceased.

In construing whether a particular action is of a continuing nature, the most important factor is whether a present violation is alleged to have existed within the statutory period for filing the charge. United Air Lines v. Evans, 431 U.S. 553 (1977); See Delaware State College v. Ricks, 449 U.S. 250 (1980). If an employee is terminated, for example, that is a definite, completed action, and a complaint under the Act must be filed within 90 days of the date of the termination.

The fact that the termination has a continuing, adverse impact as through reduced wages, and loss of other employment benefits, does not render the action a continuing violation. Each situation must, however, be considered on its own facts, and a determination of timeliness made on a case-by-case basis. Ricks, 449 U.S. at 258, n. 9.

Complainant alleged in his complaint that he was refused upgrading not once, but on numerous occasions, continuing up to and beyond the date on which he filed his charge. Respondent has admitted that Complainant was never upgraded. (S.F. 12). Complainant alleged that upgrading was continuing in other departments of Respondent's company, and that he was being unlawfully denied similar upgrading. He alleged that he was denied such upgrading within 90 days of the date on which he filed his complaint.

Under these circumstances, we find that a continuing violation of the Act was alleged. The violation began on the date Complainant was first denied upgrading, and ran to at least within 90 days of the date of the complaint. The charge alleging an unlawful refusal to upgrade was timely filed, and must be considered on its merits.

III. LIABILITY

A. Preliminary Considerations and Legal Background

The determination of liability in this case is divided into three parts. Complainant has charged Respondent with three separate acts of unlawful discrimination, encompassed in two separate but related complaints. Complainant may recover on one or more of the charges, or on none at all.

The first complaint, filed April 29, 1976, encompasses two of these charges. They are, respectively, that Respondent unlawfully refused to upgrade Complainant, and that Respondent unlawfully harassed him. The basis for both of these charges is his race, Black. (Complainant alleged in this complaint that Respondent discriminatorily refused to upgrade him on the basis of his race, Black, and his sex, male. Complainant withdrew the sex allegations and the withdrawal was accepted by the Commission in its Pre-Hearing Order of April 15, 1982. Discrimination on the basis of sex was neither argued nor briefed, and is no longer an issue in the case.)

The second complaint, filed February 23, 1981, encompasses the final charge against Respondent. Complainant alleged in this complaint that Respondent involuntarily transferred him in an unlawful discriminatory manner. The basis for this charge is also his race, Black.

A finding, of whether liability exists, must be made for each of the above charges. If Respondent is found liable for one or more of the alleged acts of unlawful discrimination, a determination of damages necessarily must follow. The Commission, as the trier of fact, has the responsibility to determine the credibility of the witnesses, to determine the appropriate weight to be given to the evidence and to resolve any conflicts in the evidence which might appear on the record. Carr v. Com., State Board of Pharmacy, 48 Pa. Cmwlth. 330, 409 A.2d 941 (1980) Colonial Gardens Nursing Homes, Inc., v. Com., Department of Health, 34 Pa. Cmwlth. 131, 382 A.2d 1273 (1978); Pennsylvania Human Relations Commission v. Hempfield Township, 23 Pa. Cmwlth. 351, 352 A.2d 218 (1976).

B. Burden of Proof

Section 5(a) of the Act, 43 P.S. §955(a) provides that it is an unlawful discriminatory practice, except for limited situations not here relevant:

For any employer because of the race...of any individual to refuse to hire or employ or to bar or discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire., tenure, terms, conditions, or privileges of employment...

The burden of proof in a case of employment discrimination based upon the discriminatory treatment of a particular individual, and brought under the Act, is set forth in McDonnell-Douglas Corporation v. Green, 411 U.S. 792, (1973), as adopted by the Pennsylvania Supreme Court in General Electric Corporation v. Cmwlth., Human Relations Commission, 469 Pa. 292 365 A.2d 349 (1976). McDonnell-Douglas involved an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. Title VII has been found to be the federal analogue to the Human Relations Act. General Electric, 265 A.2d at 654.

