

FINDINGS OF FACT *

1. Complainant Julia Osmun (hereinafter "Osmun") was hired by Respondent West Easton Athletic Association (hereinafter "Athletic Association") in October 2004 as a full-time prep cook. (N.T. 14-15)
2. Osmun is a female. (N.T. 13)
3. At the time of Osmun's hiring, the Athletic Association employed four or more persons. (N.T. 15-16)
4. When Osmun was discharged, the Athletic Association employed seven other persons. (N.T. 26)
5. Osmun was paid eight dollars an hour plus tips. (N.T. 12)
6. When Osmun was first hired, she worked the day shift. (N.T.12-13)
7. The day shift began at 10:00 a.m. and ended at 5:00 or 6:00 p.m., Monday through Friday. (N.T. 12-13)
8. Osmun's first supervisor was Jim Nagy, the Athletic Association's steward. (N.T. 14)
9. In November of 2004, Nagy told Osmun that her shift was to change to the evening and she could work four evenings per week, including Monday. (N.T. 17-18)
10. In the evening, the Athletic Association's kitchen was open from 5 p.m. to 9 p.m. (N.T. 18)
11. The major difference in the shifts was that the evening shift involves much more food service than food preparation as opposed to the day shift. (N.T. 18)
12. In mid-May 2005, Nagy informed Osmun that the kitchen would be closed on Mondays. (N.T. 19-20)
13. Nagy told Osmun that the kitchen was to be closed on Mondays because the Athletic Association did not want women in the building during its monthly meetings. (N.T. 20)

* 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 Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit

14. Specifically, Nagy told Osmun that two female bartenders (Carol Beam and Carol Decher) overheard what was said during the meetings and were repeating it to other individuals. (N.T. 20)

15. At all times relevant to this complaint, the Athletic Association's Constitution and Bylaws did not allow women to become voting members. (N.T. 40; C.E. 1)

16. In May 2005, Mike Davis was a member of the Athletic Association's Board of Directors. (N.T. 22-23)

17. After Nagy left the Athletic Association, Davis assumed his duties as steward. (N.T. 23)

18. In May 2005, Osmun approached Davis and requested additional hours on her schedule. (N.T. 22)

19. Davis' response was that he wanted "no more women" at the Athletic Association. (N.T. 23)

20. Davis terminated Osmun from her employment with the Athletic Association on June 29, 2005. (N.T. 23-24)

21. The Athletic Association's Bylaws provide that management of the Athletic Association was vested in the entire board and not in a single board member. (C.E. 1)

22. Davis terminated Osmun without the majority consent of Athletic Association's Board of Directors. (N.T. 25)

23. The Athletic Association did not produce any evidence to explain Davis' act of discharging Osmun. (N.T. 39)

24. Osmun requested to meet with the Board regarding her termination. (N.T. 34-35)

25. The Athletic Association never scheduled a meeting with Osmun. (N.T. 34-35)

26. While employed on the evening shift, Osmun earned eight dollars per hour and approximately three times that amount in tips. (N.T. 29-30; C.E. 5)

27. In pursuing her PHRC complaint, Osmun incurred \$20.00 in postage and \$86.00 in travel expenses. (N.T. 30-31)

28. On August 24, 2005, Osmun commenced employment at Dixie Consumer Products at a wage that exceeded the pay she earned with the Athletic Association. (N.T. 27)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over Osmun and the subject matter of her complaint under the Pennsylvania Human Relations Act ("PHRA")
2. The parties have complied with the procedural prerequisites to a public hearing.
3. Osmun is an individual within the meaning of Section 5(a) of the PHRA.
4. The Athletic Association is an employer within the meaning of the PHRA.
5. The PHRA prohibits employers from discriminating against individuals because of their sex.
6. Osmun has presented direct evidence that her work hours were reduced by the elimination of her employment on Mondays because of her sex.
7. Osmun has presented direct evidence that she was discharged by the Athletic Association because of her sex.
8. The Athletic Association has failed to show by a preponderance of the evidence that Osmun would have been discharged or had her hours reduced absent the fact that she is a female.
9. The Pennsylvania Human Relations Commission has broad discretion in fashioning a remedy after a finding of discrimination.

OPINION

This case arises from a complaint filed by Julia Osmun (hereinafter "Osmun") against West Easton Athletic Association (hereinafter the "Athletic Association") on or about August 1, 2005. In Osmun's complaint she alleges her hours were reduced and she was discharged because of her sex, female. Osmun further alleges that the Athletic Association's actions are in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA"), the Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951, et seq.

