

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD BRACKBILL,

COMPLAINANT

v.

ORWECO FROCKS, INC.,

RESPONDENT

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DOCKET NO. E-28783-D

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD BRACKBILL, :
 :
 Complainant :
 :
 v. : DOCKET NO. E-28783-D
 :
 ORWECO FROCKS, INC., :
 :
 Respondent :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required:

1. The Complainant herein is Donald Brackbill, an adult male who resides at 401 Delaware Street, Dauphin, Pa.
2. The Respondent herein is Orweco Frocks, Inc., 300 N. Chestnut Street, Mechanicsburg, Pa.
3. The Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, 43 P.A. §955(a).
4. The Complainant, on May 1, 1984, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-28783-D.
5. By letter dated August 29, 1984, the Commission, by its investigator, D. Monica Powell, notified the Respondent's attorney, Charles E. Friedman, that probable cause existed to credit the allegations in the complaint.

6. Donald Brackbill (date of birth ("dob") 5/25/29) ("Complainant") was hired by Orweco Frocks ("Respondent") on September 12, 1954.

7. Complainant was terminated by the Respondent on February 3, 1984, at the age of 54.

8. At the time of his termination, the Complainant was informally known as Shipping Room Foreman.

9. At the time of his termination, the Complainant's immediate supervisor was Myer Bloom ("dob") 1/19/32, date of hire ("doh") 3/1/51.

10. At the time of the Complainant's termination, Ralph Lower ("dob") 11/13/48, ~~Ralph Lower~~ ("doh") 7/24/68, worked in the shipping room.

11. Ralph Lower is still employed by Orweco Frocks.

12. Sometime between February 3, 1984 and June 8, 1984, Ralph Lower changed from an hourly employe to a salaried employe.

13. At the time of his termination, Complainant was earning \$395 per week.

14. At the time of Complainant's termination, Lower averaged for the four weeks prior wage of \$411 per week.

15. Lower's salary as of July 2, 1984, was \$390 per week.

Dante Picciano
Dante Picciano, Esquire

Charles Friedman
Charles Friedman, Esquire

Ellen K. Barry
Ellen K. Barry, Esquire
Pennsylvania Human Relations
Commission

FINDINGS OF FACT *

1. At all times relevant to this case Respondent Orweco Frocks, Inc., has employed four or more persons within the Commonwealth of Pennsylvania.
2. Efforts by the Commission and the parties to conciliate this case were unsuccessful.
3. Complainant Donald Brackbill was fifty-four (54) years old at the time of his termination by Orweco on February 3, 1984. (S.F. 6, 7)
4. At the time of his termination, Mr. Brackbill was performing duties which he was qualified to perform. (B.D. 21, N.T. 18)
5. After his discharge, Respondent continued to need the services which had been performed by Mr. Brackbill. (N.T. 94, 134-135; F.D. 15)
6. Robert Farber testified that Mr. Brackbill was terminated because of poor job performance. (F.D. 13)
7. Respondent's original position in this matter was that Mr. Brackbill was terminated for economic reasons. (C.E. 3)
8. Mr. Seidenberg's testimony that he first learned the reasons for Mr. Brackbill's termination at Mr. Farber's deposition, in December of 1985, was not credible.

* Findings of fact are also contained in the opinion which follows. They are those factual matters followed by citations to pages of the record or references to specific exhibits.

The foregoing stipulations are hereby incorporated herein as if fully set forth.

The following abbreviations are used throughout:

N. T.	Notes of Testimony
F. D.	Farber Deposition
B. D.	Bloom Deposition
S. F.	Stipulation of Fact
C. E.	Complainant's Exhibit
R. E.	Respondent's Exhibit

9. No one at Orweco told Mr. Brackbill prior to his termination that his performance was unsatisfactory. (N.T. 18)
10. Mr. Seidenberg offered in April of 1984 to reemploy Mr. Brackbill; he withdrew the offer a few hours later. (N.T. 20)
11. Both Jim Rosensteel and David Popper made statements shortly after the fact that Mr. Brackbill was discharged for economic reasons. (N.T. 125, 134, 164)
12. Mr. Farber did not discuss Mr. Brackbill's performance with either Mr. Brackbill or Mr. Bloom. (F.D. 36-38)
13. Mr. Farber's assessment of Mr. Brackbill's performance was based on subjective criteria.
14. Mr. Brackbill, Myer Bloom, Irwin Levine, and Elisa DiMartile were all discharged by Orweco within a fairly short period of time for reasons first characterized by Orweco as economic and only later as performance-related; each was over forty years old at the time of termination. (C.E. 4; N.T. 147, 155, 88, 137, 257; F.D. 18)
15. Respondent terminated Complainant because of his age, fifty-four.
16. Complainant's lost wages and benefits between February of 1984 and February of 1986, less interim earnings during that period, total \$33,532.00. (N.T. 252-254, C.E. 1)

