Final ?

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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| ESTHER S. WUERTZ,<br>Complainant | : | |
| v. | : | Docket No. E-7129 PD |
| DOWNINGTOWN AREA SCHOOL DISTRICT,<br>Respondent | : | |

## FINDINGS OF FACT

1. The Complainant, herein is Esther S. Wuertz, an adult female whose address is R.D. 1 Box 248, Honeybrook, Pennsylvania and who has been a full-time professional employee of the Downingtown Area School District as a teacher from September, 1967 to June, 1973 and other females similarly situated. (Stip. 1; Ex. 1,2)

2. The Respondent in this case is Downingtown Area School District, a Pennsylvania employer located at 450 Manor Avenue, Downingtown, Pennsylvania, 19335 (Ex. 1).

3. By letter dated July 10, 1973 the Complainant requested of the Respondent, a maternity leave of absence for the 1973-1974 school year. (Stip. 3; Ex. 3)

4. By letter dated July 12, 1973, the Respondent-Superin-

benefits to employees who are disabled for other, non-pregnancy related reasons. The complaint was amended on October 17, 1975 to include as Complainants, other females similarly situated and the Pennsylvania State Education Association, Francis X. Burns, on behalf of its female union members, alleging that the Respondent has refused to grant sick pay beneifts to other females who were disabled because of pregnancy. Consistent with Commission policy that only aggrieved individuals or the Commission itself may file complaints, the Presiding Hearing Commissioner by Order dated April 10, 1978 amended the complaint to strike the Pennsylvania State Education Association and Francis X. Burns as Complainants.

After investigation by Commission staff, the Commission made a finding of probable cause to credit the Complainant's allegations that Respondent's policy violated Section 5(a) of the Act. The Finding of Probable Cause and Proposed Remedies were sent to the Respondent and a Conciliation meeting was held at the Philadelphia Regional Office on 3/7/75.

Conciliation having been unsuccessful, the Commission approved a Pre-Hearing and Public Hearing in this matter in accordance with the provisions of the Act. A Pre-Hearing Conference was conducted on March 21, 1978 with Commissioner Doris Leader, Presiding Hearing Commissioner; attended by John Benjes, Esquire, legal advisor to the Commissioner with James McErlane, Esquire, representing Respondent School District and James D. Pagliaro, Esquire, representing Complainant. At that meeting both parties agreed to a set of stipulations of fact and exhibits and waived their rights to a Public Hearing

since no factual issues were in dispute.

By copy of letter dated April 3, 1978 the Hearing Commissioner issued a proposed Pre-Hearing Order and requested any objections within five (5) days. On April 10, 1978 the Hearing Commissioner, Doris Leader, issued a Pre-Hearing Order with the stipulations and exhibits agreed upon at the Pre-Hearing Conference held on March 21, 1978, incorporating within the Order a briefing schedule in the event that efforts to settle were not successful.

Attempts to settle having failed, Complainants petitioned the Hearing Commissioner to amend the Pre-Hearing Order and set new briefing dates in order to expedite the adjudication of the matters in controversy. On July 31, 1978 the Presiding Commissioner issued a Final Pre-Hearing Order closing the record and setting new dates for submission of briefs on the merits and the case was submitted to the Hearing Panel of Commissioners.

C O M M O N W E A L T H  O F  P E N N S Y L V A N I A

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v.

DOWNINGTOWN AREA SCHOOL DISTRICT,
Respondent

Docket No. E-7129 PD

HISTORY OF THE CASE
FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
RECOMMENDATION OF HEARING COMMISSIONERS
COMMISSION'S DECISION
FINAL ORDER

## HISTORY OF THE CASE

This case arises on the complaint of Esther S. Wuertz dated April 23, 1974 alleging a violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 951 et seq (the Act) in that on or about February 22, 1974, the Downingtown Area School District (the Respondent) discriminated against her, because of her sex, female, in denying her sick pay benefits while she was disabled due to her pregnancy and childbirth. The Complainant averred that on that date she received a letter from Alfred B. Guion, Respondent Business Manager (Stip. 12, Ex. 11) informing her that the Respondent would not grant her sick pay benefits while she was disabled on maternity leave. Investigation revealed that the Respondent does grant sick pay

tendent of Schools, Charles M. Miken, granted to the Complainant her request for a maternity leave of absence for the 1973-1974 school year. (Stip. 4; Ex. 4)

5. The Complainant was on a Maternity Leave of Absence, without pay, during the entire 1973-1974 school year in accordance with the Agreement between the Downingtown Area Board of Education and the Bargaining Unit. (Agreement) (Stip. 5; Ex. 5)

