

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CONNIE DORFMAN,  
Complainant

v.

IRVIN SINGER,  
Respondent

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:  
: DOCKET NO. E-33737  
:  
:  
:

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CONNIE DORMAN, : DOCKET NO. E-33737

Complainant :

v.

IRVIN SINGER, M.D., :

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 Connie Dorfman.
2. The Respondent herein is Irvin Singer, M.D.
3. The Respondent, at all times relevant to the case at hand, has employed four or more individuals within the Commonwealth.
4. On or about July 10, 1985, the Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-33737.
5. In correspondence, dated February 4, 1986, the Commission notified the Respondent that probable cause existed to credit the allegations contained in the instant complaint.
6. Subsequent to the probable cause determination, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion, but were unable to do so.

7. By correspondence, dated September 8, 1986, the parties were notified that a public hearing had been approved in this case.

8. The Complainant was employed by the Respondent from 1975 to September 14, 1984, and she rendered no services thereafter.

9. Beginning on October 12, 1984, and continuing through June 8, 1985, funds were transferred from the Respondent to the Complainant in the gross amount of sixty dollars (\$60) weekly to supplement the Complainant's unemployment compensation.

10. The original commitment by the Respondent to pay the gross amount of sixty dollars (\$60) weekly, starting on October 12, 1984, was intended to continue for one year or until other employment was obtained.

11. The Complainant did not secure employment before the one year period expired.

12. On June 5, 1985, the Complainant filed a complaint, docket number E-33413, alleging that Respondent discriminated against her by failing to rehire her.

13. The Complainant did not receive her \$60 check from the Respondent on June 15, 1985, or any of the seventeen (17) succeeding weeks.

14. If the Respondent had continued to transfer sixty dollars (\$60) a week to the Complainant for the remaining seventeen (17) weeks, the Complainant would have received \$1,020.

15. At a Fact Finding Conference held on July 10, 1985,

the Respondent told Human Relations Representative Clarissa Barksdale that he stopped the sixty dollar gross weekly checks because the Complainant had filed a complaint with the Pennsylvania Human Relations Commission.

16. Respondent was angered to learn that the Complainant had filed a Pennsylvania Human Relations complaint which the Respondent believed to be unjustified.

17. Complainant's Pennsylvania Human Relations complaint at docket number E-33413, the original complaint, was investigated and dismissed after a no cause finding was issued.

18. Subsequently, the Complainant requested a preliminary hearing in the complaint docketed at E-33413. By correspondence dated May 7, 1986, the Complainant was notified that said request was denied.

The Stipulations of Fact, will become a part of the official record of this case and will be incorporated into the transcript prepared during the course of the public hearing in this matter.

Albert Schlessinger  
Albert Schlessinger, Esquire  
Counsel for Respondent

Dec. 16, 1987  
Date:

Cynthia M. Williams  
Cynthia M. Williams  
Counsel for the Commission

Dec. 16, 1987  
Date:

Joshua P. Rubinsky  
Joshua Rubinsky, Esquire  
Counsel for the Complainant

Dec. 16, 1987  
Date:

FINDINGS OF FACT\*

1. Connie Dorfman, (hereinafter the "Complainant"), was Irvin Singer, M.D.'s office manager. (N.T. 9, 22)

2. Dr. Singer is a medical general practitioner and the sole practitioner and sole shareholder in Irvin Singer, M.D., Professional Corporation, (hereinafter the "Respondent"). (N.T. 20, 21)

3. On September 10, 1984, Dr. Singer advised the Complainant of her pending termination and instructed the Complainant that the Respondent would pay the Complainant any difference between her salary and any unemployment compensation benefits the Complainant might receive after her termination. (N.T. 10, 15, 23)

4. On September 14, 1984, the Complainant's termination became effective. (N.T. 9)

5. Between October 12, 1984 and June 8, 1985, Dr. Singer paid the Complainant the gross amount of \$60.00 per week from Respondent funds from which taxes were deducted. (N.T. 24; J.E. 2, 3)

6. Between October 12, 1984 and June 8, 1985, the Respondent's payroll records listed the Complainant as an employee. (J.E. 2, 3)

7. The Complainant requested and was furnished an itemized explanation of deductions made from the \$60.00 gross weekly payment. (N.T. 12; C.E. 1)

