COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BETTY A. DIEHL, Complainant

v.

EARLSTON LUMBER COMPANY, INC., Respondent

DOCKET NO. E-2l3l6

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF THE HEARING PANEL

FINAL ORDER

FINDINGS OF FACT

The following abbreviations will be used throughout these Findings of Fact for reference purposes:

R.A. Request for Admission
N.T. Notes of Testimony
C. Complaint
C.E. Complainant's Exhibit

1. The Complainant herein is Betty A. Diehl, an adult female, who resides at R.D. #3, P.O. Box 95, Everett, Bedford, Pa, 15537. (R.A. 1 and N.T. 12).
2. The Respondent is Earlston Lumber Company, Inc., located at R.D. #3, P.O. Box 361, Everett, Bedford, Pa., 15537. (R.A. 2).
3. The Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter referred to as the "Act"), Act of October 27, 1955, 43 P.S. 955(a) et seq. as amended. (R.A. 4).

4. On or about October 15, 1981, Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter referred to as the "Commission"), at Docket Number E-21316. (C.)
5. All procedural prerequisites to the holding of a Public Hearing under the Act have been met in this case. (R.A. 7).
6. Complainant began working for Respondent as a secretary in August, 1975. (R.A. 8 and N.T. 12).
7. In August, 1978, Complainant was promoted to the position of Corporation Secretary. (R.A. 9 and N.T. 12).
8. During Complainant's employment with Respondent, Complainant was supervised in part by Respondent's President and Owner, Mr. Eugene Cowles. (N.T. 13).
9. Complainant had daily contact with Mr. Cowles. (N. T. 13).
10. Complainant testified that in January, 1977, while she was home sick, she called Mr. Cowles regarding her job status, and Mr. Cowles asked Complainant to meet him away from the office. (N.T. 13 and 14).
11. Complainant and Mr. Cowles met at a residence unfamiliar to Complainant where Complainant indicated Mr. Cowles first put his arm across and around her. (N.T. 14 and 15).
12. Complainant testified that in essence, Mr. Cowles told her that if she liked her job and if she wanted her job, that she had to go to bed with him. Complainant testified further that she complied in order to keep her job. (N.T. 15).
13. Approximately two months later, Mr. Cowles arranged a second meeting at the same place the first incident occurred. Complainant went to this meeting to express her anger to Mr. Cowles. (N.T. 16 and 17).
14. At this second encounter, Complainant had sex with Mr. Cowles after he again told Complainant that "if you want to continue to work for me, you will go to bed with me." (N.T. 17).
15. At an unoccupied residence, in April, 1977, Mr. Cowles again subjected Complainant to sexual advances, which were cleverly avoided by Complainant by making up an acceptable excuse so as not to jeopardize her job. (N.T. 18).
16. During the six week period which preceded the middle of July, 1977, Complainant was off work following surgery. During this period Mr. Cowles called the Complainant at home seeking sex, however, again Complainant created an excuse to avoid compliance. (N.T. 19).
17. In August, 1977, Mr. Cowles took Complainant on a short business trip to Huntingdon County Courthouse. Both during the trip to the courthouse and while they were at the courthouse, Mr. Cowles told Complainant that he wanted to rent a motel room for the day and constantly talked about sex. (N.T. 21).
18. Complainant refused to go to a motel with Mr. Cowles. (N.T. 21).
19. Upon leaving the courthouse, Mr. Cowles detoured to the Huntingdon Dam, where he stopped and took a blanket and a pillow out of the trunk of the car. Mr. Cowles wanted Complainant to sit on the blanket with him but she refused. Additionally, Mr. Cowles asked Complainant to show him her surgical scar, which is very low on her pelvis area, but she refused. (N.T. 22).
20. During this incident, Mr. Cowles did not tell Ms. Diehl that she would be fired if she did not have sex with him. (N.T. 23).