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 in this case.
3. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("Act").
4. Respondent is an employer within the meaning of the Act.
5. Complainant here has made out a prima facie case by proving that:
 - a. At the time of the challenged action he belonged to a protected class;
 - b. He was performing duties that he was qualified to perform;
 - c. He was terminated from his position; and
 - d. Respondent demonstrated a continuing need for the services which he had performed.
6. Respondent has met its burden of introducing admissible evidence of a legitimate, nondiscriminatory reason for terminating Mr. Brackbill.
7. Complainant has established that the proffered reason for his discharge was pretextual.
8. Complainant was discharged because of his age, in violation of the Act.
9. Complainant is entitled to relief which includes lost wages for the period between February, 1984, and February, 1986, less his actual earnings during that period, plus interest of 6% calculated from the date of his discharge until such time as payment is made. He is not entitled to an award of front pay.

OPINION

This case arises on a complaint filed by Donald R. Brackbill ("Complainant") against Orweco Frocks, Inc., ("Respondent") with the Pennsylvania Human Relations Commission, ("Commission") on or about May 1, 1984, at Docket No. E-28783-D. In his complaint, Mr. Brackbill alleged that Respondent dismissed him because of his age, 54 years, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. ("Act"). Respondent has consistently denied any violation of the Act.

Commission staff, after investigation, found probable cause to credit the allegations of discrimination. The parties and the Commission thereupon attempted to eliminate the allegedly unlawful practices through conference, conciliation, and persuasion. The case was approved for public hearing when these attempts were unsuccessful. A public hearing was held on February 25 and 26, 1986, in Harrisburg, PA, before Hearing Examiner Edith E. Cox.

Mr. Brackbill was born on May 25, 1929. He was hired by Orweco on September 12, 1954. At the time of his termination on February 3, 1984, he was fifty-four years old. (S.F. 6, 7)

Orweco Frocks, Inc., manufactures and ships women's garments. (N.T. 11) Mr. Brackbill began as a packer at Orweco's Mechanicsburg plant; he worked his way up through the positions of shipping clerk, picker, and assistant manager of the shipping room. He became shipping room foreman, the position from which he was terminated, in 1974. (N.T. 10) He supervised approximately sixteen people. (N.T. 12) His immediate supervisor was Myer Bloom. (S.F. 9; N.T. 11)

Orweco Frocks, Inc., was founded and originally owned by Joseph Confino, Morris Weiner, and Harry Oriole, first as a partnership, later as a corporation. By the time of this hearing the company had several plants in Pennsylvania, with its main office in New York. (N.T. 89) Sometime during the 1960's the corporation bought out the Orioles. In the early 1980's, the company bought out the Weiners. (N.T. 65) Mr. Weiner had been running the company's Pennsylvania operations. After the buy-out, this role was filled briefly by a Mr. Mevorah, who was replaced in December of 1983 by Robert Farber. (F.D. 7) It was Mr. Farber who made the decision to terminate Mr. Brackbill in February of 1984. (B.D. 25-26; F.D. 12) The question presented by this case is whether that discharge violated the Act.

Complainant bears the initial burden of making out a prima facie case. If he does this, Respondent must rebut the inference of discrimination thus created by setting forth through the introduction of admissible evidence the legitimate, nondiscriminatory reason(s) for the challenged action. Complainant may then still prevail by proving that the proffered reason(s) were pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); General Electric Corp. v. PA Human Relations Commission, 365 A.2d 649 (1976).

The prima facie case is based on evidence introduced by the Complainant. Should a Respondent remain silent in the face of that evidence, judgment must be entered for the Complainant. Where evidence of a Respondent's reason for its action is received, the Complainant's burden of establishing a prima facie case merges with his ultimate burden of persuading the trier of fact that there was intentional discrimination. Burdine, supra. In that situation, where a Respondent has done all that would have been required of it

had the Complainant properly made out a prima facie case, it is no longer relevant whether the Complainant did so; the trier of fact should then decide the ultimate question of whether or not discrimination occurred. United States Postal Service Board of Governors v. Aikens, 450 U.S. 711 (1983).