PHRC staff conducted an investigation and found probable cause to credit the allegations of unlawful discrimination. The parties attempted to eliminate the unlawful practices through conference, conciliation and persuasion. Such efforts were unsuccessful and this matter was approved for public hearing. A public hearing was held in this matter on December 7, 2009 in Easton, PA before Permanent Hearing Examiner Phillip A. Ayers. PHRC Assistant Chief Counsel Joseph T. Bednarik represented the state's interest in the complaint. Carlton Tucker, President, appeared on behalf of the Athletic Association. Following the public hearing, the parties were afforded the opportunity to file post-hearing briefs. Commission Counsel filed a post-hearing brief on January 29, 2010.

Section 5(a) of the PHRA provides in pertinent part:

It shall be an unlawful discriminatory practice . . . for any employer because of the sex . . . of any individual . . . to discharge from employment such individual . . . or to otherwise discriminate against such individual . . . with respect to . . . terms, conditions or privileges of employment . . . if the individual is the best able and most competent to perform the services required.

Normally in a case of this nature, there are two distinct analytical models in disparate treatment allegations. The first model was developed in the case of McDonnell-Douglas v. Green, 411 U.S. 792 (1973). In utilizing that model, the complainant must set forth a *prima facie* case of unlawful discrimination. After the Complainant sets forth a *prima facie* case, the burden of production shifts to the Respondent to articulate a legitimate, nondiscriminatory reason for the action. If the Respondent meets this burden, then the Complainant must prove that the reason presented by the Respondent is pretextual and that the true reason was motivated by unlawful discrimination.

The second analytical model used in disparate treatment cases is where the Complainant presents persuasive direct evidence of a discriminatory motive to support the allegation of unlawful discrimination. Allison v. PHRC, 716 A.2d 689 (Pa. Commonwealth Ct. 1998) When direct evidence is presented by a complainant the case can proceed without the aid of rebuttable presumptions. New Corey Creek Apartments, Inc. and Charles Wood, Manager v. PHRC 865 A.2d 277 (Pa. Commonwealth Ct. 2004)

In the instant case, the direct evidence model will be utilized. Firstly, the Constitution and Bylaws of the Athletic Association in existence at the time of the complaint, clearly did not permit women to exercise full membership rights strictly based on their sex. As Commission Counsel notes, Article III, Section I of Athletic Association's Constitution and Bylaws provided that membership in the Athletic Association was open to "any male over the age of twenty-one years who is of good moral character and a citizen of the United States" (C.E. 4)

It was clearly the intent of the Athletic Association, at that point in time, to maintain male only control over its affairs. It is with this intent that the Athletic Association attempted to prevent female members from overhearing discussions at regular membership meetings held on Mondays. This intent was accomplished by closing the Athletic Association's eating facility on Mondays. This closure had a direct impact on Osmun and other female employees. Further, the manner in which this closure occurred is reflective of the Athletic Association's discriminatory motivation in this matter. Osmun testified that in mid May 2005, she learned from steward Jim Nagy that her services were not required on Mondays. (N.T. 19-20) Nagy explained that the Athletic Association would be closed on Mondays "because that is the night of the membership meeting and no women were allowed in the building on that night." Nagy noted that female members had overheard discussions during the meetings and repeated the statements to other women in the club. (N.T. 20) After the reduction in hours, Osmun asked board member Mike Davis if she could add hours to her schedule to resume full time status. (N.T. 22-23) Osmun testified that she went to Davis because he "basically ran the show." Davis, in denying her request, stated "no more women." (N.T. 23)

After the above interaction with Osmun, Davis terminated her on June 29, 2005. Osmun, on that day, changed the daily special with the permission of Bruce Fortner, the acting steward for the day. This was the first opportunity for Davis to act on his clearly anti-women sentiments. Osmun credibly testified that she had received express permission from Fortner. (N.T. 26) Fortner was not called as a witness by the Athletic Association to contradict Osmun's testimony. Furthermore, upon review, it appears that Davis terminated Osmun without approval of the full Board of Directors. Article IV,

Section 6 of the Athletic Association's Constitution and Bylaws provide: The Board of Directors shall have the authority to hire and discharge any employees necessary for conducting the affairs of the club" Davis clearly did not comply with the requirement of obtaining the Board's approval when he terminated Osmun on June 29, 2005. Subsequent to Davis' action, Osmun attempted to schedule a meeting with the Board, however her request was ignored. (N.T. 34-35)

Considering the record presented in this case, Osmun has shown by direct evidence that her hours were reduced and she was ultimately discharged because of her sex, female. Davis' anti-female sentiment and the pretextual nature of his reason for his termination of Osmun clearly indicate that the actions taken were because of Osmun's sex. Furthermore at the public hearing, the Athletic Association did not present any evidence that the same decisions would have been made absent the impermissible sex-based consideration. In fact, Osmun testified that the Athletic Association's clear rationale in reducing the work hours was because they did not want women in the building.

