COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT D. DEIGER, Complainant	:	
v.	:	DOCKET NO. E-10182
TEENY TOT DAY CARE CENTER, et al., Respondent	:	

FINDINGS OF FACT

1. Complainant Robert D. Deiger is an adult white male individual residing at 1550 Cranbrook, Sharon, Pennsylvania. (Stipulation No. 1).

2. Respondent Teeny Tot Day Care Center ("Teeny Tot") was a day care center for children ages three to six, and on or about January 13, 1976 was an employer of four (4) or more persons within the Commonwealth of Pennsylvania. (Stipulation No. 2).

3. Respondent Farrell Area Day Care Center is a day care center for children ages three to six and is an employer of four (4) or more persons within the Commonwealth of Pennsylvania. (Stipulation No. 3).

4. Respondent Farrell Area School District is a body corporate and politic created and existing pursuant to the provisions of the Public School Code of 1949, Act of March

10, 1949, P.L. 30, 24 P.S. §§ 101 et seq., as amended, and is an employer of four (4) or more persons within the Commonwealth of Pennsylvania. (Stipulation No. 4).

5. Prior to May 4, 1978, Teeny Tot was a day care center for children ages three to six and administered its own program. (Stipulations No. 5 and 6).

6. The Farrell area day care program is in part administered through the Farrell Area Day Care Center. (Stipulation No. 7).

7. On or about May 4, 1978, Teeny Tot ceased to exist as a functional day care center; to date it continues to exist as a non-profit corporation, incorporated under the laws of Pennsylvania, No. 160, June Term, 1970, in the Court of Common Pleas of Mercer County. (Stipulation No. 9).

8. On or about March 11, 1976, a formal verified complaint was filed by the Complainant before the Pennsylvania Human Relations Commission against Respondent Teeny Tot, alleging that Teeny Tot violated Section 5(a) of the Pennsylvania Human Relations Act by refusing to hire him for the position of Teacher-Director because of his race and sex. (Stipulation No. 10).

9. On March 30, 1981, this Complaint was amended to add Farrell Area Day Care Center and Farrell Area School District as Respondents. The amended complaint alleged the same unlawful discriminatory act and further alleged that Teeny Tot had been subsequently absorbed by the Farrell Area Day Care Center, which is operated by the Farrell Area School District, and that the Farrell Area School District was there-

fore the successor employer to Teeny Tot. (Stipulation No. 13).

10. Probable cause was found to credit the allegations of the complaints. (N.T. 107).

11. Investigation of the case occurred between 1976 and 1979. (N.T. 125).

12. Teeny Tot was an independent entity until October of 1975, at which time it contracted to provide day care services for the Farrell Area School District and Day Care Center. (N.T. 193).

13. At all times relevant to this action, the Farrell Area School District and Day Care Center have received funds from the Pennsylvania Department of Welfare for the purpose of providing day care services. (N.T. 193).

14. After October of 1975, Teeny Tot employees received their paychecks from the Farrell Area School District. (N.T. 135).

15. After 1975, Teeny Tot employees were approved by the Farrell Area School Board before being placed on the payroll. (N.T. 135; C.E. 22).

16. Farrell Area School District and Day Care Center monitored Teeny Tot's operation after October of 1975 to ensure that Teeny Tot as subcontractor complied with DPW requirements relating to provision of day care under the prime contract between DPW and the school district. (N.T. 24, 26, 40, 50).

17. When the Pennsylvania Department of Labor and Industry refused to approve the building which Teeny Tot occupied, Teeny Tot was offered space by the School District

and moved into this space in the spring of 1976. (N.T. 137-8).

18. In 1978, when Teeny Tot ceased to function, its entire operation was merged into that of the Farrell Area Day Care Center. (N.T. 113, 119).

19. Teeny Tot never moved out of the space it shared with the Farrell Area School District after the spring of 1976. (N.T. 154).

20. The Farrell Area School Board is an elected board with responsibility for all actions, including personnel actions, of the Farrell Area School District. (N.T. 60-1, 191).

21. The Farrell Area School Board approves all expenditures of money by the Farrell Area School District, including payroll expenditures. (N.T. 196-7).

22. Day care services are provided by the Farrell Area School District, under contract with the Pennsylvania Department of Welfare, through the Farrell Area Day Care Center. (N.T. 42-3).

23. The contract between the Farrell Area School District and the Department of Welfare was ratified by the Farrell Area School Board. (N.T. 192).

24. Payroll actions involving the Farrell Area Day Care Center are approved by the Farrell Area School Board. (N.T. 61-2).