McDonnell-Douglas, setting out the elements of a prima facie case of refusal to hire, noted that differing factual situations would call for variation in the elements. 411 U.S. at 802, n. 13. Pennsylvania courts have similarly recognized the need for flexibility. Reed v. Miller Printing Equipment Division, 75 Pa. Commonwealth 360, 462 A.2d 292 (1983). Here Mr. Brackbill has made out a prima facie case by proving that:

1. At the time of the action complained of he belonged to a protected class;
2. He was performing duties which he was qualified to perform;
3. He was discharged; and
4. Respondent sought a replacement with similar qualifications or otherwise demonstrated a continuing need for the services he had been performing.

Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979).

The parties do not dispute that Mr. Brackbill was terminated from his position when he was fifty-four years old, and thus protected by the Act from discrimination based on his age. 43 P.S. §§954(h) and 955(a). While Respondent argues that Mr. Brackbill was not qualified, an issue which will be discussed fully below, his immediately supervisor, Myer Bloom, testified that Mr. Brackbill's performance had been good. (B.D. 21) This, combined with his thirty year history with the company and his repeated promotions, is sufficient to establish the second element of his prima facie case.

The fourth element is vigorously disputed by the parties. Respondent asserts that proof of replacement with a younger worker is required for Complainant's prima facie case and claims that this proof is lacking. Complainant does not dispute that he must prove replacement at least in part with a younger worker but argues that he has done so. Neither accurately states the applicable burden of proof.

In McDonnell-Douglas v. Green, supra, the United States Supreme Court decided that a prima facie case of refusal to hire brought under Title VII required proof that the complaining party belonged to a protected class and applied for a position for which he was qualified, and that the employer declined to hire him and continued to seek applicants with similar qualifications. Id. at 802. As the court persuasively observed in Loeb v. Textron, supra, McDonnell-Douglas did not require as part of the prima facie case proof that a person outside the protected class was hired: an inference of discrimination was raised by proof that a qualified minority applicant was rejected and that the position remained open. By analogy, the inference of discrimination is raised in a termination case when a qualified employee is discharged and the employer seeks a replacement with similar qualifications or in some other way demonstrates a continuing need for the services that person had performed.

Flexibility in this last element is needed to prevent anomalous results, particularly in age discrimination cases which so often arise in the context of a company-wide reduction in force and consolidation of duties. See e.g. McCuen v. Home Insurance Co., 633 F.2d 1150 (5th Cir. 1981), eliminating the need to show replacement by a younger worker in an age discrimination case involving a reduction in force. If proof of replacement with a single,

identified younger worker were to be rigidly demanded, an employer facing a reduction in force could systematically terminate its oldest (and generally most highly paid) employees, distribute their functions among the remaining younger workers such that each job was divided between at least two people, and escape any liability under anti-discrimination laws. Such a result should not be permissible under the Act. We therefore decide that, while proof of replacement with a younger worker will generally be relevant in an age discrimination case, the absence of such proof will not automatically defeat such a case.

In Mr. Brackbill's case it is therefore not necessary to decide whether he was replaced by a Mr. Lower, a younger employee working in the shipping room at the time of Mr. Brackbill's termination. (S.F. 6, 10) It is sufficient for purposes of Complainant's prima facie case that there was a continuing need for the services he had performed, a fact which the parties do not dispute. As Complainant has made out a prima facie case, it is necessary to consider Respondent's explanation of events.

Respondent at hearing argued that Mr. Brackbill was fired because his performance was inadequate. It relied on statements of Robert Farber, who made the decision to terminate Mr. Brackbill. Mr. Farber, whose deposition was introduced jointly by the parties in lieu of live testimony, indicated that in his opinion Mr. Brackbill was not loyal either to the company or to Mr. Farber himself as head of management. He claimed that Mr. Brackbill didn't have the managerial "work ethic", that he "goofed off" and failed to set a proper example for the people he supervised. As examples of goofing off, Mr. Farber referred to "(t)rips to the bathroom, reading papers, just BS sessions all around the place." (F.D. 39)

Inadequate performance is of course a legitimate and nondiscriminatory reason for terminating an employee. By introducing the testimony of Mr. Farber, Respondent rebutted Mr. Brackbill's prima facie case within the meaning of the cases cited above.

However, as also noted above, Complainant may still prevail by showing that the reasons given by Respondent were pretextual. For the reasons which follow, a careful review of the record in this case persuades me that that was the situation here, and that Complainant was not in fact terminated because of inadequate performance.

