

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

GERALD W. BOLING,
Complainant

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,
MAYVIEW STATE HOSPITAL,
Respondent

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Docket No. E-33371

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. Gerald W. Boling, (hereinafter "Boling"), is an adult individual who resides at 232 Bench Avenue, Washington, Pennsylvania 15301.

(S.F. 1)

2. The Commonwealth of Pennsylvania, Department of Public Welfare, Mayview State Hospital, (hereinafter "Mayview"), is a long term care nursing home facility which services patients 65 and over who have a medical diagnosis. (J.D. 6)

3. Two buildings make up Mayview: Temple Center 1 and Temple Center 2. (N.T. 65, 111; J.D. 7, 8)

4. In each center there are 4 patient care units. (N.T. 75)

5. Boling became a Mayview employee on August 16, 1980 and worked in the position of Psychiatric Aide I, during his entire employment with Mayview. (S.F. 3; N.T. 22)

6. Initially, Boling was assigned to Temple Center 2 until May 1984, at which time, Boling was transferred to Temple Center 1. (N.T. 23)

* To the extent that the Opinion which follows develops 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:

- N.T. Notes of Testimony
- S.F. Stipulations
- S.F.E. Stipulations Exhibit
- C.E. Complainant's Exhibit
- R.E. Respondent's Exhibit
- C.D. Chastain Deposition
- J.D. Jones Deposition

7. In July 1984, Boling filed a complaint with the Pennsylvania Human Relations Commission, ("PHRC"), at Docket No. E-30913, alleging sex-based discriminatory harassment and disciplinary actions. (S.F. 4; C.E. 1)

8. In December 1984, during a PHRC fact finding conference regarding Boling's July 1984 complaint, Boling withdrew his complaint in exchange for the removal of certain records reflecting prior disciplinary actions. (S.F. 5; N.T. 25; C.E. 2)

9. Mayview has a written policy that requires employees to take their breaks in assigned areas. (N.T. 99)

10. Prior to December 29, 1984, Boling had been verbally warned on three or four occasions that he was in violation of Mayview's assigned break policy. (N.T. 95)

11. On December 29, 1984, Charge Nurse Patricia Smiley, ("Smiley") noted that Boling failed to leave his ward during a break as required by Mayview policy. (N.T. 95; S.F.E. 1)

12. Smiley was Boling's immediate supervisor on December 29, 1984. (N.T. 78, 79)

13. On December 31, 1984, Smiley drafted a memorandum to Martha Saenz, ("Saenz") recommending disciplinary action be taken against Boling for his December 29, 1984 violation of Mayview's assigned break policy. (S.F. 8; S.F.E. 1)

14. Saenz held the position of Psychiatric Nurse IV Coordinator which meant that Saenz indirectly supervised all Mayview employees in both Temple Center 1 and 2. (N.T. 109, 110)

15. Smiley had previously recommended discipline for other Mayview employees that violated Mayview's assigned break policy. (N.T. 105)

16. Repeat offenders had been disciplined. (N.T. 106)

17. No disciplinary action was taken against Boling regarding Boling's December 29, 1984 violation of Mayview's assigned break policy. (N.T. 107)

18. On January 7, 1984, Smiley again directed a memorandum to Saenz recommending disciplinary action against Boling because of Boling's failure to properly exercise sign in/out procedures. (S.F.E. 2)

19. Approximately 8:30 p.m., while working on January 10, 1985, Boling injured his neck, shoulder and arm, while lifting a Mayview patient. (S.F. 10; N.T. 27)

20. Boling asked relief charge nurse Bruno for an accident blank and was instructed to come to Bruno's office at 11:00 p.m. to get one. (N.T. 27, 64, 68, 69, 71)

21. Boling obtained an accident blank at 11:00 p.m. from Bruno's office. (S.F. 11; N.T. 28, 40)

22. Boling's working hours were 3:15 p.m. to 11:45 p.m. (N.T. 29, 44)

23. Before leaving Mayview on January 10, 1985, Boling completed an accident blank and placed two copies of the report in an internal mailbox directed to Saenz. (S.F. 12; N.T. 28)