Complainant has the initial burden of establishing a prima facie case, which will necessarily vary, depending upon the factual situation involved. *Id.*, 365 A.2d at 65, n. 11, citing McDonnell-Douglas, 411 U.S. at 802, n. 13. The four basic elements, required by McDonnell-Douglas and General Electric to establish a prima facie case, are:

1. Membership in a protected class;
2. Application for a position for which qualified;
3. Rejection;
4. Continued search by the employer for other applicants of equal qualifications.

Once Complainant carries this burden, and successfully proves a prima facie case, the burden shifts to Respondent, who must articulate and establish a legitimate, non-discriminatory reason for its actions. If Respondent successfully accomplishes this requirement, the burden is upon Complainant to prove that Respondent's proffered defense, while facially valid, is no more than a pretext for unlawful discrimination. McDonnell-Douglas, 411 U.S. at 802-04.

Allegations of disparate treatment, such as Complainant's, require proof of discriminatory motive on the part of Respondent. In the absence of such proof, which may be established by circumstantial evidence in appropriate situations, the case must be dismissed. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36, n. 15 (1977).

C. Refusal to Upgrade Charge

The first portion of Complainant's April 29, 1976, complaint charges that Respondent discriminatorily refused to upgrade him because of his race. Complainant, who is Black, was hired by Respondent on September 19, 1966. On October 21, 1974, he transferred into Respondent's Line Department as a Clerk-Junior, replacing Mary Fillmore Snyder in that position. Snyder, who is White, had been upgraded to Clerk-Senior, whenever the incumbent in that position was absent for union business, vacation or illness. Complainant, after his transfer, was never upgraded to Clerk-Senior when similar circumstances arose.

Based upon this evidence, we find that Complainant has I proven a prima facie case of unlawful discrimination. He is a member of a protected class, and was treated less favorably by Respondent than a similarly situated employee, who was not a member of that class. These elements carry Complainant's initial burden, and shift to Respondent the burden of articulating and establishing a legitimate, non-discriminatory reason for its actions.

Respondent states that it refused to upgrade Complainant as an economic measure, based upon its need to save money in the face of a financial crisis. Respondent first encountered severe financial problems, beginning in 1973 and 1974, and was forced to drastically reduce operating costs and expenses. Respondent had four divisions, each of which had flexibility in the cost reduction techniques that it employed. Complainant worked in the Western Division, and one of the methods used to reduce expenses in that Division was the elimination of all upgrading except for that which was deemed absolutely necessary for the efficient operation of Respondent's business. Complainant's transfer into the Line Department coincided with this elimination, and he was not upgraded.

We find Respondent's explanation for not upgrading Complainant to be persuasive. Respondent was faced with a severe financial crisis, requiring it to cut costs. Elimination of upgrading was one method, instituted by the Western Division, in which Complainant worked, and the policy was enforced throughout that division. Respondent has established a legitimate, non-discriminatory reason for its action, and we must now consider evidence that this reason is no more than a pretext for unlawful discrimination.

Complainant points out that Snyder, his immediate predecessor in the Line Department, was routinely upgraded until the time that he replaced her in October, 1974, despite the Western Division's policy against unnecessary upgrades, that it had supposedly instituted some time previously. When the policy was first instituted, however, not all supervisors immediately curtailed upgrades. One of those who did not was the Line Department Supervisor, Philip Houck. He continued to upgrade Snyder, who was an experienced clerk in the Line Department. She was extremely capable and knowledgeable in the performance of her duties, whenever she was upgraded.

In the Fall of 1974, the Respondent was faced with a company-wide reduction in force, as a result of the financial crisis. With this reduction, which Respondent knew would result in Snyder's replacement in the Line Department, the Western Division Manager determined that the time had come to absolutely prohibit Houck from upgrading her successor. It was not known who would replace her, and the instructions given to Houck were simply not to upgrade that person, whomever it might be.

Snyder continued to be upgraded, therefore, not because there was no policy against upgrades, but because of an initial lack of strong, certain enforcement of that policy. We find it (extremely) credible that a supervisor would continue to upgrade an employee who had proven her exceptional merit in the upgraded position, as long as he could manage. The Western Division did not strictly prohibit its supervisors from unnecessary upgrading until the reduction

in force spurred it on. At that point, the policy became firm, and Complainant just happened to be affected.