25. After October of 1975, Loraine Mondich as Director of the Farrell Area Day Care Center and Janis Rubeo as Teacher-Director of Teeny Tot worked together on budgets. (N.T. 25).

26. In February of 1976, when Patricia Woodbridge was hired as Teacher-Director of Teeny Tot, former Teacher-Director Janis Rubeo became Education Coordinator; in the latter capacity Ms. Rubeo oversaw both Teeny Tot and Farrell Area Day Care Center classrooms on a contract dividing her time between those two programs. (N.T. 26).

27. In November of 1981, Janis Rubeo became Day Care Coordinator of Farrell Area Day Care Center; she was supervised by Loraine Moudich, Executive Director of the FADCC. (N.T. 33-4).

28. At all times relevant to this action, Louis J. Morocco was Superintendent of the Farrell Area School District, with oversight responsibility for the entire school district, including the Farrell Area Day Care Center. (N.T. 60).

29. Louis Morocco as Superintendent is a member of the Farrell Area School Board and attends all School Board meetings. (N.T. 63).

30. Louis Morocco as Superintendent approved the hiring of Patricia Woodbridge as Teacher-Director of Teeny Tot in February of 1976 (N.T. 32), subject to School Board approval. (N.T. 135).

31. In December of 1975, a help wanted advertisement for "Teacher-Director" appeared in an edition of the Sharon Newspaper entitled "the Hearald"; functionally Teeny Tot was attempting to fill a position of Teacher-Director. (Stipulations No. 14 and 15).

32. The Teacher-Director's duties included acting as Director of Teeny Tot while at the same time assuming the

responsibility of teaching a class of children. (Stipulation No. 16).

33. Complainant applied for the position as Teacher-Director of Teeny Tot in December of 1975 by filling out and submitting an application for Professional Employment. (Stipulation No. 17; C.E. 2).

34. Applications for the Teacher-Director position were also submitted by Patricia Woodbridge, a black female, Joe Moss, a black male, and six white females; only the Complainant, Ms. Woodbridge, and Mr. Moss were interviewed. (Stipulations No. 18-26; C.E. 3, C.E. 4, C.E.5, C.E. 6, C.E. 7, C.E. 8, C.E. 9 and C.E. 10).

35. At all relevant times Teeny Tot and the Farrell Area Day Care Center were regulated by the Pennsylvania Department of Public Welfare. (Stipulation No. 27).

36. The Department of Public Welfare had no regulations pertaining to day care centers which establish a job classification of Teacher-Director. (Stipulation No. 28).

37. The DPW job classification which would most closely fit the position of Teacher-Director would be the job classifications of "child day care director" or "group supervisor". (Stipulation No. 29; C.E. 11)

38. The Teacher-Director of Teeny Tot was required to have eighteen (18) hours of college work in early childhood. (N.T. 134).

39. Robert Deiger had completed the required college level work in early childhood; he had a bachelor's degree with a major in elementary childhood and a high concentration

in early childhood. (N.T. 66-70, 76; C.E. 23).

40. Robert Deiger's teaching experience prior to his application with Teeny Tot included student teaching and substitute teaching in the primary and elementary grades. (N.T. 70-72).

41. Prior to applying for the Teacher-Director position, Robert Deiger worked for three months at a day camp in Ventor, N.J., working daily with a group of fifteen five year old children. (N.T. 73).

42. One semester of Mr. Deiger's student teaching was in a day care center in Erie, Pennsylvania, where his experience included teaching a day's lesson plan and supervising playground activities one day each week.

43. Both Mr. Deiger and Ms. Woodbridge were interviewed by Janis Rubeo for the Teacher-Director position. (N.T. 128-9).

44. Following the interviews, Ms. Rubeo recommended that Ms. Woodbridge be hired for the position. (N.T. 130).

45. Patricia Woodbridge was hired as Teacher-Director of Teeny Tot on or about February 2, 1976. (Stipulation No. 33).

46. Teeny Tot has stated that Patricia Woodbridge was hired over the Complainant because of her prior experience in working with parents in a supervisory capacity. (Stipulation No. 35).

47. Ms. Woodbridge's only experience in working with young children was at a Family Guidance Center where she did referral and some counseling of families and children with emotional problems. (N.T. 144).

48. Janis Rubeo contacted DPW to make sure that Ms. Woodbridge had the necessary qualifications for the Teacher-Director position. (N.T. 146-8).

49. Ms. Rubeo was sure that Mr. Deiger had the necessary qualifications for the position. (N.T. 148).

50. Ms. Woodbridge majored in art education in college and had twelve credit hours of work in early childhood. (C.E. 3).

51. Ms. Rubeo testified that she recommended Ms. Woodbridge for the Teacher-Director position because of the latter's intelligence, self assurance, and familiarity with community social service resources. (N.T. 142-144).