24. On Boling's report he listed 11:00 p.m. as the "Time of Accident." (C.E. 4; N.T. 42)

25. Boling called off work on January 11, 1985. (S.F. 13; N.T. 30)

26. On January 11, Boling called Mayview's Health Service Supervisor, Inez Jones ("Jones"). (J.D. 7, 12, 13; N.T. 30)

27. Pursuant to Mayview policy, Jones instructed Boling that he needed to bring a doctor's certificate upon returning to work. (J.D. 13; C.D. 8-9; N.T. 31)

28. Boling returned to work on January 12, 1985. (N.T. 31, 82, 115)

29. Jones was off on January 12, so Smiley asked Boling for his doctor's certificate. (N.T. 82)

30. Boling told Smiley he had slipped his doctor's certificate under Jones' door. (N.T. 84)

31. When Jones was not in her office she always locked her door because her office was located in an area accessible to patients. (J.D. 16)

32. On January 14, 1985, a report from Smiley to Saenz indicated that Boling had told Smiley he had put his doctor's certificate under Jones' door. (N.T. 115)

33. Saenz went into Jones' office but failed to locate a doctor's certificate from Boling. (N.T. 117)

34. Saenz confronted Boling asking Boling where his doctor's certificate was. (N.T. 118)

35. Boling first told Saenz that he had put his doctor's certificate under Jones' door, but changed his story to suggest he placed an "I.O.U." under Jones' door. (N.T. 118, 119)

36. When advised no I.O.U. had been found either, Boling then related to Saenz that he had a doctor's appointment on January 22, 1985. (N.T. 119)

37. Saenz instructed Smiley to meet with Boling to review the proper method of completing accident blanks. (N.T. 92, 121)

38. When Smiley met with Boling, Boling reacted angrily and refused to cooperate with Smiley's efforts to discuss Boling's erroneous accident blank submitted on January 10, 1985. (N.T. 87, 93)

39. Boling simply walked out of the meeting. (N.T. 88)

40. Smiley considered Boling's actions insubordinate and recommended disciplinary action. (N.T. 93)

41. Other Mayview employees who had similarly expressed insubordinate actions had been recommended for disciplinary action. (N.T. 121)

42. On January 14, 1985, Mayview's Personnel Director/Labor Relations Coordinator, Fred Chastain, ("Chastain"), spoke with Saenz and Jones regarding Boling. (C.D. 12)

43. On January 25, 1985, Chastain met with Boling and informed him he was being suspended pending an investigation regarding Boling's submission of an accident blank containing erroneous information, and Boling's actions with respect to submission of a doctor's certificate after Boling's January 10, 1985 injury. (C.D. 13)

44. In February 1984, Boling had been suspended for 10 days after it was determined he had provided false or misleading statements in a patient abuse case. (C.D. 10; R.E. 1)

45. Prior to suspending Boling, Chastain consulted the Labor Relations Division in Harrisburg, reviewed disciplinary guidelines, and Boling's prior suspension. (C.D. 13)

46. Chastain and the Labor Relations Division jointly recommended Boling's suspension. (C.D. 13)

47. During the period of Boling's suspension, Chastain either interviewed Mayview staff members or received and reviewed written statements. (C.D. 15)

48. By letter dated February 7, 1985, Boling was notified that he could attend a pre-disciplinary conference designed to provide Boling with the opportunity to fully give his side of the story. (C.D. 16, 17; R.E. 3)

49. Boling did not attend the scheduled pre-disciplinary conference. (C.D. 17)

50. Subsequently, Chastain and the Labor Relations Division in Harrisburg jointly recommended Boling's discharge. (C.D. 18)