Complainant also notes that Respondent continued upgrading clerks into clerical positions, after it refused to upgrade him. After his transfer into the Line Department, upgrades from clerical positions into clerical positions did occur within the Western Division. They involved only two employees, however, both in the Meter Department, who were each upgraded once for five man-days apiece. Complainant transferred into the Line Department on October 21, 1974, and all clerical to clerical upgrades were stopped by December 13, 1974. No clerical to clerical upgrades occurred after December 13, 1974, within the Western Division.

Respondent's explanation for its refusal to upgrade is completely consistent with this evidence. It implemented a ban on unnecessary upgrades during the period of 1973 to 1974. A few supervisors failed to immediately follow this directive, and it was only upon the reduction in force in the Fall of 1974, that Respondent began to strictly enforce its policy. Houck ceased clerical upgrades upon Complainant's transfer into his department, as he was unequivocally ordered. Upgrades of clerks ceased in all other departments, except the Meter Department, where Respondent swiftly and surely ended those, as well.

Respondent was, admittedly, somewhat lax in the initial enforcement of its ban on clerical upgrades. There is no evidence, however, that the ban was a pretext for unlawful discrimination. Once Respondent began strict enforcement, concurrent with the reduction in force in the Fall of 1974, not a single clerical to clerical upgrade occurred in the Western Division for the entire period of Complainant's tenure within the Line Department. Of the two clerks who were upgraded shortly after Complainant's transfer, one was White and one was Black, which while not determinative of Complainant's charge, that he was the subject of racial discrimination, does buttress the fact that Respondent had no racial motivations in its actions.

Finally, Complainant points out that there were upgrades of non-clerical employees into clerical positions, after Complainant was denied upgrading. Such upgrades did occur in one department, Transportation. There was only one clerk in the Transportation Department, and when that clerk was absent, it was necessary to have continued clerical coverage to dispatch vehicles and receive reports on gasoline deliveries. These operations had to continue and the only way the Transportation Department could reasonably do this was by upgrading. After the 1974 reduction in force, it was infeasible to borrow a clerk from another department because of lack of personnel. Mechanic apprentices were the only Transportation Department employees who could be spared for clerical work, and they were upgraded until they became second-class mechanics, and available for such work without the need for upgrade.

While upgrades into clerical positions continued in the Transportation Department, therefore, we find that those upgrades were required by business necessity. The Line Department, with two clerks, did not require an upgrade to keep its operations functioning, as did Transportation. Upgrades from non-clerical into clerical positions occurred only in the Transportation Department after Complainant was denied upgrading. There were valid business reasons for those upgrades, and the fact that they occurred does not render Respondent's defense pretextual.

Complainant has proven a prima facie case of unlawful discrimination, due to Respondent's refusal to upgrade him after his transfer into the Line Department. Respondent has articulated and established a legitimate, non-discriminatory reason for the refusal to upgrade him. Complainant has failed to establish that Respondent's reason is a pretext for unlawful discrimination. The portion of the April 26, 1976, complaint dealing with a refusal to upgrade must, therefore, be dismissed.

D. Harassment Charge

The second portion of Complainant's April 29, 1976, complaint charges Respondent with unlawful harassment due to Complainant's race, Black, during his tenure in the Line Department. This charge has two aspects. The first is that Respondent treated him differently than it treated other, similarly situated employees, and the second is, that Respondent subjected him to opprobrious racial remarks.

There is much conflicting testimony on the issue of harassment. Weighing all the evidence, we are unconvinced that Complainant was treated less favorably than any other, similarly situated employee, or that he was subjected to an unlawful atmosphere of racial harassment. Complainant testified that he was treated less favorably than the other clerk in the Line Department, James Furey. We, however, do not find this to be the case. Both of them, for example, had to do occasional janitorial work. Neither had to ask permission to go to the restroom. Furey would not sit idly at his desk, while Complainant was forced to be constantly at work. Complainant received the same treatment in the Line Department as any other employee, White or Black.

