

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

PATRICIA M. MARINACCI, Complainant:

v.

ROBERT WHOLEY & CO., INC., Respondent

Docket No. E-37932

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PATRICIA M. MARINACCI, Complainant:


v.

ROBERT WHOLEY & CO., INC., Respondent

Docket No. E-37932

JOINT STIPULATIONS OF FACT

1. Complainant, Patricia Marinacci, is an adult individual residing in Pennsylvania.
2. At all times relevant to the complaint Respondent employed more than four employees.
3. Complainant filed the Original Complaint on September 15, 1986 and the Amended Complaint on October 30, 1986 Docket No. E-37932-D with the Pennsylvania Human Relations Commission.
4. A fact finding conference was held on December 11, 1986.
5. A probable cause determination was approved on March 16, 1988.
6. Conciliation efforts were not successful.
7. A public hearing request was approved on March 26, 1990.
8. The action alleged in the Complaint occurred in Allegheny County.
9. In 1985, Complainant's yearly salary at Robert Wholey & Company was \$20,881.64.
10. Complainant was employed at Basic Products from July 1987 through September 1987 and earned \$5,185.34.
11. Complainant was employed at Color Tile from October 1987 through November 1987 and earned \$1,162.20.
12. Complainant was employed at Cavanaugh Flying Fish from June 1989 through November 1988 and earned \$5,130.00.
13. Complainant was employed part-time at Publishers Services from March 1989 through May 1989 and earned \$1,021.00.
14. Complainant was employed at Jarrell and Rea from May 1989 through January 1990 and earned \$9,840.00.
15. Complainant has been employed by Bell Telephone since April 1990 and has earned \$4,718.47 (as of 8/18/90).


Matthew J. Wholey
Counsel for Respondent


Diane Blancett-Maddock
Counsel for Commission

September 6, 1990
MSW DBM

FINDINGS OF FACT

The foregoing "Stipulations of Fact" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

S.F. Stipulations of Fact
N.T. Notes of Testimony

1. The Complainant is an adult individual residing in the Commonwealth of Pennsylvania. (S.F. 1)
2. At all times relevant to the instant complaint, the Respondent had more than four employees in the Commonwealth of Pennsylvania. (S.F. 2)
3. The Complainant filed a previous complaint with the Pennsylvania Human Relations Commission on June 19, 1986, docketed at E-37097. (N.T. 16)
4. The Complainant then withdrew that complaint on July 22, 1986. (N.T. 18)
5. The Complainant filed the instant complaint on September 15, 1986, and amended the complaint on October 30, 1986. (S.F. 3)
6. The Complainant was initially employed as an inside sales representative with the Respondent in December of 1982. (N.T. 11)
7. The Complainant's duties included: handling accounts, contacting the customers, taking and processing orders, and making customers aware of new products. (N.T. 11)
8. The Complainant also trained new sales representatives when they were hired. (N.T. 11)
9. Some of the individuals trained by the Complainant were: Paula Hazlewood, Helen Wagner, Susan Howard and Michael Gleason. (N.T. 12)
10. The Complainant also participated in the holding of seafood seminars while she was employed by the Respondent. (N.T. 12-13)
11. During 1986, there were approximately nine inside sales representatives employed by the Respondent. (N.T. 15)
12. The inside sales representatives were ranked according to the total dollar sales per week. (N.T. 15)
13. During the time that Complainant worked for the Respondent, she was always ranked within the top five inside sales representatives. (N.T. 16)
14. In 1986, the Complainant's supervisor was Robert Wholey, Jr. (N.T. 14)
15. During the time that Complainant was employed by the Respondent, she did not receive any formal reprimands nor suffer any disciplinary action other than the suspension that led to her termination. (N.T. 38)
16. In 1986, a number of inside sales representatives, including the Complainant, had posted a stress poster near their desktops. (N.T. 23)
17. The inside sales representatives were told to remove the posters from their desks. (N.T. 25)
18. The Complainant placed her poster under her calendar. (N.T. 25)
19. The Complainant was suspended for one week by Robert Wholey, Jr. for possessing the poster on September 15, 1986. (N.T. 27-28)
20. Other sales representatives had the poster in their possession but they were not disciplined by the Respondent. (N.T. 28)