6. By letter dated July 30, 1974, the Respondent stated that during the 1973-1974 school year, the Complainant was employed as substitute teacher, working a total of 16 days between September 5, 1973 and December 12, 1973 and a total of 9 days between May 7, 1974 and June 20, 1974. (Stip. 6; Ex. 6)

7. The Complainant, at the recommendation of her physician, Dr. Richard M. Smith, M.D., did not work full-time during the first semester of the 1973-1974 school year due to her pregnancy. The Complainant gave birth to a child on January 4, 1974. (Stip. 7; Ex . 7)

8. The Complainant was certified as disabled by her physician, Dr. R.M. Smith, M.D., as a result of her giving birth, from January 4, 1974 to April 1, 1974 and was unable to perform the duties of her job because of her pregnancy related disability. (Stip. 8; Ex. 8)

9. The School Code provides that when a professional or temporary professional employee who is prevented by illness or accidental injury from following his or her occupation, the school district shall pay to said employee for each day of absence the

full salary to which the employee may be entitled as if said employee were actually engaged in the performance of duty for a period of 10 days and that any such unused leave shall be cumulative from year to year in the school district without limitation. (Stip. 9; Ex.9).

10. By letter dated January 23, 1975, the Respondent stated that at that time the Complainant became disabled, January 4, 1974, the Complainant had accumulated 68 unused sick days. (Stip. 10; Ex. 10)

11. The Complainant requested of the Respondent that her accumulated sick pay benefits be applied to the time she was absent between January 4 and April 1, 1974 due to her pregnancy related disability. (Stip. 11)

12. By letter dated February 22, 1974, the Respondent informed the Complainant that she would not be granted pay for her unused sick days while she was absent due to her pregnancy related disability. (Stip. 12; Ex. 11)

13. It is the Respondent's policy that in accordance with the Agreement Between the Downingtown Area Board of Education and the Bargaining Unit, all female professional employees are required to report pregnancies to the Superintendent as soon as they are medically confirmed but not later than 4 months prior to expected birth and that such employees are eligible to receive only maternity leave without pay. (Stip. 16; Ex. 5)

14. According to a letter from Respondent attorney dated March 12, 1975 the Respondent does not treat pregnancy related disability as it would an illness. Respondent grants maternity leaves in accordance with its regular leave policy which does

not provide for the payment of accumulated sick leave benefits or the continuance of insurance benefits unless the employee pays the premiums, while the employee is on maternity leave. (Stip. 17; Ex. 13).

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| DOWNINGTOWN AREA SCHOOL DISTRICT,<br>Respondent | : | |

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over both the parties and the subject matter of this Complaint, pursuant to Section 9 of the Pennsylvania Human Relations Act, 43 P.S. §959.

2. Respondent received proper notice of this Complaint and proper notice and opportunity for public hearing as required by Section 9 of the Pennsylvania Human Relations Act, 43 P.S.§959.

3. Respondent, Downingtown Area School District, is an employer within the meaning of Sections 4(b) and 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §954(b) and 955(a).

4. Complainant, Esther S. Wuertz, is an individual within the meaning of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §955 (a).

5. The Respondent's failure to provide coverage for the pregnancy related disability of the Complainant constitutes discrimination in the terms, conditions and privileges of her employment because of her sex, in violation of Section 5(a)

of the Pennsylvania Human Relations Act, 43 P.S. §955(a).

C O M M O N W E A L T H  O F  P E N N S Y L V A N I A

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RECOMMENDATION OF HEARING COMMISSIONERS

AND, NOW, this day of , 1978, upon consideration of the entire Record in this matter, including the Complaint, the Stipulations of Facts and Exhibits, the Hearing Commissioners hereby adopt the attached as their proposed History of the Case, Findings of Fact, Conclusions of Law, Opinion and Final Order, and hereby recommend that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

Doris M. Leader
Chairperson, Hearing Panel

E.E. Smith
Hearing Commissioner

Mary Dennis Donovan
Hearing Commissioner

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## COMMISSION'S DECISION

AND NOW, this day of , 1978, upon consideration of the full Record in this case, and upon consideration of the foregoing Recommendation of the Hearing Commissioners, the Pennsylvania Human Relations Commission adopts the foregoing History of the Case, Findings of Fact, Conclusions of Law and Opinion.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
Joseph X. Yaffe, Chairperson

ATTEST

BY: _____
Elizabeth M. Scott, Secretary

C O M M O N W E A L T H  O F  P E N N S Y L V A N I A

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FINAL ORDER

AND NOW, this day of , 1978, the Pennsylvania Human Relations Commission hereby:

ORDERS

1. Respondent shall cease and desist from refusing to provide coverage for pregnancy related disabilities under its sick leave disability benefit plans.

