

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOSEPH D. CESTELLO,  
Complainant

v.

ROBERT MORRIS COLLEGE,  
Respondent

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:  
:  
: Docket No. E-27343  
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STIPULATIONS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

JOSEPH D. CESTELLO,  
Complainant

v.

ROBERT MORRIS COLLEGE,  
Respondent

Docket no. E-27343

STIPULATIONS OF FACT

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

1. Respondent, Robert Morris College, is an independent, non-profit, coeducational institution of higher education, organized and existing pursuant to the applicable laws of the Commonwealth of Pennsylvania.

2. Respondent maintains its principal offices on the Moon Township Campus, Narrows Run Road, Coraopolis, Pennsylvania 15108. Respondent also operates a Pittsburgh Center located at Fifth and Sixth Avenues, Pittsburgh, Pennsylvania 15219.

3. At all times pertinent hereto, Respondent has employed four (4) or more employees within the Commonwealth of Pennsylvania.

4. Complainant, Joseph D. Cestello, is an adult individual residing at 216 West First Avenue, Latrobe, Pennsylvania 15650.

5. At all times pertinent hereto, Respondent has maintained a defined contribution retirement plan for its employees.

6. Contributions under this defined contribution plan are applied to individual annuities issued to each participant by the Teachers Insurance and Annuity Association ( hereinafter "TIAA" ) and for the College Retirement Equities Fund ( hereinafter "CREF" ).

7. The provisions of Respondent's TIAA-CREF Retirement Plan ( hereinafter "Plan" or "Retirement Plan" ) are set forth in a resolution established by the Board of Trustees on October 1, 1963 and amended through January 1, 1985 ( a true and correct copy is included among the Joint Exhibits as Exhibit "A" ).

8. In general, all full time and permanent part time employees are eligible to participate in the Retirement Plan. However, employees whose employment is incidental to their educational program at the College are not eligible. Participation is voluntary, and matching contributions may begin on the first day of the month after completing one (1) year service with Respondent and attaining age 26, or any first day of the month

thereafter.

9. Plan contributions are to be made at least monthly during the years of participation, except for months in which no salary is paid, in accordance with the following schedule:

Regular Salary	By the Participant	By Respondent
Up to \$8,000	1%	1%
	2%	2%
	3%	3%
	4%	4%
	5%	5%
\$8,001 and above	1%	2%
	2%	4%
	3%	6%
	4%	8%
	5%	10%

10. Normal retirement age under the Plan is the last day of the month in which age 65 is attained.

11. The Plan defines "regular salary " for faculty as meaning only academic year contract salary. For all other employees, regular salary means basic annual earnings exclusive of overtime.

12. Under the terms of a collective bargaining agreement, dated April 13, 1986 and executed November 20, 1986, between Respondent and the Robert Morris College Federation of Teachers, Local 2412, AFT, AFL-CIO, Respondent ceased making any matching contributions

to the Retirement Plan when an employee reaches age 65. ( A true and correct copy of the relevant portions of the agreement is included among the Joint Exhibits as Exhibit "B" ). The employee is still permitted to contribute to the Plan thereafter. The prior collective bargaining agreement, applicable at the time of the filing of the above-captioned complaint contained identical provisions. ( A true and correct copy of the relevant portions of the agreement are included among the Joint Exhibits as Exhibit "C" ).

13. Complainant is currently employed by Respondent's as an Assistant Professor, and has worked for Respondent since 1970.

14. Upon Complainant's reaching his 65th birthday on May 1, 1983, Respondent's contributions to Complainant's Retirement Plan ceased, as per the above-mentioned collective bargaining agreement.

15. On or about December 8, 1983, Complainant filed a notarized complaint with Pittsburgh Office of the Pennsylvania Human Relations Commission at Docket No. E-27343 ( a true and correct copy of the formal complaint is included among the Joint Exhibits as Exhibit "D" ).

16. Complainant's regular annual earnings and contributions to the TIAA-CREF Retirement Plan are as follows:

	Earnings	Contributions
5/1/83 - 12/31/83	\$21,524.48*	\$3,320.00
1984	\$32,303.04**	\$3,300.00
1/1/85 - 9/30/85	\$23,422.59	\$1,350.00

\*earnings include \$2,600.00 of "overload" pay  
 \*\*earnings include \$2,700.00 of "overload" pay

17. By correspondence dated April 5, 1985 from Lawrence M. Mitchell, Jr. to Sidney Zonn, Esquire, Respondent was notified that probable cause existed to credit the allegations of the complaint ( A true and correct copy is included among the Joint Exhibits as Exhibit "E" ).

18. By correspondence dated April 30, 1985, Respondent refused to enter into conciliation discussions in this matter.

19. This case was approved for public hearing on June 24, 1985, and respondent was notified of this approval ( a true and correct copy of this approval is included among the Joint Exhibits as exhibit "F" ).

20. Commencing April 1, 1987, the Respondent College, with the agreement of the Robert Morris College Federation of Teachers, initiated making contributions to the Retirement Plan on behalf of all employees aged 65 and older who participate in said plan.