21. After the Complainant's suspension on September 15, 1986, she never returned to the Respondent's workplace. (N.T. 29)
22. Subsequently when the Complainant went to collect unemployment, the Respondent informed the Bureau of Employment Security that the Complainant had been fired. (N.T. 20)
23. After her termination by Respondent, the Complainant actively sought employment. (S.F. 10-15)
24. In 1985, the Complainant's yearly salary was \$20,881.64. (S.F.9)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations 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.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Respondent is an employer within the meaning of the Act.
5. The Complainant has made out a prima facie case of retaliatory discharge by proving that:
 - a. She was engaged in a protected activity;
 - b. The Respondent was aware of it;
 - c. She suffered an adverse decision; and
 - d. There is a causal link between the protected activity and the adverse decision.
6. The Respondent has met its burden of producing evidence of a legitimate non-discriminatory reason for its action.
7. The Complainant has met her ultimate and overall burden of proving unlawful discrimination by showing that the Respondent's proffered explanation is pretextual.
8. When an individual has participated in the PHRC complaint process, the truth or falsity of that initial claim is not a consideration regarding the issue of retaliation.
9. The Pennsylvania Human Relations Commission may fashion a remedy which will effectuate the purpose of the Pennsylvania Human Relations Act.
10. The Pennsylvania Human Relations Commission is permitted to award interest in backpay awards at the rate of 6% per annum.

OPINION

This case arises out of a complaint filed by Patricia M. Marinacci (hereinafter "Complainant") against Robert Wholey Co., Inc. (hereinafter "Respondent"), with the Pennsylvania Human Relations Commission, on or about October 30, 1986, at Docket No. E-37932. In her complaint, the Complainant alleged that the Respondent violated Section 5(d) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended 43 P.S. §951 et seq.("PHRA"), which prohibits retaliation against an individual for filing a PHRC complaint. The Complainant was discharged by the Respondent.

After this matter was investigated, PHRC staff found probable cause to credit the Complainant's allegations. The parties attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. However, these attempts were unsuccessful and this case was approved for a Public Hearing.

A Public Hearing was held in this matter on September 6 and 7, 1990 in Pittsburgh, Pennsylvania before Phillip A. Ayers, Permanent Hearing Examiner. Matthew J. Wholey, Esquire, represented the Respondent, and Diane Blancett-Maddock appeared on behalf of the Commission. Following the Public Hearing, post-hearing briefs were submitted by the parties.

In this case, the Complainant, in accordance with McDonnell Douglas v. Green, 411 U.S. 792, 5 FEP 965 (1973), has the initial burden to prove a prima facie case of discrimination. As has often been emphasized, the McDonnell Douglas prima facie formula is not rigid. Instead the exact elements of the prima facie case are frequently changed since the elements are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations.

To establish a prima facie case of retaliation, the Complainant must show:

1. that she was engaged in a protected activity;
2. that the Respondent was aware of it;
3. that Complainant suffered an adverse decision; and
4. that there is a causal link between the protected activity and the adverse decision.

The Complainant has clearly established the first element of the prima facie case, that is, she was engaged in a protected activity under Section 5(d) of the Pennsylvania Human Relations Act. Section 5(d) makes it unlawful to:

"discriminate in any manner against any individual because such individual has opposed any practice forbidden by this Act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this Act." 43 P.S. §955(d)

In the instant case, it is undisputed that the Complainant filed an earlier complaint with the Commission on June 19, 1986. This filing would constitute a protected activity under the Pennsylvania Human Relations Act.

Secondly, it is undisputed that the Respondent was aware of the complaint since it was served upon the Respondent. The handling of the complaint was then delegated to the Respondent's Controller. This notice would satisfy the second element of the prima facie case.

Thirdly, the Complainant suffered an adverse employment decision when she was suspended on September 15, 1986. This suspension was eventually changed to a termination at a later date.