\* The foregoing "Stipulations of Fact" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites 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  
C.E. Complainant's Exhibit  
S.F. Stipulations of Fact  
J.E. Joint Exhibit

8. The Respondent reported to the I.R.S. that the \$60.00 payments to the Complainant were wages. (N.T. 14; J.E. 1)

9. The sole reason Dr. Singer discontinued the \$60.00 per week supplemental checks was because the Complainant had filed a complaint with the Pennsylvania Human Relations Commission. (N.T. 32)

10. The \$60.00 supplemental payments were not a personal gratuity from Dr. Singer. (N.T. 14, 15, 24, 26; J.E. 1, 2, 3)

## 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. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Respondent is an employer within the meaning of the Act.
5. Complainant here has made out a prima facie case of retaliatory discharge by proving that:
  - a. She was engaged in a protected activity;
  - b. The Respondent was aware of it;
  - c. She suffered an adverse decision; and
  - d. There is a causal link between the protected activity and the adverse decision.
6. The Respondent provided direct evidence of a discriminatory motive by admitting that the sole reason for ceasing supplemental payments was because the Complainant had filed a PHRC complaint.
7. The Respondent failed to offer any evidence of a legitimate, non-discriminatory reason for ceasing supplemental payments to the Complainant.
8. Supplemental payments to the Complainant were ceased in retaliation for the Complainant having filed a PHRC complaint.
9. The PHRC may fashion a remedy which will effectuate the purpose of the Pennsylvania Human Relations Act.

O P I N I O N

This case arises on a complaint filed by Connie Dorfman ("Complainant"), against Dr. Irvin Singer, M.D., ("Respondent"), with the Pennsylvania Human Relations Commission, ("PHRC"), on or about July 10, 1985, at Docket No. E-33737. In her complaint the Complainant alleged that the Respondent violated Section 5(d) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended 43 P.S. §951 et seq. ("PHRA"), which prohibits retaliation against an individual for filing a PHRC complaint. Specifically, the complaint alleged that the Respondent discriminatorily discontinued agreed upon weekly supplemental compensation following her termination.

After this matter was investigated, PHRC staff found probable cause to credit the Complainant's allegations. The parties attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. However, these attempts were unsuccessful and this case was approved for a public hearing.

A public hearing was held on December 16, 1987, in Philadelphia, Pennsylvania, before Hearing Examiner Carl H. Summerson. Albert Schlessinger, Esquire, represented the Respondent. Joshua P. Rubinsky, Esquire, appeared as the Complainant's private attorney, and Cynthia M. Williams, Esquire, represented the PHRC interest in the complaint. Following the Public Hearing post hearing briefs were submitted by the parties. The Respondent's brief was received on February 29, 1988, and the Complainant's brief was received on February 24, 1988.

Since it would appear that none of the facts relevant to the disposition of this matter are in dispute, we can turn our focus onto the legal questions raised in this case. First, during the Public Hearing, the Respondent, in effect, argued that Section 5(d) requires proof of a



discriminatory action. The Respondent seems to be suggesting that because Section 5(d) does not use the word retaliation, some other manner of discrimination must be established.

Section 5(d) of the PHRA provides:

"It shall be an unlawful discriminatory practice "(d) For any 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." (Emphasis added.)

The two most recent Pennsylvania Commonwealth Court decisions which have addressed Section 5(d) allegations both clearly recognize that Section 5(d) is the retaliation provision of the PHRA. See Harmony Volunteer Fire Co. and Relief Assoc. v. PHRC, 459 A.2d 429 (Pa. Cmwlth. 1983); and Berks County Prison v. PHRC, 387 A.2d 1030 (Pa. Cmwlth. 1978). Similarly, a multitude of federal cases interpreting Section 704(a) of Title VII have in effect ruled that similar federal statutory language can readily be interpreted as intended to address employer retaliation against complainants. Section 704(a) of Title VII provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Although neither provision uses the word retaliate, it is clear that both Section 704(a) of Title 7 and Section 5(d) of the PHRA are intended to insure uninhibited access to the enforcement mechanisms of the EEOC and the PHRC. Section 5(d) is considered instrumental in keeping complainants free from coercion in initiating complaints, as the complaint process is the lifeblood of the PHRA.