51. The discharge recommendation was based on a combination of perceived false and misleading statements made by Boling in his January 10, 1985 accident report, the provision of false and misleading information regarding submission of a medical certificate on January 12, 1985, and the false and misleading circumstances which resulted in Boling's 10 day suspension a year earlier in February 1984. (C.D. 19)

52. Matters in mitigation or extenuation were considered and Mayview's policy which required certain elements of substantiation was followed. (C.D. 23)

53. John Elliott, Mayview's officer in charge, accepted the recommendation to terminate Boling. (S.F. p.5 of N.T.; C.D. 19)

54. Boling was terminated from his position of Psychiatric Aide I, on February 14, 1985. (S.F. 17; R.E. 4)

55. Before Boling's termination, other Mayview employees had been terminated for either the same or similar reasons which prompted Boling's discharge. (C.D. 28)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this case.
3. Mayview is an "employer" within the meaning of the P.H.R.A.
4. Boling is an "individual" within the meaning of the P.H.R.A.
5. Boling here has met his burden of establishing a prima facie case by proving that:
 - (a) he filed a P.H.R.C. complaint;
 - (b) Mayview was aware of the complaint;
 - (c) he was discharged; and
 - (d) the discharge followed the filing of the complaint within such a period of time that a retaliatory motive can be inferred.
6. Mayview has articulated legitimate reasons for terminating Boling.
7. Boling failed to establish by a preponderance of the evidence that the reasons offered by Mayview for its actions were pretextual.

OPINION

This case arises on a complaint filed by Gerald W. Boling, ("Boling"), against Mayview State Hospital ("Mayview"), with the Pennsylvania Human Relations Commission ("PHRC"). In his complaint filed on or about May 5, 1985, Boling alleged that the Respondent had unlawfully retaliated against him for filing an earlier complaint at Docket No. E-30913 which had alleged sex-based discrimination. Boling's complaint alleges a violation of Section 5(d) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. ("P.H.R.A.").

PHRC staff investigated the allegations and in correspondence, dated August 6, 1986, informed the Respondent that probable cause existed to credit Boling's allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion but such efforts proved unsuccessful. Subsequently, the PHRC notified the Respondent that it had approved a Public Hearing.

The Public Hearing was held on May 24, 1989 in Pittsburgh, PA, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Diane Blancett-Maddock. James S. Marshall, Esquire, appeared on behalf of the Respondent. Following the Public Hearing, the parties were afforded an opportunity to submit briefs. The post-hearing brief on behalf of the complaint was received on August 8, 1989 , and the brief for the Respondent was received on September 1, 1989 .

Allegations of retaliation are brought under Section 5(d) of the PHRA which states: "It shall be an unlawful discriminatory practice...for any person, employer, employment agency or labor organization 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."

In this case, the order and allocation of proof shall follow the oft repeated general pattern first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and clarified by the Pa. Supreme Court in Allegheny Housing Rehabilitation Corp. v. P.H.R.C., 516 Pa. 124, 532 A.2d 315 (1987). The PA Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to "simply...produce evidence of a 'legitimate, non-discriminatory reason' for... [its action]." If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). Boling may establish a prima facie case of unlawful retaliation by proof:

1. That he filed a PHRC complaint against Mayview;
2. That Mayview knew Boling had filed a complaint;
3. That he was discharged; and
4. That the discharge either followed the filing of a complaint within such period of time or was done in such a manner that a retaliatory motive can be inferred.

See' Brown v. Biglin, 454 F.Supp. 394, 22 FEP Cases 228 (E.D. Pa. 1978); Consumers Motor Mart, 108 Pa. Cmwlth. 59, 529 A.2d 571 (1987); Kowalski v. Adams, Docket No. E-26679 (Pa. Human Relations Commission, March 5, 1987).

The parties stipulated that Boling had filed a prior PHRC complaint and the testimony of Chastain, Smiley, and Saenz establish that Mayview knew Boling had filed the complaint. Equally clear is the simple fact that Boling was discharged. Accordingly, there should be no dispute that Boling established the first three elements of a prima facie showing.