There were, to be certain, personality problems within the Line Department during Complainant's tenure. The Line Department was much larger than the Dispatching Department, where Complainant had previously been assigned. He was the only clerk in the Dispatching Department, and had considerable freedom to come and go as he pleased. The Line Department had two clerks, many more employees, and the workload and duties were different and significantly heavier than in Dispatching. Complainant was never able to satisfactorily perform all of these duties, and began to develop a negative attitude within the Line Department.

Respondent, desiring to put an end to these problems, attempted to restore harmonious relations by counselling Complainant, Furey, and Philip Houck, the Line Department Supervisor, on the need to work smoothly together. Despite these attempts, however, the problems continued. Complainant would do things to purposefully annoy his co-workers, particularly Furey and Houck. He would refuse to talk. He would not always answer the phones, and he would sometimes not give Furey his telephone messages. He would call in, less than an hour or so before his shift was scheduled to start, and request vacation leave, which would require Houck to do last minute personnel shuffling, in order to accommodate him.

On one occasion, Complainant swore at one of his supervisors, Paul Sabold, the Project Coordinator in the Line Department, because Sabold had noticed that he was sitting idly at his desk, after his scheduled lunch hour, and had inquired as to whether he was still at lunch. When Houck was summoned to the scene, Complainant verbally abused and threatened him, as well. He threatened to leave work, but Houck and Fred Wentzel, Supervisor of Construction and

Maintenance prevailed upon him to remain. They did this because they did not want him to lose his job, which would have been the likely result had he left.

As a result of this incident, Complainant received a Disciplinary Action letter. He was counselled about it, and about the various shortcomings he exhibited in the performance of his duties in the Line Department. He was given the opportunity to respond, and again Respondent attempted to re-establish a good working relationship with him.

Complainant did testify that Houck called him "boy" on possibly two occasions. (N.T. 35-6). The only other evidence that he presented of a racially motivated, discriminatory employment atmosphere was that he was Black, while his supervisors were White, and that "he was there." (N. T. 60). These facts, however, even coupled with one or two racial slurs do not prove a sufficiently serious atmosphere of racial harassment to constitute a violation of the Act. See Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied 406 u.s. 957 (1972).

While there were personality conflicts within the Line Department, those conflicts were primarily caused by Complainant. There was no unequal treatment, nor unlawful discriminatory atmosphere. Even if there had been an atmosphere of racial harassment, egregious enough to violate the Act, an employee who instigates and actively contributes toward that atmosphere, as did Complainant with his attitude and actions, may not be able to recover under the Act. See Gan v. Kepro Circuit Systems, Inc., 27 E.P.D. ¶32,379 (E.D. Mo. 1982). (No constructive discharge based on an atmosphere of sexual harassment where Complainant actively contributed to that atmosphere).

Complainant has failed to establish a prima facie case of racial harassment by Respondent, either due to unequal treatment or a discriminatory atmosphere. Respondent, in the absence of a prima facie case, has no duty to articulate and establish a legitimate, non-discriminatory reason for its actions. The portion of the April 26, 1976, complaint, dealing with unlawful harassment, must therefore be dismissed.

E. Involuntary Transfer Charge

Having disposed of the charges contained in Complainant's first complaint, we turn to those in his second, filed on February 23, 1978. In this complaint, Complainant charged Respondent with unlawfully discriminating against him due to his race, Black, in that he was involuntarily transferred from the position of Clerk in the Line Department to the position of Clerk in the Engineering Department. This transfer took place on February 14, 1978. It is undisputed that Complainant was transferred involuntarily.

Most of the events leading up to the transfer have been set forth in Part III, Section D, supra, concerning Complainant's harassment charge. There were problems in the Line Department, caused by Complainant's poor work performance and negative attitude on the job. The result was friction and unrest, which culminated on January 31, 1978, at a meeting over a grievance filed by Complainant. At this meeting, Complainant verbally attacked his supervisor, Philip Houck, concerning a personal family problem unrelated to the grievance or to work. Houck, as a result of

this attack, became extremely unnerved and distraught. Following this incident, on February 17, 1978, Complainant was involuntarily transferred.

We find that Complainant has carried his burden of proving a prima facie case of unlawful discrimination due to his involuntary transfer. He is Black. He was involuntarily transferred from the Line Department to the Engineering Department. At the time of the transfer, there were two clerks in the Line Department, Complainant and James Furey. Complainant was involuntarily transferred, while Furey, who is White, was not.