In this case, the Complainant, in accordance with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973), has the initial burden to prove a prima facie case of discrimination. As has often been emphasized, the McDonnell Douglas prima facie formula is not rigid. Instead, the exact elements of a prima facie case are frequently changed since the elements are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations. Spruill v. PA Dept. of Transportation, Docket No. E-18816 (PHRC, February 28, 1983); Fisher v. Montgomery County Sheriff's Dept., Docket No. E-21522 (PHRC August 9, 1984); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

To establish a prima facie case of retaliation the Complainant must show:

1. That she was engaged in a protected activity;
2. That the Respondent was aware of it;
3. That she suffered an adverse decision;
4. That there is a causal link between the protected activity and the adverse decision. See Jordan v. Wilson, 42 FEP 950 (M.D. Ala. 1986), citing Donnellon v. Fruehauf Corp., 794 F.2d 598, 41 FEP 569 (11th Cir. 1986).

At the outset, it should be noted that the validity of a retaliation claim does not depend upon the validity of the Complainant's objection to an act of a Respondent. PHRC v. Thorpe, Reed Armstrong, 24 Pa. Commonwealth Ct. 295, 361 A.2d 497 (1976). Here the Complainant had filed a complaint against the Respondent at PHRC Docket No. E-33413 which had alleged a failure to rehire. After an investigation of this allegation, the complaint at Docket No. E-33413 was dismissed after a finding of no probable cause. The near universal position taken on the question of whether the

underlying complaint must be valid is that the factual truth of the first protesting complaint is not controlling.

Turning to whether a prima facie has been established, it is clear that the evidence does indicate that the Complainant has shown a prima facie case. First, it is undisputed that the Complainant had filed a PHRC complaint. In fact, the evidence in this case allows us to simply conclude that the admitted sole motivation for the Respondent's adverse action was the anger raised by the fact that the Complainant had filed a complaint. This actually presents sufficient direct proof that the decision to terminate the weekly supplemental payments was in retaliation to the perceived disloyalty of the Complainant when she filed the PHRC complaint at Docket No. E-33413.

Rather than attempt to articulate a nondiscriminatory reason for ceasing the supplemental payments, the Respondent instead chose to rely on the argument that the payments were gratuitous. Simply stated, the Respondent contends that it had no contractual obligation to provide the payments and that the monetary supplement was a humanitarian gesture born out of a long-standing close relationship between the parties. The Respondent has failed to cite any authority for these arguments.

Conversely, the Complainant cites some authority for its position that the supplemental payments should be deemed compensation. Frankly, the attendant facts and circumstances of the payments certainly do have many earmarks of having been considered as salary.

However, Section 5(d) of the PHRA makes an ultimate decision unnecessary regarding whether the supplemental amounts paid to the Complainant were compensation or merely gratuitous. Clearly, Section 5(d) states that the act of discrimination can be done "in any manner..." Combining the "action of any kind" language of Section 5(d) with the requirement to construe the PHRA "liberally for the accomplishment of the

purposes thereof..." language of Section 12(a), it is easy to conclude that whether the Respondent ceased either a gratuity or compensation, it never-the-less retaliated pure and simple. A act strictly forbidden by the PHRA.

Turning once against to federal cases dealing with retaliation we find courts imposing retaliation liability for such acts as a Respondent initiating a libel suit because of statements made in a Complainant's discrimination allegations. See EEOC v. Virginia Carolina Veneer Corp., 495 F. Supp. 775, 23 FEP 340 (W.D. Va. 1980); or the mere writing of a letter to an employe which stated that the bringing of discrimination charges destroyed the mutual confidence necessary to the employment relation. See Stebbins v. Nationwide Mutual Ins. Co., 3 FEP 1217 (D. Va. 1971) aff'd on other grounds 469 F.2d 268 (4th Cir. 1972) cert denied 410 U.S. 939 (1973). Accordingly, liability in this case is likewise appropriate.

Since the parties have stipulated that \$1,020.00 was the amount the Complainant would have received but for the Respondent's adverse action, an appropriate order follows.





PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

John P. Wisniewski  
John P. Wisniewski  
Assistant Secretary