Accordingly, we now move to consideration of an appropriate remedy. Section 9(f) of the PHRA provides in pertinent part:

If, upon all evidence at the hearing, the Commission shall find that a respondent had engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement . . . with or without back pay . . . and any other verifiable reasonable out-of-pocket expenses caused by such unlawful discriminatory practice . . . as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

In employment cases, the function of the remedy is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. PHRC V. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. Supreme Ct. 1973) The remedy is intended to eradicate the unlawful discriminatory practice. Firstly, the Athletic Association should cease and desist from sex-based discrimination in regard to employment decisions. Secondly, we move to the issue of back pay. When a Complainant shows an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co. Inc., 684 F.2d 1355, 29 FEP Cases 1259 (11th Cir. 1982) Also, a proper basis for calculating lost earnings need not be mathematically precise but must simply be a “reasonable means to determine the amount [the complainant] would have probably earned . . .” PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975),-aff'd 387 A.2d 58 (1978)

In the instant case, Osmun first seeks back pay for the reduction in hours she suffered. Osmun credibly testified that she earned wages and tips in the amount of thirty-two dollars per hour while she was employed on the evening shift. That figure included an hourly wage of eight dollars and three times that figure in tips. Because of the Athletic Association’s actions, Osmun was denied the opportunity to work on six Mondays during May and June of 2005. Since she had previously worked four hours on that shift, Osmun lost twenty-four hours of Monday employment for a total of \$768.00 (\$192.00 in wages and \$576.00 in tips).

6 Mondays	
4 hours @ \$8.00 per hour	\$32.00
4 hours @ \$24.00 (tips)	\$96.00
Total wages lost each Monday	\$128.00
6 Mondays @ \$128.00	\$768.00

In cases of this nature it is the responsibility of the complainant to mitigate damages. Booker v. Taylor Milk Co., 71 FEP Cases, 525, 526 (3rd Cir. 1995) When Osmun was terminated, she immediately sought to mitigate her damages. Osmun began a new job on August 24, 2005 and her income increased substantially effectively mitigating her damages at that time. However, as a result of her unlawful termination, Osmun lost not only the four days she was working but also the fifth day because of discriminatory reasons. Those figures follow:

Wages – 5 days @ 4 hours @ \$8.00	160.00
Tips – 5 days @ 4 hours @ \$24.00	480.00
Total Lost Wages	\$640.00
June 29 – August 24, 2005 (8 weeks) @ \$640	5,120.00
TOTAL Backpay (\$768 + \$5120)	\$5,888.00

Osmun also testified that she incurred reasonable out-of-pocket expenses in pursuing her complaint in regard to travel and postage. Osmun traveled back and forth to the Harrisburg Regional Office on two occasions. Osmun is therefore entitled to a travel reimbursement in the amount of \$86.00. In addition the parties stipulated at the public hearing that Osmun spent \$20.00 for postage in forwarding relevant documents to PHRC. Accordingly her reasonable out-of-pocket expenses totaled \$106.00.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JULIA OSMUN,
Complainant

v.

WEST EASTON ATHLETIC
ASSOCIATION, INC.
Respondent

PHRC CASE NO. 200500505

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above captioned case, the Complainant has proven sex-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is therefore my Recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, I recommend the issuance of the attached Final Order.

March 8, 2010
Date


Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

2. That the Athletic Association shall pay to Osmun, within thirty days of the effective date of this Order, the lump sum of \$5,888.00, which amount represents eight weeks of denial of work on Mondays and eight weeks of lost wages because of unlawful termination.

3. That the Athletic Association shall pay additional interest on the back pay award at the rate of six percent per annum, calculated from August 23, 2005 until the payments are made.

4. That the Athletic Association shall pay Osmun the sum of \$106.00 in reasonable out of pocket expenses incurred by her in pursuing her complaint.

5. That the Athletic Association shall report the means which it will comply with this Order, in writing to Joseph Bednarik, PHRC Assistant Chief Counsel, within thirty days of the date of this Order.

By: 
Stephen A. Glassman, Chairperson

Attest:


Dr. Daniel D. Yun, Secretary