Complainant did not suffer any monetary or other loss of employment benefits as a result of this transfer, except for the possible loss of opportunities for increased overtime work. We find the involuntary transfer alone, however, to be an adverse employment action sufficient for purposes of a prima facie case, regardless of any loss of tangible benefits.

Respondent, in defending against Complainant's prima facie case, has stated that it transferred Complainant because he was the junior clerk, because he was a poor worker, and because of his poor attitude and consequent disruption of the Line Department.

Complainant was the junior clerk in the Line Department, both in terms of job classification and seniority within the Department. Furey was the Clerk-Senior, and had held that position since 1972. Complainant was the Clerk-Junior, obtaining that position in October, 1974, and was subordinate to the Clerk-Senior in the chain of command. There had been only one prior occasion on which an employee had been involuntarily transferred under similar circumstances, and it had been the junior employee who was transferred.

Complainant also had significant difficulties in performing his duties in the Line Department. The Dispatching Department, to which he had been previously assigned, was a much smaller operation (see Part III, Section D at p.30, supra), and he was never able to satisfactorily handle all of the increased responsibilities and duties in the Line Department. Furey, in contrast, was experienced and capable in the performance of his Line Department duties.

Complainant, although he received neither unequal treatment, nor other unlawful harassment, from his co-workers and supervisors in the Line Department (see Part III, Section D, supra), became disgruntled and caused an increasing amount of friction to occur. He became unable to work with Furey, the Clerk-Senior. His disruptive behavior did not abate, for any length of time, despite Respondent's repeated good faith efforts to resolve the problem. By February, 1978, Respondent had to do something permanent about the situation, and it was determined that Complainant should be transferred.

We find Respondent's explanation of Complainant's involuntary transfer to be persuasive. Complainant had less seniority than Furey. He did not perform his Line Department clerical duties as well as Furey. He had caused significant friction and unrest within the Department, which showed no signs of improving as long as he remained where he was. It was necessary for the most efficient operation of Respondent's business that Complainant be transferred. Respondent, therefore, has rebutted Complainant's prima facie case, and the burden shifts to Complainant to establish pretext.

Complainant has attacked Respondent's proffered defense from several angles. He argues that Respondent, at the time it transferred Complainant, had no policy of transferring the junior employee where unrest in a department necessitated a transfer. The evidence shows that in the only previous instance in which Respondent had involuntarily transferred an employee for similar reasons, it was the junior employee who was transferred. Despite this one prior incident, however, we do not feel that Respondent had a set policy of transferring the junior employee in situations similar to Complainant's.

The fact that Complainant was the junior employee, however, was only one factor in the decision to transfer him. While the single precedent did not constitute company policy, it was known and considered by Clugston at the time of his decision to transfer Complainant. In determining that Complainant should be transferred, the fact that a precedent existed may validly be used as one consideration, as it was in this instance. We find that the precedent simply buttressed the decision to transfer the junior employee, and the fact no set policy existed does not render its use pretextual.

Complainant also argues that he was transferred solely because of a personality conflict which created an undesirable working climate, for which he was not completely at fault, and that the other person involved, James Furey, was not disciplined for his role in those problems. A personality conflict in the Line Department did exist, and it was the major and precipitating factor for the transfer. As stated herein, however, we have found that two other factors were also involved in the decision. Respondent, in determining to transfer Complainant, desired to keep the most competent clerk in the Line Department. Furey was a good worker, while Complainant was barely adequate. Complainant was also the junior employee, and as already discussed, Respondent took appropriate consideration of the existence of a similar, past involuntary transfer of a junior employee. It was the combination of these three factors which convinced Respondent to transfer Complainant, with the second two buttressing and reinforcing the appropriateness of the total decision.

Respondent must, of course, treat its employees equally, without regard to race. The one time an equally serious personality problem occurred, a White employee was transferred. To prove that Respondent's non-discriminatory explanation of its action is pretextual, however, Complainant must show a similarity between his conduct and that of White employees, who were treated more favorably. Johnson v. Bunny Bread Company, 646 F.2d 1250, 1255 (8th Cir. 1981). See McDonnell-Douglas Corporation v. Green, 411 U.S. at 804.