21. The documents identified in these stipulations as being included among the Joint Exhibits as Exhibits A-F are authentic documents, or are true and correct copies thereof and can be admitted without further proof of authenticity.

By: Sidney Zorn  
Sidney Zorn, Esquire  
Attorney for Respondent  
Robert Morris College

Date May 15, 1987

By: William R. Fewell, Jr.  
William R. Fewell, Jr.  
Assistant General Counsel  
Pa. Human Relations Commission

Date May 15, 1987

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOSEPH D. CESTELLO, :  
Complainant :  
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v. : Docket No. E-27343  
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ROBERT MORRIS COLLEGE, :  
Respondent :

CONCLUSIONS OF LAW

1. The Complainant, Joseph D. Cestello, is a person within the meaning of the Pennsylvania Human Relations Act. (Hereinafter "PHRA") 43 P.S. Sections 951, et seq.
2. The Respondent is an employer of four or more individuals within the meaning of the PHRA, at all times pertinent to this action.
3. The Complainant filed a timely complaint with the Pennsylvania Human Relations Commission.
4. The Complainant's action is based on the PHRA which prohibits age discrimination in employment against any person between the ages of 40 and 70. 43 P.S. Sections 954(h) and 955(a).
5. The Pennsylvania Human Relations Commission does not have jurisdiction over the parties and subject matter of the complaint pursuant to 43 P.S. Section 951 et seq.
6. The Pennsylvania Human Relations Act is preempted by ERISA (Employee Retirement Income Security Act).



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OPINION

This case arose on a complaint filed by Joseph D. Cestello ("Complainant") against Robert Morris College ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on December 8, 1983 at Docket No. E-27343. Commission staff investigated the matter and found probable cause to credit the allegations of the complaint. The case was approved for public hearing after efforts to conciliate were unsuccessful. In January of 1986, both parties agreed to submit the above case to the Commission on briefs instead of holding a public hearing. The final stipulations in this matter were submitted on December 14, 1987.

The facts of the case before the Commission are fairly straight forward. The Complainant is a faculty member who has been employed by the Respondent since 1970. The Respondent provides a contribution retirement plan in which employees may participate. Contributions under the plan are applied to individual annuities issued by each participant by the Teachers Insurance and Annuities Association ("TIAA") and

the College Retirement Equities Fund ("CREF"). At all times pertinent to this case, the Respondent has maintained a contribution retirement plan for its employees. In general all full-time and permanent part-time employees are eligible to participate in Respondent's retirement plan.

The contributions by the Respondent may begin on the final day of the month after an employee completes one year of service with the Respondent and attains age 26, or any first day of the month thereafter. Normal retirement age under the plan is the last day of the month in which an employee attains age 65. In accordance with the terms of the Collective Bargaining Agreement between the Respondent and the Robert Morris College Federation of Teachers, Local 3412, AFT, AFL-CIO, the Respondent ceases making any matching contributions to the retirement plan when a faculty member reaches 65 years old. The Complainant reached age 65 on May 1, 1983. Since that time, the Respondent has ceased contributions to the Retirement Plan on behalf of the Complainant.

The Complainant then filed a complaint alleging that the Respondent violated the Pennsylvania Human Relations Act by discontinuing matching contributions to the Retirement plan on behalf of the Complainant.

The singular legal issue, as agreed by both parties, to be determined in this matter is whether the Pennsylvania Human

Relations Act is preempted by the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, et seq. ERISA is the specific federal legislation that deals with employee benefit plans. Under ERISA, an employee benefit plan is defined as "any plan, fund or program maintained by an employer that provides retirement income to employees or results in deferral of income by an employee extending to or beyond termination of employment." 29 U.S.C. Section 1002(2)(A). The Complainant in this case, contends that ERISA was not intended to preempt the Pennsylvania Human Relations Act.

The issue of preemption presents a distinct split of authority at the first appellate stage in Pennsylvania. Section 514(A) of ERISA provides that "the provisions of this subchapter...shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in 29 U.S.C. Section 1003(A) and not exempt under 29 U.S.C. Section 1003(b). There is no argument in this case that the Respondent's plan is an employee benefit plan as defined in ERISA. Federal interpretation of this key provision suggests there is no question about Congress's intent to preempt in this area. For example, in Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294, 1297 (N.D. Cal. 1978), a district court stated, "The Court doubts that Congress could have chosen any more precise language to express its intent to preempt a state statute...insofar as it seeks to regulate ERISA-covered employee benefit plans..."

However, as stated before in Pennsylvania, there is a definite split of authority on this issue. The Pennsylvania Superior Court has specifically ruled that ERISA does not preempt the Pennsylvania Human Relations Act. See Lukus v. Westinghouse Electric Corp. 276 Pa. Super. 234, 419 A.2d 731 (1980). In Lukus, the court stated. "In instances, however, where a state law relating primarily to matters not governed by ERISA only indirectly affected employee benefit plans, that is, in a way not in conflict with the purposes ERISA was designed to achieve, courts have usually held that the state law was not preempted." The Lukus case involved a complaint filed as a class action alleging the violation of rights of female Westinghouse employees under the PHRA. The complaint was centered on the position that Westinghouse's refusal to pay Lukus benefits during her absence due to pregnancy and childbirth constituted sex discrimination. Westinghouse filed preliminary objections asserting that ERISA had preempted PHRA's regulation of Westinghouse's employee disability plan. In Lukus, the Superiors Court held that the complaint was not barred by the preemptive language of ERISA.