21. During her employment with Respondent, Mr. Cowles also subjected Complainant to a barrage of verbal sexual harassment. Mr. Cowles often complained to Complainant about his sex life with his wife in explicit detail. (N. T. 23).
22. Complainant unsuccessfully told Mr. Cowles to stop talking about these problems. (N.T. 23 and 24).
23. Mr. Cowles also made other comments of a sexual nature to Complainant, such as: asking her what color and style of underpanties she wore (N.T. 20, 24, and 25), asking her if she ever had sex with a man on a first date (N.T. 25), asking her what "her price" would be to go to bed with a man, (N.T. 45), telling her every woman has her price to go to bed with a man. (N.T. 45).
24. On one instance, Mr. Cowles took the door off the bathroom when Complainant wanted to use it. The bathroom door was in close proximity to Mr. Cowles' office and the door was approximately four feet from his chair. (N.T. 35 and 36).
25. In late 1977 or early 1978, Mr. Cowles offered Complainant $10,000 to go to bed with him once a week for a year. (N.T. 28 and 29).
26. With the hope that he would stop asking her for sexual favors, Complainant made demands that she knew Mr. Cowles could not meet. (N.T. 29 and 30).
27. In November, 1979, Complainant went on leave for surgery and remained on leave until February 1980. (N.T. 31 and 32).
28. From February, 1980 until August 21, 1980, Complainant was laid off her job with Respondent. (N.T. 32).
29. During the period from November, 1979 to August 21, 1980, Mr. Cowles called Complainant at her home several times asking .for sexual favors, which requests were refused (N.T. 32).
30. At the end of July, 1980, Mr. Cowles called Complainant and asked her to return to work. (N.T. 33).
31. Complainant initially told Mr. Cowles that she would not return to work for Respondent because of Mr. Cowles' sexual advances and remarks. However, after Mr. Cowles threatened to have Complainant's unemployment compensation terminated, Complainant agreed to return to work, provided that Mr. Cowles would not subject her to further sexual harassment. (N.T. 33).
32. For several weeks after Complainant returned to work Mr. Cowles refrained from sexual harassment. However, after Complainant's husband had suffered a life-threatening stroke, Mr. Cowles told Complainant that he would be "more than willing" to perform the "husbandly duties." (N.T. 34).
33. Complainant told Mr. Cowles to leave her alone. (N. T. 34).
34. From September, 1980 until August 31, 1981, when Complainant was terminated, Mr. Cowles asked her to have sex with him several times a week, and made remarks to Complainant about his sex life with his wife. (N.T. 35).
35. Complainant refused to comply with Mr. Cowles' requests for sex and rebuffed his sexual remarks and innuendos. (N.T. 34).
36. Men who worked for Respondent were not subjected to unwanted sexual comments and advances. (N.T. 47).
37. On August 15, 1981, Mr. Cowles told Complainant that she was terminated, effective August 31, 1981. (N.T. 37).

38. The sole reason that Mr. Cowles gave Complainant for her termination was that he believed that she was having an affair with someone else in the office and if he could .not have sex with Complainant, no one else could. (N.T. 37).
39. Shortly after Complainant was terminated, Respondent hired Sally Longhan to replace her. (N.T. 37 and 47). Prior to Complainant's termination, Mr. Cowles had offered Complainant's job to Pam Fisher, a former employee of Respondent. (R.A. 11).
40. Earlston's President and Owner, Mr. Cowles, was notified of the scheduled Public Hearing by letters dated February 27, 1985 and March 28, 1985 (C.E. 2 and 4), and by telephone on March 26, 1985. (C.E. 4; N.T. 6). Mr. Cowles agreed to waive the Act's requirements that Public Hearings be held in the county in which the alleged act of discrimination occurred. (N.T. 6 and C.E. 3).
41. A Public Hearing was held on April 10, 1985, in Harrisburg, before Commissioners Doris M. Leader, Chairperson, Benjamin S. Loewenstein and Robert Johnson Smith. No representative from Respondent was present at the Public Hearing. Complainant presented her case, in accordance with 16 Pa. Code §42.l05.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant and the Respondent and the subject matter of the Complaint under the Pennsylvania Human Relations Act, pursuant to Section 9 of the Pennsylvania Human Relations Act (Act). 43 P.S. §959.
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter, pursuant to Section 9 of the Act. 43 P.S. §959.
3. Respondent is an "employer" within the meaning of Section 4(b) and 5(a) of the Act. 43 P.S. §954(b) and §955(a).
4. Complainant is an "individual" within the meaning of Section 5(a) of the Act. 43 P.S. §955(a).
5. Sexual harassment is a form of sex discrimination and is a violation of Section 5(a) of the Act. 43 P.S. §955(a).
6. Statements in Requests for Admissions not denied are deemed admitted.
7. The McDonnell-Douglas standard is flexible and contingent on the facts of each case.
8. In order to establish a prima facie case of sexual harassment, a Complainant must show:
    a. That she belongs to a protected group;
    b. that she was the victim of unwanted sexual harassment attributable to the Respondent;
    c. that the sexual harassment complained of was based on sex; and
    d. that the sexual harassment affected a term, condition, or privilege of employment.
9. Complainant has established an unrebutted prima facie case of sexual harassment from which an inference of unlawful discrimination arises.
10. Sexual advances must be unwelcome but there is no requirement that such advances be rejected.
11. Complainant was terminated for her refusal and rejection of repeated sexual advances of the President and Owner of Earlston.
12. A workplace permeated by repeated and long-standing conversation and conduct of a sexual nature renders an employment environment intimidating, hostile, and offensive,

and such an atmosphere is a violation of the right to a workplace free from sexual harassment.