The last element of a prima facie showing in a retaliation complaint is the causal link between the protected activity and the adverse decision. When determining this last element, the first

three factors came into play in order to discern causation. There has already been participation in a protected activity and an occurrence of an adverse employment decision. When participation in the protected activity and the occurrence of the adverse employment action occur within close proximity in time, causation is inferred. Goodwin v. Pittsburgh, 480 F. Supp. 627, (W.D. Pa. 1979) aff'd without op. 624 F.2d 1090 (3rd Circuit 1980) There is no dispute that less than two months after the withdrawal of her initial complaint, the Complainant was suspended. As Regional Counsel notes in her brief, the inference of retaliation is created by the closeness of time between the complainant's original participation in the complaint process and the adverse employment decision.

The above elements clearly establish a prima facie showing in a complaint of retaliation. Utilizing the allocation of proof analysis, once the prima facie case has been established, the burden of production shifts to the Respondent to simply produce evidence of a legitimate non-discriminatory reason for its action.

The Respondent in its brief sets forth several reasons for its actions against the Complainant. The Respondent asserts that it terminated the Complainant because of her insubordination, putting a poster up in the office, and basically, being a disruptive influence in the office. By presenting these reasons, the Respondent has clearly met its burden of producing evidence of legitimate non-discriminatory reasons for its actions.

Now we enter the final phase of the allocation of proof analysis. The Complainant still has the ultimate and overall burden of proving unlawful discrimination by showing that the Respondent's proffered explanation is pretextual. Initially we must dispense with an issue raised in the Respondent's brief. The Respondent spent some time in its brief attempting to show that the initial complaint of the Complainant was invalid. The law is clear that the resolution of the instant complaint does not require an inquiry into the Complainant's initial complaint. PHRC v. Thorpe Reed and Armstrong, 24 Pa. Cmwlth. 205, 361 A.2d 497 (1976). A Complainant is still protected from retaliation.

Now we turn to the question of whether the Complainant can show that the proffered explanations of the Respondent are pretextual. Upon review of the entire record in this case, it must be held that the explanations of the Respondent are pretextual. The Complainant was never disciplined by the Respondent for insubordination. The Complainant was never given a bad performance evaluation. As a matter of fact the Complainant was such a valued employee that she was given the responsibility of training new sales representatives. Furthermore, the Complainant was thought to be responsible enough to participate in the holding of seafood seminars in order to elicit new business. It is certainly not normal business practice that someone who has a disruptive influence and was insubordinate to her superiors, would be allowed to train new employees and meet prospective customers. For the above reasons, it is clear that the Complainant has met its ultimate and overall burden of proving unlawful discrimination by showing that the explanations of Respondent were pretextual.

When reviewing the record in this matter, there were some additional factors that were considered. In the record much of the testimony was contradictory. Generally, one must take into account each witness' motive, state of mind, strength of memory, and demeanor and manner

while testifying. Consideration is also given to whether a witness' testimony was contradicted, and the bias, prejudice, and interest, if any, of each witness. In addition, consideration is also given to any relation each witness bore to either side of the case; the manner in which each witness might be affected by a decision in the case; and the extent to which, if at all, each witness was either supported or contradicted by other evidence.

Fundamentally the knowledge and recollection of a witness is basic to assessing credibility. Witnesses who clearly appeared to feign forgetfulness either of circumstances which would be recalled if the witness had any memory at all or of matters to which the witness would be open to contradiction if the testimony was untrue, were considered unworthy of belief. Consideration was given to a witness' general bearing, conduct on the witness stand, demeanor, candor, or frankness or evasiveness of testimony, and even intonations of a witness' voice. Bearing this analysis in mind, we now proceed to the incident which led to the Complainant's termination.

In 1986, some of the sales representatives had "stress" posters on their individual corkboards. The stress posters contained the words, "choke the living shit out of some asshole". These posters were observed by Robert Wholey, Sr., semi-retired President of Respondent Company. He asked his son, Robert Wholey, Jr. to have them removed. Apparently Robert Wholey, Jr. removed them from the boards and put them on the sales representatives' desks. The next day, Robert Wholey, Jr. went to each sales representative and allegedly told them to remove the poster. Mr. Wholey, Jr. testified that he went directly to Complainant and told her to remove her poster. Approximately two weeks later, the Complainant was suspended when the poster was seen near her desk.