Perhaps most striking, Respondent's initial position in this case was that Mr. Brackbill was let go because of job consolidation which took place for economic reasons. In a letter dated May 21, 1984, addressed to a Commission investigator and admitted to the record as Complainant's Exhibit 3, Morton Seidenberg, now the company's chief operating officer (N.T. 66), wrote in part:

The Company agrees that on February 3, 1984, Donald Brackbill was dismissed without any advance notice. The fact that no performance warning was issued is true however, Mr. Brackbill was not laid off for performance reasons. Rather the economic feasibility of job elimination. The position of Shipping Foreman has been eliminated thru the consolidation of duties with the Shipping Manager and various other shipping employees. The fact that Mr. Brackbill was the oldest employee in the Shipping Department was just a chronological incident of birth. Age played no part in this job consolidation.

(C.E. 3) As Complainant argues, the fact that Respondent has asserted two completely different defenses greatly diminishes the credibility of either.

Respondent did attempt to account for its changing position. Mr. Seidenberg testified that he had not discussed the facts of the case with Mr. Farber before writing the letter "(b)ecause I always took care of this"

(N.T. 91) referring to labor relations matters, including PHRC complaints. (N.T. 86, 89) He claimed that he assumed the reasons were economic because he knew Mr. Farber had a mandate to reduce the payroll. Incredibly, he claimed to have first learned the actual reasons for Mr. Brackbill's discharge when he attended Mr. Farber's deposition, taken in December of 1985. (N.T. 93) This was notwithstanding the uncontradicted facts that by April of 1984 Mr. Brackbill's immediate supervisor, Myer Bloom, had also been fired, that Mr. Seidenberg had then taken over the shipping room (N.T. 93), and that Mr. Seidenberg had succeeded Mr. Farber as chief operating officer by July or August of 1985, several months before Mr. Farber's deposition. (N.T. 69, F.D. 9) If the shipping department was as marginally run during Mr. Brackbill's time as Respondent claims, and improved as much subsequently, it is not credible that Mr. Seidenberg would have remained unaware of this during a period when he took over both the shipping room and the role of chief operating officer. Respondent's explanation for the total change in its stated rationale is credible only if one also believes that Mr. Farber and Mr. Seidenberg discussed neither the complaint nor the operation of the shipping department; both seem unlikely at best.

Respondent's inadequate performance rationale is also undermined by the undisputed facts that Mr. Brackbill was never warned, never disciplined, never told to change any aspect of the way he was doing his job. Mr. Farber in his deposition testified that he never discussed Mr. Brackbill's performance with him. (B.D. 36) Nor did Mr. Farber ever direct Mr. Bloom, Mr. Brackbill's immediate supervisor, to correct perceived deficiencies in Mr. Brackbill's performance.

Further discrediting the inadequate performance defense is the fact that Mr. Seidenberg in April of 1984 offered to reemploy Mr. Brackbill, only to withdraw the offer a few hours later, after Mr. Brackbill had quit his part-time bartending job. (N.T. 20) Mr. Seidenberg's account of this was equivocal and unpersuasive. Asked if he had offered Mr. Brackbill a job, he answered: "I did not offer him a job. I offered to talk to him about a job, come in and talk to me about a job. Well, yes, I did offer it that there was a job available on Friday. Right." (N.T. 71) His explanation for withdrawing the offer was that he got "cold feet" and ". . .just didn't think it was a good idea. . ." (N.T. 72) Poor performance was not mentioned either as an impediment to making the offer or as a reason for the decision to withdraw it.

It is also significant that two other Orweco employees admittedly told either Mr. Brackbill or his wife shortly after his discharge that the reason for the discharge was economic. Jim Rosensteel, the company's controller, testified that he told a distraught Mrs. Brackbill that her husband was terminated for economic reasons, that he was one of the highest paid shipping room employees and had to go. (N.T. 125, 134) He did not mention performance to her, although he also testified that Mr. Farber had regularly complained to him about Mr. Brackbill's work. (N.T. 129) His explanation for what he later portrayed as a complete fabrication was that she was upset and he only wanted to end the conversation; he didn't however clarify why, rather than simply disclaiming knowledge, he came up with the same later disavowed explanation as everyone else, namely financial considerations.