13. The Commission has broad discretion in fashioning remedies and the Act's purposes are effectuated by awarding lost wages and a cease and desist order requested by the Complainant.

OPINION

The case arises on a complaint filed by Ms. Betty A. Diehl ("Complainant") against Ear1ston Lumber Company, Inc., ("Respondent" or "Ear1ston") with the Pennsylvania Human Relations Commission ("Commission") on or about October 15, 1981 at Docket No. E-213l6. Ms. Diehl alleged that Earlston had discriminated against her because of her sex, female, in violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 set seq. ("Act").

Section 5(a) of the Act makes it an unlawful discriminatory practice:

> (a) For any employer because of the race...sex ...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual,...or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...43 P.S. 955(a)

More specifically, Complainant alleged that she had been the victim of sexual harassment as her employment was conditioned on her sexual submission and cooperation with the President and Owner of Earlston. Ultimately, Complainant alleged that her discharge from employment was based on her rejection of repeated unwanted sexual advances.

Earlston initially indicated that Complainant's discharge was based on a belief that Complainant was having an extra marital affair with another employee. During the course of the investigation, Earlston, through its President and Owner, Mr. Cowles, denied any violation of the Act and maintained that Complainant's discharge was due to changing economic conditions.

Commission staff investigated and found probable cause to credit the allegations of discrimination. When conciliation efforts failed, the case was set for Public Hearing. Prior to the hearing, Requests for Admissions were forwarded to Earlston; however, no answer was made. Accordingly, all statements that were not denied are deemed as admitted. These admissions were subsequently incorporated into the record of the Public Hearing, and are hereby incorporated into the foregoing Findings of Fact. Additionally, both parties waived their right to a hearing in the county in which the alleged offense was committed, by agreeing to hold the Public Hearing in Dauphin County.

The Public Hearing was held on April 10, 1985, before Commissioners Leader, Panel Chairperson, Loewenstein, and Smith. No representative from Respondent was present at the Public Hearing. Accordingly, entry of proof of notice was entered upon the record and the hearing proceeded with the presentation of the case in support of the complaint.

The tripartite test for analyzing cases of unlawful employment discrimination and allocating the burdens of production therefore is well established. First, complainant has the burden of

producing evidence which demonstrates a prima facie case of unlawful discrimination. Second, if Complainant demonstrates a prima facie case, Respondent must produce evidence which articulates a legitimate, nondiscriminatory reason for the challenged action. Third, if Respondent rebuts the prima facie case, Complainant has the opportunity to produce evidence which shows that Respondent's proffered reason is pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089 (1980); McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).

Our initial observation indicates that cases which allege sexual harassment do not fit the McDonnell-Douglas mold perfectly. As we have often noted, the McDonnell-Douglas test is not a fixed absolute that applies in all respects to all circumstances. The standard is a flexible one contingent on the peculiar factual details of a given scenario.

We would adjust the McDonnell-Douglas formula to the present case as follows: To establish a prima facie case of illegal discharge in retaliation against the Complainant's refusal of sexual advances by the President and Owner of Earlston, the Complainant must show (1) that she belongs to a protected group; (2) that she was a victim of unwelcome sexual harassment attributable to the Respondent; (3) that the harassment complained of was based on sex; and (4) that the harassment complained of affected a term, condition or privilege of employment. Bundy v. Jackson, 641 F.2d 934, 24 F.E.P. 1155 (D.C. Cir. 1981); Henson v. City of Dundee, 682 F.2d 897, 903-904, 29 F.E.P. 787 (11th Cir. 1982).

The Commission has published Guidelines On Sexual Harassment which indicates that harassment on the basis of sex violates the Act. SEE: Guidelines On Sexual Harassment, 11 Pa. Bulletin No. 12 5 p. 522 (1/31/81). Sexual harassment is defined in the Guidelines as:

> (a) Harassment on the basis of sex is a violation of the Pennsylvania Human Relations Act. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

A review of the record and the totality of the circumstances reveals that the Complainant has clearly established a prima facie case. She is a female who was not only the victim of repeated sexual advances but was also subjected to an extensive amount of lewd and vulgar conversation and conduct in the workplace. The violative conduct placed Complainant in the position of making a choice and created pressures on her that male employees were not subjected to. Lastly, there was unquestionably a negative effect on Complainant's employment as her discharge was clearly connected to her refusal of unwanted sexual advances.

For purposes of clarity, there is a requirement that sexual advances be unwelcome but there is no requirement that the advances be rejected. Accordingly, even though Complainant initially granted sexual favors, sexual harassment still occurred as the requests for sexual favors and

advances were unwelcome. In essence, Complainant was specifically told on several occasions that she would be fired if she did not engage in sex with the President and Owner of Earlston.