2. Respondent shall immediately adopt sick leave disability benefit plans in conformity with the Pennsylvania Human Relations Commission's regulations, 16 Pa. Code §41.101, et. seq.

3. Respondent shall immediately inform, in writing, all present employees of its new policy regarding pregnancy related disabilities.

4. Respondent shall inform all future employees of its policy regarding pregnancy related disabilities.

5. Respondent shall immediately pay Complainant for her actual salary loss for 68 days of her period of pregnancy related disability plus six (6) percent interest per annum computed from the date of complaint April 23, 1974 to the date of payment.

6. Respondent shall report the manner of compliance with this order within thirty (30) days of its issuance.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
Joseph X. Yaffe, Chairperson

ATTEST

BY: _____
Elizabeth M. Scott, Secretary

C O M M O N W E A L T H O F P E N N S Y L V A N I A

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OPINION

Complainant, Esther S. Wuertz, had been employed by the Respondent as a teacher at the time of the violation of the Act. (Stip. 1) The Complainant requested a maternity leave of absence for the 1973-1974 school year. (Stip. 2) The Respondent in accordance with the Bargaining Unit Agreement (Stip. 5, Ex. 5) granted her request for a maternity leave of absence without pay for the 1973-1974 school year by letter dated July 12, 1973 (Stip. 4, Ex. 4). The Complainant at the recommendation of her physician did not work full-time but did work as a substitute teacher for a total of 25 days during the 1973, 1974 school year. (Stip. 6,7 and Exs. 6 and 7).

The Complainant's physician, Dr. Smith, certified that the Complainant was actually disabled as a result of her pregnancy and childbirth from January 4, 1974 to April 1, 1974 and unable to perform the duties of her job because of her pregnancy related disability. (Stip. 8, Ex. 8)

Under the Respondent's School Code, a professional or

temporary professional employee prevented by illness or accidental injury from performing his/her duties is able to utilize accrued sick leave which is cumulative from year to year. (Stip. 9, Ex. 9) The Complainant, at the time of her actual disability, had 68 unused sick days which she requested be used during the time of her actual disability. (Stip. 10 and 11, Ex. 10) The Respondent, by letter dated February 23, 1974, refused to permit Complainant her accrued sick leave while she was disabled due to her pregnancy-related disability (Stip. 12, Ex. 11). The Respondent does not treat pregnancy related disability in the same way it treates other temporary disabilities or illnesses and does not provide for the use of accumulated sick leave benefits or continuation of insurance benefits during the time of actual disability. (Stip. 17, Ex. 13)

The exclusion of pregnancy-related disabilities from otherwise comprehensive sick pay plans has been found to be unlawful sex discrimination in violation of Section 5(a) of the Act. Anderson v. Upper Bucks County Vocational-Technical School, 30 Pa. Cmwlth 103, 373 A.2d 126 (1977) petition for allocatur denied (May 2, 1978). The Commonwealth Court in Unemployment Compensation Board of Review v. Perry, 22 Pa. Cmwlth 429, 349 A. 2d 531 (1975) held that the Act requires that "pregnancy be treated as any other disease."

This line of cases complies with the precedent set by our Supreme Court which found in two leading cases upholding the Commission's findings that where an employer singles out pregnant employees to their disadvantage by excluding them from the benefits of employment enjoyed by other non-pregnancy related disabled employees or where an employer's policies apply only

to pregnancy to the disadvantaged of females as a class since it applies to a condition peculiar to their sex, "this is discrimination pureand simple" and "sex discrimination per se." Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277, 280 (1973) and Freeport Area School District v. Pennsylvania Human Relations Commission, 18 Pa. Cmwlth 400, 335 A.2d 873 (1974), modified and aff'd, ___Pa.___,359 A.2d 724 (1976).