The testimony of David Popper from Orweco's New York office was similar. Mr. Popper testified that he had numerous, daily telephone dealings

with Mr. Brackbill, and that his work was fair at best. (N.T. 159, 161) Yet he admitted to telling Mr. Brackbill after his discharge that ". . .I thought he was the highest salaried man, and I felt real bad that he was fired." (N.T. 164) He claimed to have guessed that the reason was economics (N.T. 164), a guess that was remarkably consistent with the statements of other Orweco personnel.

Certain aspects of Mr. Farber's deposition were also noteworthy. As already noted, he indicated that he did not discuss Mr. Brackbill's performance with him at any time. (F.D. 36) He did say he had discussed Mr. Brackbill with a number of other supervisors, not however including Mr. Brackbill's own supervisor, Myer Bloom. (F.D. 36-38) Remarkably, he claimed that he never considered holding Mr. Bloom accountable for Mr. Brackbill's claimed shortcomings (F.D. 42), and that he wasn't even sure what duties were performed respectively by Mr. Brackbill and Mr. Bloom, as there was a lot of interplay between them. (F.D. 52) He thus testified to firing a thirty-year employee whose duties were at best unclear to him based on discussions with everyone except the people directly involved.

Further, his description of Ralph Lower, who he admitted replaced Mr. Brackbill at least in part, was curiously lukewarm. Having first claimed that Mr. Lower, unlike Mr. Brackbill, had a positive attitude, he continued: "Certainly Lower was as qualified as Brackbill to take over the responsibilities and he did and he performed certainly adequately." (F.D. 20) Moreover, both descriptions are essentially subjective, as was Mr. Farber's assessment of Mr. Brackbill as a "goof off". While employment decisions based on subjective performance evaluations do not necessary violate the Act, they are suspect and have frequently been condemned. General Electric v. PA Human

Relations Commission, 365 A.2d at 657, n. 14.

Finally, it is significant that Mr. Brackbill was one of a group of Orweco employees terminated within a fairly short period of time for reasons first described as economically-motivated job consolidation; in each case, as with Mr. Brackbill, Respondent subsequently attempted to abandon its economic rationale and introduce performance considerations which were totally absent from its early responses. Complainant's Exhibit 4, submitted to a Commission investigator by Orweco in July of 1984, states that Myer Bloom, Elisa DiMartile, Irwin Levine, and Don Brackbill were terminated because of "job consolidation." The document was signed by Morton Seidenberg and payroll manager Robert D'Agostino, and notarized. Mr. D'Agostino however testified at hearing that the document did not indicate why people were fired, but only what happened to their jobs after they were fired. (N.T. 147) He nevertheless later testified that he told both the Commission and Unemployment Compensation that Mr. Bloom, Mr. Brackbill and Mr. Levine were fired because of job consolidation, and that he told them that "(a)s per Mr. Farber's intruc-tions." (N.T. 155, emphasis added) Mr. Seidenberg meantime testified that he himself fired Mr. Levine because "(h)e was a bum. . . he didn't want to work." (N.T. 88) Mr. Rosensteel testified that he got permission to have Ms. DiMartile fired because she didn't do anything. (N.T. 137) And Mr. Farber claimed to have fired Mr. Bloom because Mr. Bloom refused to obey a direct order. (F.D. 18) No particular attempt was made by Respondent to explain these other inconsistencies, other than Mr. D'Agostino's unpersuasive testimony that job consolidation was the aftermath but not the reason for the terminations. It is therefore of particular significance that, like Mr. Brackbill, Ms. DiMartile, Mr. Levine and Mr. Bloom were well over forty years old when they were terminated. (See Complainant's Exhibit 4)

For all of the above reasons, I therefore conclude that Respondent terminated Mr. Brackbill because of his age, fifty-four, in violation of the Act. Following such a finding relief may be awarded which includes back pay, front pay, interest of six percent (6%) yearly on wages lost, and such other relief as will effectuate the Act's purposes. 43 P.S. §959; Williamsburg Community School District v. PA Human Relations Commission, ___ Pa. Commonwealth ___, 512 A.2d 1339 (1986); Goetz v. Norristown Area School District, 16 Pa. Commonwealth 389, 328 A.2d 579 (1974).

In this case, after some initial difficulties, Mr. Brackbill has located what appears to be stable employment, at a lower salary than he would have been earning had he remained at Orweco. He requests wages lost up to the time of hearing, plus lost benefits and interest. In addition, claiming that he fears he would be harassed if he returned to Orweco, Mr. Brackbill requests front pay in an amount representing the wages he expects to lose between the time of hearing and his sixty-fifth birthday in May of 1994.