Complainant, with the overall burden of proof, has presented no evidence of any employee, White or Black, who was not transferred, or was otherwise treated more favorably than Complainant, under similar circumstances to his own. Furey's conduct, with which Complainant compares his own, was not similar, nor nearly as serious in nature. Furey was a good worker, and did not instigate any of the problems in the Line Department. He did allow himself to become cold and distant toward Complainant, which did not help the situation, but that conduct was brought on by Complainant. There is no evidence that other employees, White or Black, were treated less favorably than Furey, in comparable situations.

Whether we feel that Furey should have been subject to some adverse action, due to his conduct, is irrelevant, since there is no evidence that a Black employee in similar circumstances would have been treated differently. In the absence of any evidence that Furey would have been treated less favorably, for his smaller role in the problem situation, had he been favorably, had he been White, we are unable to conclude that Respondent accorded Furey more favorable treatment than! Complainant, due to their race.

Dissimilar conduct merits dissimilar treatment, and that is what occurred. See Board of School Directors of Fox Chapel Area School District v. Rossetti, 488 Pa. 125, 411 A.2d 486, 489 (1979). (Evil to be remedied by the Act is dissimilar treatment of persons similarly situated.) We can discern no racial motivation for Respondent's actions. We find that Respondent could justifiably determine that Furey's less serious misconduct merited no adverse action, without rendering its decision to transfer Complainant unlawfully discriminatory.

Complainant has established a prima facie case of unlawful discrimination due to his involuntary transfer. Respondent has established a legitimate, non-discriminatory reason for this action. Complainant has failed, however, to establish that this proffered reason is pretextual. Complainant has not carried his burden of proof, and his February 23, 1978, complaint of unlawful discrimination must therefore be dismissed.

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

CHARLES B. WALKER, Complainant

v.

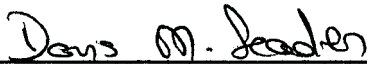
METROPOLITAN EDISON COMPANY, Respondent:

DOCKET NOS. E-10469 and E-13511

CONCURRING OPINION OF HEARING COMMISSIONER

I concur in the Recommendation of the Hearing Panel that the Complaints in this matter be dismissed. I am writing separately to express my belief that Finding of Fact No. 69 is not supported by substantial evidence, to the extent that it finds Complainant's poor work performance was a factor in Respondent's decision to involuntarily transfer him.

In my opinion, Respondent made the decision to transfer Complainant because of the disruption and personality problems he was causing, and because he was the junior employee. Complainant's poor work performance was not cited by the witnesses as a reason for the decision. I would eliminate Complainant's poor work performance as a reason supporting the involuntary transfer, and base the dismissal of the case on the other reasons, which I believe to be fully sufficient to support that decision.

BY: 
DORIS M. LEADER
Vice-Chairperson

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARLES B. WALKER, Complainant

v.

METROPOLITAN EDISON COMPANY, Respondent:

DOCKET NOS. E-10469 and E-13511

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, the Hearing Panel finds that Respondent did not discriminate against Complainant in violation of the Pennsylvania Human Relations Act, and recommends that the attached Findings of Fact, Conclusions of Law, Opinion and Final Order be finally adopted and issued by the Pennsylvania Human Relations Commission.

BY: <u><i>Doris M. Leader</i></u>	<u>November 19, 1982</u>
DORIS M. LEADER Panel Chairperson	Date
<u><i>Rita Clark</i></u>	<u>November 19, 1982</u>
RITA CLARK Hearing Commissioner	Date
<u><i>Rita Clark</i></u>	<u>November 19, 1982</u>
RAQUEL OTERO de YIENGST Hearing Commissioner	Date

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARLES B. WALKER, Complainant

v.

METROPOLITAN EDISON COMPANY, Respondent:

DOCKET NOS. E-10469 and E-13511

FINAL ORDER

AND NOW, this 24th day of November, 1982, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel and therefore

ORDERS

That the complaints in this matter be, and the same hereby are, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 
JOSEPH X. YAFFE, Chairperson

ATTEST: 
ELIZABETH SCOTT, Secretary