Respondent failed to appear at the Public Hearing and has not produced any evidence of a legitimate, nondiscriminatory reason for terminating Complainant. Consequently, Complainant's prima facie case is unrebutted and the inference of discrimination raised by the prima facie case must stand. Allegheny Housing Rehabilitation Corp. v. PHRC, No. 2234 C.D. 1983, Slip Op. Filed: 3/29/1985 (Pa. Cmwlth. Ct.).

Complainant's testimony that Mr. Cowles told her that she was being terminated because of her rejection of his sexual advances is uncontroverted. Patently, this shows Complainant's termination was unlawful discrimination.

If Respondent had been at the Public Hearing to defend its actions, the record suggests that Respondent would have claimed that Complainant was terminated because Respondent needed to eliminate her position due to poor economic conditions. At least, this was the alleged defense proffered by Respondent during the investigation of Complainant's complaint. However, this reason is clearly a pretext, since Complainant was replaced by Sally Langhan almost immediately, and Complainant's position was offered to Pam Fisher approximately three weeks prior to Complainant's termination.

Thus, Respondent has failed to meet its burden of producing evidence which articulates a legitimate, nondiscriminatory reason for its actions. All of the evidence on the record supports Complainant's claim that her termination was caused by her refusal to submit to unwanted sexual advances.

We, therefore, conclude that Respondent discriminatorily discharged Complainant for resisting unwanted sexual advances made by the President and Owner of Earlston.

Additionally, we find that the workplace was permeated by repeated and long-standing conversation and conduct of a sexual nature which rendered the employment environment at Earlston intimidating, hostile, and offensive. Such an atmosphere is in violation of Complainant's right to a working environment free from sexual harassment.

Following these findings, we are empowered by Section 9 of the Act to award relief, including lost wages, and a cease and desist order. Interest on backpay awards may also be ordered. Goetz v. Norristown Area School District, 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1975). Pennsylvania courts have consistently allowed us broad discretion in fashioning a remedy. PHRC v. Alto Reste Park, 453 Pa. 124, 306 A.2d 881 (1973). Our computations of backpay must be reasonably calculated to replace earnings lost as a result of discriminatory conduct; they need not and often cannot be mathematically precise.

Complainant here has requested both lost wages and a cease and desist order, and we find that the Act's purposes will be effectuated by awarding both. For purposes of computing the award, we accept the calculations summarized in Complainant's Exhibit 6, with the following minor modifications: Testimony revealed that Complainant's final rate of pay at Glass Specialty was

$4.15 per hour, not $4.25 per hour, as indicated in the seventh line down and third column from the left on C.E. 6. Additionally, Complainant was laid off by Glass Specialty on May 14, 1984, not May 2, 1984, as indicated on the seventh and eighth lines down and first column on the left on C.E. 6. Due to there modifications, the total backpay lose is calculated at $11,617.80 plus interest in the amount of $900.39.

Accordingly, we order relief as described in the order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BETTY A. DIEHL, Complainant

v.

EARLSTON LUMBER COMPANY, INC., Respondent

DOCKET NO. E-2l3l6

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, the hearing panel concludes that Respondent violated Section 5(a) of the Pennsylvania Human Relations Act, and therefore unanimously recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.

Doris M. Leader — July 29, 1985
DORIS M. LEADER — Date
HEARING PANEL CHAIRPERSON

Benjamin S. Loewenstein — July 29, 1985
BENJAMIN S. LOEWENSTEIN — Date
COMMISSIONER

Robert J. Smith — July 29, 1985
ROBERT JOHNSON SMITH — Date
COMMISSIONER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BETTY A. DIEHL, Complainant
v.
EARLSTON LUMBER COMPANY, INC., Respondent

DOCKET NO. E-2l3l6

ORDER

AND NOW, this 31st day of July, 1985, 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 Panel, pursuant to Section 9 of the Act, and therefore

ORDERS

1. Respondent shall pay to Complainant a lump sum of $12,518.19, representing the amount equal to the difference between what she actually earned since her termination from Respondent and what she would have earned if she had remained as Corporation Secretary for Respondent until the day of the Public Hearing, plus 6% annual simple interest on that amount. This amount shall be paid by check payable to BETTY A. DIEHL, within thirty days of the effective date of this Order.
2. That Respondent cease and desist from discrimination in the form of sexual harassment and take affirmative measures to prevent recurrence of all forms of sexual harassment by:
    a. affirmatively raising the subject of sexual harassment with all employees and informing them that sexual harassment is illegal;
    b. establishing and publishing a complaint mechanism;
    c. taking all necessary steps promptly to investigate any harassment, including warnings and appropriate discipline directed at an offending party; and
    d. insuring that complaints of sexual harassment receive thorough and effective treatment within the complaint mechanism established.

PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BY: _____
JOSEPH X. YAFFEE
CHAIRPERSON

ATTEST:

_____
ELIZABETH M. SCOTT
SECRETARY