In construing state fair employment practice laws, states are accorded broad powers and are not bound by interpretations of Title VII and may outlaw practices that are not otherwise prohibited by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The Commonwealth Court has specifically considered and rejected the holding of the U.S. Supreme Court in General Electric Company v. Gilbert, 429 U.S. 215, (1976) and by implication the reasoning employed by the U.S. Supreme Court in Nashville Gas Company v. Satty, ___U.S.___, 46 LW 4026 (1978) in its decision in Anderson, supra. Our own Supreme Court's reasoning in Cerra, supra, Freeport, supra and in refusing to hear Anderson, supra by implication accepts the analysis that the treatment of pregnancy-related disabilities different from non-pregnancy related disabilities is unlawful sex discrimination violative of Section 5(a) of the Act. The U.S. Supreme Court rulings in Gilbert, supra and Nashville, supra construed Title VII as expressly providing that the state statutes defining sex discrimination more comprehensively than the Civil Rights Act of 1964, shall not be preempted or superseded

by Title VII, Section 702(a) (1), 42 U.S.C. §2000e-2 (a) (1). Nor does Federal Constitutional law require preemption in this area.

Thus, the state courts of Pennsylvania and other states are free to, and have, interpreted state human rights laws in a fashion that entitles pregnancy related disabilities the same treatment as other disabilities. See Brooklyn Union Gas Company v. New York State Human Rights Appeal Board, 41 N.Y. 2d 84 (1976); Massachusetts Electric Company v. Massachusetts Commission Against Discrimination, 375 N.E. 2d 1192 (Mass. Sup. Jud. Ct. 1978) and Castellano v. Linden Board of Education, 158 N.J. Super, 350, 386 A.2d 396 (1978). These cases hold that state civil rights laws bar the exclusion of different treatment of pregnancy related disabilities from otherwise comprehensive employer disability plans.

The Respondents denial of Complainants request to use accrued sick pay during maternity leave when she was actually disabled is unlawful sex discrimination since only females are pregnant; this policy singles out women as a class to their disadvantage. In Cerra, supra, the Pennsylvania Supreme Court held that where pregnant women "are singled out and placed in a class to their disadvantage because of a condition peculiar to their sex, i.e. pregnancy, " (t)his is sex discrimination pure and simple." Id., at 277 A. 2d 277, 280.

Arguments regarding defining pregnancy-related disabilities as "sickness" for the purposes of using sick leave are likewise unavailable to the Respondent. As the Commonwealth Court held in Anderson, supra " . . . while pregnancy may not be an illness or accidental injury, it must under Pennsylvania law be treated

as any other physical infirmity." 373 A.2d 126, 132.

Thus, the artifical distinction used by Respondent school district to deny use of sick leave for pregnancy-related physical infirmities is sex discrimination per se. The Respondent 's policy treats pregnancy unlike any other illness, infirmity or disability. (Stip. 17, Ex. 13) The Complainant should have been permitted to utilize her 68 days of accrued sick leave for the time of her actual physical disability and had her disability been any other than pregnancy-related she would have permitted to do so under the School Code. (Stip. 9, Ex. 9)

The Respondent's policy regarding use of accrued sick leave for pregnancy-related disabilities violates Section 5(a) of the Act. Accordingly, the Complainant was a victim of unlawful employment discrimination because of her sex and is entitled to be placed in her "rightful place" that is, to be placed in the position she would have been in"but for" the act of discrimination. See, Pettway v. American East Iron Pipe Company, 494 F. 2d 211, 252 (5th Cir. 1974) in which the Court held that:

> .... the victim of illegal employment discrimination must be restored to the economic position in which they would have been but for the discrimination - their "rightful place" citing U.S. v. Georgia Power Company, 474 F. 2d 906, 5 F.E.P. Cases 587 (5th Cir. 1973).

The central purpose of employment discrimination laws is to make persons whole for injuries suffered on account of unlawful employment discrimination. Albermarle Paper Company v. Moody, 422 U.S. 405, (1975) Complainant is due then her sixty-eight (68) days of paid sick leave plus six (6) percent interest computed at the date of payment to Complainant from the date of the filing of the complaint.

Further, the policy must be struck down and the Respondent ordered to allow pregnant females to use accumulated sick leave benefits for temporary disability due to pregnancy in the same fashion that said benefits are granted to employees who are temporarily disabled, but not pregnant. This policy is embodied in the Pennsylvania Human Relations Commission's Guidelines found at 16 Pa. Code Section 41.103(a) and which provides in pertinent part:

> Temporary disability due to pregnancy or childbirth. Written and unwritten employment practices and policies regarding job benefits and job security including, but not limited to, commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to the same terms and conditions as they are applied to other temporary disabilities. 16 Pa. Code Section 41.103(a).

The policy enunciated in these regulations is in keeping with relevant statutory and case law. Accordingly, the Commission enters the attached Final Order.