Another recent Superior Court case in this area is Driscoll v. Carpenters District Counsel of Western Pennsylvania and United Brotherhood of Carpenters, 536 A.2d 412 (1988). The Driscoll case involved allegations discrimination [sex and retaliation] in job referrals against a labor organization. The claims were based on rights provided in the PHRA. The

Respondents [Appellees] filed a Motion for Summary Judgment contending that the claims were preempted by applicable federal labor law. The Superior Court, in Driscoll, found against preemption by determining that the "intent of Congress would not be frustrated by a finding against preemption in the circumstances of this case." Driscoll also dealt with the issue as to whether the regulated behavior is conduct which touches interests deeply rooted in local feeling or is only of peripheral concern to federal law. The Superior Court said:

" The particular matter of sex-based discrimination,....appears to be only of peripheral concern under the national labor Relations Act, while it is a subject of high priority under the Pennsylvania Human Relations Act." This analysis resulted in a finding against preemption.

However the Commonwealth Court of Pennsylvania has also ruled on similar arguments in International Ladies 'Garment Workers' Union, Local No. 111 and International Ladies 'Garment Workers' Union v. Human Relations Commission of the City of Allentown, \_\_\_ Pa \_\_\_ (1980). The International Ladies 'Garment Workers' case involved two females who were pregnant and claimed that the Union's health plan discriminated against them because of their sex. The Union argued that ERISA expressly preempted the Commission's regulation of the plan and the Commission was without jurisdiction. This case reviewed the analysis on preemption presented by a number of cases including the Superior Court's opinion in Lukus. The Commonwealth Court in International Ladies 'Garment Workers' expressly rejected each argument used in Lukus to avoid preemption. The Commonwealth Court, in delineating the arguments, said:

"...(1) the "peripheral concern" argument--state fair employment laws are of only peripheral concern to ERISA and, therefore, Congress did not intend to preempt these state laws; and (2) the "double savings clause" contention---since ERISA does not preempt nonconflicting federal law, Section 514(d), 29 U.S.C. Section 1144(d), and since Section 708 of Title VII, 42 U.S.C. Section 2000e-7, does not preempt state antidiscrimination laws, then ERISA, like Title VII, does not preempt nonconflicting state laws. We find these reasons ingenious but unpersuasive." (Emphasis added)

According to the Commonwealth Court, there was no question that the preemption language in ERISA extends to state laws such as the Pennsylvania Human Relations Act. More precisely stated, the direct precedent of the Commonwealth Court indicate, if an employer's benefit plan complies with ERISA, state law cannot prohibit what is lawful under ERISA. Therefore, it is clear that any reading of the PHRA which impinges on the Respondent's right to cease making matching contributions after retirement relates to an employee benefit plan and is preempted.

Upon reflection, it would appear that the more prudent course of action for the Complainant would have been to pursue his action through the Common Pleas Court. The Pennsylvania Human Relations Commission is constrained to follow the ruling of Commonwealth Court in the International Ladies 'Garment' Workers case and accordingly must rule in favor of preemption by ERISA. Both Lukus and Driscoll resulted from appeals to the Superior Court from actions in Common Pleas Courts.

Accordingly, the foregoing complaint must be dismissed. An appropriate order follows.

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Respondent :

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the Hearing Panel that the Pennsylvania Human Relations Commission is unable to assess whether the Respondent violated the PHRA because the PHRA is preempted by the Employee Retirement Income Security Act (ERISA). Accordingly, it is the Hearing Panel's Recommendation that the attached Stipulations of Fact, Conclusions of Law, Opinion and Order be adopted by the full Pennsylvania Human Relations Commission.

John P. Wisniewski  
John P. Wisniewski, Hearing Panel  
Chairperson

8/29/88  
Date

Rita Clark  
Rita Clark, Hearing Panel  
Member

8/29/88  
Date

Carl E. Denson  
Carl E. Denson, Hearing Panel  
Member

8/29/88  
Date

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FINAL ORDER

AND NOW, this 31st day of August, 1988,  
following review of the entire record in this case, including  
the submission of all of the briefs by both parties, the  
Pennsylvania Human Relations Commission hereby adopts the  
foregoing Stipulations of Fact, Conclusions of Law, and Opinion,  
in accordance with the Recommendation of the Hearing Panel,  
pursuant to Section 9 of the Pennsylvania Human Relations Act,  
and therefore

O R D E R S

that the PHRAct is preempted by ERISA as to the issue and facts  
presented in this case, and the same hereby is dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Thomas L. McGill, Jr.  
Thomas L. McGill, Jr., Esquire  
Chairperson

ATTEST:

Raquel O. Yiengst  
Raquel O. de Yiengst  
Assistant Secretary