Mr. Brackbill's uncontradicted testimony was that he briefly tended bar at the Clover Club after his discharge, resigning when Mr. Seidenberg offered him a job at Orweco; by the time that offer was rescinded, another bartender had been hired. (N.T. 20, 21) Mr. Brackbill next worked at Fruehauf, beginning in late April of 1984 and ending on August 31, 1984, when he was laid off. (N.T. 19) He next found work as a microfilmer at Blue Shield in April of 1985; at the time of hearing he still held that position. (N.T. 22)

Mr. Brackbill also testified that he did not wish to return to Orweco. He indicated that the reasons for this were his present stability of employment, the benefits he receives at Blue Shield, and his fears that some-

one at Orweco would make things hard on him. (N.T. 55-56) He acknowledged that in his deposition testimony only a month before hearing he had said he would return to Orweco, but indicated that he had changed his mind. (N.T. 52) He did not refer to any new information which had caused him to change his mind, but spoke of his fears of harassment and his realization that, while the money at Orweco looked good, ". . .you just can't always depend on money." (N.T. 57)

Based on this history, I find that Mr. Brackbill is entitled to an award equal to all benefits and wages lost between the time of his discharge in February of 1984 and the time of this hearing in February of 1986, less his actual earnings, plus interest of six percent per annum for the same period, i.e. February, 1984 to February, 1986. Respondent's arguments that he failed to mitigate damages and that any backpay award should be cut off by his employment at Fruehauf are without merit. Mr. Brackbill testified credibly to making numerous applications for employment after his discharge, including several positions in shipping and receiving; Respondent has not produced proof of a single position for which Mr. Brackbill was qualified and failed to apply. Nor has it offered any authority for its assertion that Mr. Brackbill should bear the cost of his period of unemployment between Fruehauf and Blue Shield, a period which would not have occurred absent his unlawful discharge by Orweco.

Based on this record however Mr. Brackbill has not shown facts entitling him to front pay. While the Commission is empowered to award front pay, Williamsburg Community School District v. PA Human Relations Commission, supra, Complainant here has testified that he prefers the stability and benefits of his present position to the higher pay at Orweco; while he has

expressed concern about retaliation should he return to Orweco, he has not offered facts in support of his concern, or explained the absence of such concern only a month prior to hearing. While he is of course free to forego the normal remedy of reinstatement, something more than his preference must be shown to establish entitlement to front pay as an alternative. See Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2d Cir. 1984), holding that front pay is appropriate upon a showing that, inter alia, reinstatement is either impossible or impracticable, and may be necessary where an ADEA plaintiff has no reasonable prospect of gaining comparable alternative employment. Where as here there is no proof of the impossibility of reinstatement, there is satisfactory alternative employment, and reinstatement is expressly rejected, such an award is not justified. As in Williamsburg, it is appropriate to refrain from deducting amounts received in Unemployment Compensation benefits. Relief is therefore ordered as specified in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD BRACKBILL,	:	
COMPLAINANT	:	
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ORWECO FROCKS, INC.,	:	
RESPONDENT	:	

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondent violated Section 5(a) of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission.

Edith E. Cox

Edith E. Cox
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONALD BRACKBILL, :
COMPLAINANT :
v. : DOCKET NO. E-28783-D
ORWECO FROCKS, INC., :
RESPONDENT :

FINAL ORDER


AND NOW, this 28th day of October, 1986, 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 Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S:

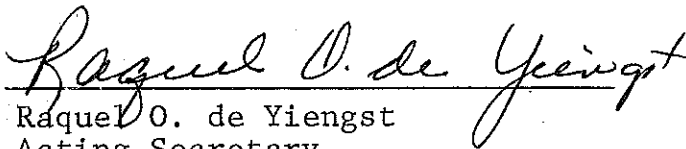
1. Respondent shall cease and desist from discriminating on the basis of age;
2. Respondent shall pay Complainant, within thirty days of the effective date of this Order, the lump sum of \$33,532.00 being the total of his lost wages and benefits between his discharge and the date of the hearing in this case, less his actual earnings during that period, calculated according to the method set forth in Complainant's brief except for the deduction in Unemployment Compensation benefits.
3. Respondent shall in addition pay Complainant interest of six percent per annum on the amount specified in paragraph 2 above, calculated yearly from February of 1984 until such time as payment is made.

4. Within thirty 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 Ellen K. Barry, Esquire, at the Commission's Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 
Alvin E. Echols, Jr.
Acting Chairperson

ATTEST:


Raquel O. de Yiengst
Acting Secretary