The fourth element of the required showing has been phrased as an optional showing. Causation evidence could be presented by inference either through a showing that the discharge followed the filing of a complaint within a short period of time or by showing other evidence which tends to show disparate treatment surrounding the termination. Here, Boling's evidence appears to wholly rely upon the timing of his discharge.

A motion for a directed verdict was denied because the timing of a Respondent's action could, standing alone, be enough to infer a retaliatory motive. See Rutherford v. American Bank of Commerce, 565 F.2d 1162, 16 FEP 26 (10th Cir. 1977); Minor v. Califano, 452 F. Supp. 36, 17 FEP 756 (D.D.C. 1978); Hochstadt v. Worcester Foundation, 425 F. Supp. 318, 11 FEP 1426 (D.Mass), aff'd 13 FEP 804 (1st Cir. 1976). In this case,

Boling filed a PHRC complaint in July 1984. Boling's complaint refers to alleged harassing conditions between October 19, 1984 and November 2, 1984 in the form of Boling being denied the opportunity to work with a cast even though he had a full doctor's release. At the Public Hearing, no evidence was presented on this contention.

Boling's complaint also referred to an allegation that he was charged with unauthorized leave because Saenz did not turn in an accident report. Once again, Boling presented no evidence on this allegation.

However, Boling did present evidence on incidents beginning on December 31, 1984. In combination with an alleged chain of events beginning in December 1984 and culminating in Boling's January 25, 1985 suspension and February 14, 1985 discharge, we note that in December, Boling withdrew his prior complaint.

Because alleged incidents began to occur shortly after Boling's withdrawal of his prior complaint, Boling's initial required showing of the fourth element of a prima facie case was deemed to also have been established. Accordingly, the burden of production shifts to Mayview to articulate some legitimate non-discriminatory reason for its actions.

Clearly, Mayview has met this burden. Beginning with December 31, 1984, Boling argues that Smiley's disciplinary action recommendation was retaliatory. Mayview presented un rebutted evidence that Boling had violated a written policy that Mayview employees were required to take their breaks away from the patient's wards. After three or four verbal warnings, Boling continued to violate that policy. Additionally, Smiley testified that she had previously recommended discipline for other Mayview

employees found to violate the assigned break policy.

The same analysis can be applied to Boling's allegation that Smiley again recommended disciplinary action on January 7, 1985 for retaliatory reasons. Once again, un rebutted testimony reflects that Boling had violated Mayview's sign-in/out policies.

Boling next cites a counseling session on January 13, 1985 as being held out of a retaliatory motive. The evidence reveals that Boling had made fundamentally erroneous entries on an accident report he had submitted on January 10, 1985. Smiley testified that Saenz had instructed Smiley to hold a counselling session with Boling to review the proper manner of completing accident reports. Saenz's testimony suggested that informational meetings were appropriate supervisory sessions which were not unusual.

Finally, Boling contends his suspension on January 24, 1985 and ultimate termination effective February 14, 1985, were retaliatory actions. Mayview presented evidence that generally three factors led to Boling's suspension and termination. First, in February 1984, Boling had been suspended for 10 days because he had submitted false or misleading information with respect to an alleged patient abuse case. Second, Boling was perceived as again submitting false or misleading information in an accident report. Third, Boling was being seen as again providing false or misleading information to his supervisors regarding his provision of a doctor's certificate on January 12, 1985.

Chastain specifically testified that Boling's prior PHRC complaint did not in any way influence his recommendation to terminate Boling. Boling was afforded a full opportunity to relate his side of the issues to Chastain but specifically did not avail himself of that option. Boling himself testified that in his perception, Chastain was not harassing him.

Since Mayview successfully articulated reasons for its actions, the burden shifts back to Boling to prove by a preponderance of the evidence that the reasons offered were pretextual. Boling's effort in this regard was minimal.