Much of the Respondent's position on this point relies on the testimony and credibility of Robert Wholey, Jr. Robert Wholey, Jr. testified that he gave the Complainant a direct order to get rid of the poster, and she disregarded that order. The Complainant credibly testified that the poster was not on her desk and that other sales representatives had also retained the poster. Mr. Wholey, throughout his testimony, would allude to conferences with the Complainant and various incidents in regard to her not following orders or being disruptive. However, the record is void of any specificity as to the conferences with Complainant. There were no specific dates or times as to when these conferences took place. Furthermore, as to the "incidents" that other Respondent witnesses testified to, the testimony was, once again, vague and lacked any specificity. As noted before in this Opinion, the knowledge and recollection of a witness is basic in assessing credibility. Furthermore, as aforementioned, witnesses who seemed to forget circumstances which would be recalled if the witness had any memory are not deemed to be credible. Upon review of the entire record in this matter and with consideration of the demeanor and attitude of Respondent witnesses, it shows that the testimony of the Respondent witnesses was not credible. Accordingly, the Complainant has met her ultimate and overall burden of proving unlawful discrimination on the part of the Respondent for its action in terminating her in retaliation for her prior filing of a complaint.

Having reached the above finding, Section 9 of the Pennsylvania Human Relations Act empowers the Commission to award backpay and any such other relief as will in the judgment of the Commission to effectuate the Act's purposes. The Complainant is seeking backpay from the date of Complainant's termination until the date of the Public Hearing. The Complainant argues

that she is also entitled to a yearly 5% increase in her earnings. This 5% annual increase is purely speculative on the part of the Complainant and will not be awarded in this matter. While the Respondent attacks the credibility of her efforts to seek other employment, it introduced no evidence of its own to establish her lack of diligence. Therefore, it is the finding of the Commission that Complainant has credibly testified to reasonable attempts to mitigate, and that Respondent has not shown that she failed to do so. Marks v. Prattco, 633 F.2d 1122 (5th Cir. 1981)

The backpay award of the Complainant shall be computed as follows:

	Potential Earnings	Mitigated Earnings	Net Damages
1986	\$20,880	0	*\$ 5,481.00
1987	\$21,124	\$ 6,347	\$14,777.00
1988	\$23,030	\$ 5,130	\$17,900.00
1989	\$24,171	\$10,861	\$13,310.00
1990	\$25,379	\$ 4,718	\$20,661.00

Total Damages -\$72,129.00

*Complainant worked for the Respondent until September 15, 1986.

In dealing with the issue of damages, no consideration was given to the reinstatement question since the Complainant did not request reinstatement to her position.

Accordingly, having found that the Respondent did unlawfully discriminate against the Complainant by discharging her in retaliation for Complainant filing a prior PHRC complaint, an appropriate Order follows:

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

PATRICIA M. MARINACCI, Complainant:

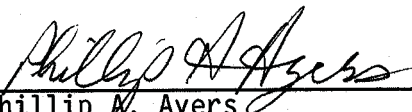
v.

ROBERT WHOLEY & CO., INC., Respondent

Docket No. E-37932

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that the Respondent did unlawfully discriminate against the Complainant by discharging her in retaliation for the Complainant having filed a PHRC complaint. The Respondent's adverse action was in violation of Section 5(d) of the Pennsylvania Human Relations Act. Accordingly, it is recommended that the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, Recommendation of Permanent Hearing Examiner, and Final Order be adopted by the full Pennsylvania Human Relations Commission.



Phillip W. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PATRICIA M. MARINACCI, Complainant:

v.

ROBERT WHOLEY & CO., INC., Respondent

Docket No. E-37932

FINAL ORDER

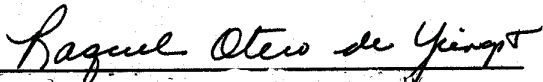
AND NOW, this 3rd day of September, 1991, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, in accordance with the Recommendation of the Permanent Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

ORDERS

1. Respondent shall pay Complainant within 30 days of the effective date of this Order, the lump sum of \$72,129.00, plus an additional amount of interest of 6% per annum, to be calculated up to the month during which the Public Hearing was held.
2. Within 30 days of the effective date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to Diane Blancett Maddock, Esquire, at the Commission's Pittsburgh Regional Office located at 11th Floor State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania.


PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



Raquel Otero de Yiengst, Vice Chairperson

ATTEST:


Gregory J. Celia, Secretary