To some, recommending disciplinary action for improper sign in/out procedures may appear trivial. However, cases weighing the significance of recorded infractions present a stronger case for a finding of triviality when the same infractions had been done by others but not recorded against them. See ie, Harris v. Richards Mfg. Co., 511 F.Supp. 1193, 25 FEP 720 (W. D. Tenn. 1981), aff'd in material part 675 F.2d 811 6th Cir. 1982). In this case, unrebutted testimony states others were similarly treated when they violated sign in/out procedures.

One of Boling's performance evaluations was introduced into evidence. Mayview evaluates its employees yearly. The introduced Boling annual evaluation was dated November 19, 1984. In that evaluation, Boling received no excellent or very good ratings, two low good rates and in the remaining five categories Boling was marked as fair. The written narrative on that evaluation speaks quite negatively of Boling. During the Public Hearing, note was made that the failure to introduce prior evaluations

could lead to certain inferences to be drawn from the fact that only one evaluation was presented. No other evaluations were introduced.

When previously good employees suddenly receive an unfavorable evaluation after filing a complaint, this tends to suggest pretext. See ie, Guilday v. Dept. of Justice, 485 F.Supp. 324, 22 FEP 376 (D. Del. 1980). Also, when written evaluations are wholly inconsistent with laudatory evaluations of one's performance from other contemporary sources, a retaliatory motive might be found.

Here, Boling's evidence contains neither alternate source praise nor previous good evaluations. These factors significantly weaken any effort to establish pretext.

Similarly, because in retaliation cases, the most reliable evidence of a retaliatory motive is probably a showing that, although the adverse action taken was ostensibly predicated on actual misconduct, other, non-complaint filing, employees also guilty of similar conduct were not subjected to equally severe treatment. Here, Mayview witnesses consistently testified that others, who apparently had not filed PHRC complaints, were treated exactly the same. Literally, no effort was made to rebut this general evidence. Thus, Boling's effort to show pretext is again dealt a severe blow. On the contrary, Mayview's position is significantly bolstered.

Boling's case rests primarily on the proximity of his discharge and Mayview's knowledge of his complaint. Although we have permitted this factor to pose a successful prima facie showing factor, we are not prepared to hold that this factor is sufficient to establish Mayview's articulated

reasons for Boling's termination are pretextual. See Kralower v. Prince George's County, 24 FEP 549 (D. Md. 1980), aff'd without opinion, 29 FEP 1750 (4th Cir. 1982).

One final factor deserves comment. Here, an arbitration ruling modified Boling's termination into a suspension. However, in doing so, Boling was denied back pay. Obviously, the arbitration process recognized misconduct was present, however, it appears, the arbitrator deemed the action taken as too severe. Put into the specific context of the discrimination analysis here, the arbitration modification does little to help Boling's case. In fact, changing the termination into a suspension without back pay tends to support a conclusion that Mayview's actions were based on some misconduct by Boling.

Taken as a whole, the evidence presented here was insufficient to meet Boling's burden to show pretext. Accordingly, Boling having failed to meet his burden of proof, this case must be dismissed. An appropriate order follows.

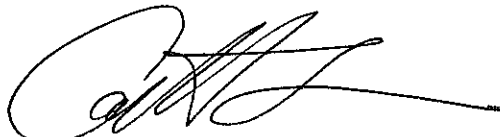
COMMONWEALTH OF PENNSYLVANIA
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Respondent :

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, the Permanent Hearing Examiner finds that Mayview did not violate the Pennsylvania Human Relations Act, and therefore recommends that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.



Carl H. Summerson
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF PUBLIC WELFARE,
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Respondent

Docket No. E-33371

FINAL ORDER

AND NOW, this 29th day of September, 1989, after a review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion, of the Permanent Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act. Further, the Pennsylvania Human Relations Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

that the complaint in this case be, and the same hereby is dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

Raquel Otero De Yiengst
Raquel Otero De Yiengst, Secretary