52. Ms. Woodbridge stated on her application to Teeny Tot that it was a limiting condition that she had not done administrative work. (C.E. 3).

53. Complainant's salary would have been $7,902 annually had he been hired by Teeny Tot on February 2, 1976. (Stipulation No. 39).

54. Complainant gained full-time employment on August 2, 1978; between February 2, 1976 and August 2, 1978, he earned $9,426.54 exclusive of unemployment benefits. (Stipulations No. 40 and 42).

O P I N I O N

This case arises on a complaint filed by Robert D. Deiger ("Complainant") against Teeny Tot Day Care Center of Shenango Valley ("Respondent" or "TT") with the Pennsylvania Human Relations Commission ("Commission") on March 11, 1976, at Docket No. E-10182. An amended complaint was filed on March 30, 1981, which added as respondents the Farrell Area School District and Farrell Area Day Care Center ("FASD" and "FADCC" or "Farrell Respondents"), alleging that the Farrell Respondents were successor employers to Teeny Tot. Commission staff investigated the matter and found cause to credit the allegations of discrimination. The case was approved for public hearing after efforts at conciliation failed. Both parties having waived their rights to a hearing before a panel of three Commissioners, the public hearing was held on November 9, 1982, before Commissioner Rita Clark, Chairperson of the designated hearing panel.

The original complaint alleged that Respondent discriminated against Complainant on the basis of his race, white, and sex, male, by refusing to hire him for the position of Director-Teacher, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§ 951 et seq. ("Act"). The amended complaint alleged commission of the same unlawful act, adding that the Farrell Respondents

had absorbed Teeny Tot and were therefore liable as successor employers.

Before considering the merits of this case, we must resolve the Farrell Respondents' contention that the proceeding was barred by operation of the doctrine of laches. Laches is an equitable defense which must be proven by the party asserting it. Two distinct elements must be clearly established: there must be unreasonable and unexcusable delay in instituting a suit, and the delay must result in prejudice to the Respondent. In re Marushak's Estate, 488 Pa. 605, 413 A.2d 649 (1980). It is a factual question which can be determined by examination of all circumstances surrounding the case. Leedom v. Thomas, 473 Pa. 193, 373 A.2d 1329 (1977). Merely demonstrating the passage of time does not make out the defense. EEOC v. Westinghouse Electric Corp., 592 F.2d 484 (8th Cir 1979).

While a regrettable period of time passed before this hearing was held, we do not find that there was unreasonable and unexcusable delay. The record establishes that investigation occurred between 1976 and 1979. The amended complaint was filed in 1981. Nothing in the record shows what happened during the two year period between 1979 and 1981. It is thus possible but has not been proved that the case was inactive for two years. Even if that were the case, we would not find it unreasonable. SEE: PHRC v. Beaver Valley Geriatric Center, Court of Common Pleas of Beaver Co., No. 240 1982, where the court in rejecting a claim of laches found that the delay had not been deliberate, and that the passage of three years did not exceed allowable bounds.

This finding makes it unnecessary to consider prejudice to the Farrell Respondents, as both elements of the defense must be present. We note however that no prejudice has been shown. Respondents' brief speculates about what the testimony of a Mr. Shannon, now deceased, might have been. It is not explained how his testimony could have aided the defense of this case, or added to the evidence which is said to show that the successful applicant was better qualified. Nor does Respondent claim prejudice caused by missing documents which might have aided it but became unavailable because of the passage of time. Neither element of the defense having been proved, we must reject the claim of laches.

Another preliminary issue must be decided before the merits of Mr. Deiger's claim need be considered. As noted, the amended complaint names the Farrell Respondents as successor employers to Teeny Tot. Teeny Tot ceased to operate in 1978, and now exists in name only. The Farrell Respondents argue that there was never an agreement to assume responsibility for Teeny Tot's prior acts. Liability is denied. It is urged that consolidation or merger pursuant to 15 C.S.A. §7921 never occurred.

Successor liability is the exception rather than the general rule, but has been found where one or more of the following exists:

> (1) The successor expressly or impliedly agrees to assume liability for the predecessor's acts;
>
> (2) The transaction amounts to a consolidation or merger;

(3) The successor is merely a continuation of the predecessor;

(4) The transfer is entered fraudulently to escape liability; or

(5) The transfer is made without adequate consideration or adequate provision for creditors of the predecessor.

Dawejko v. Jorgensen Steel Co., Pa. Super. 434 A.2d (1981); Jacobs v. Lakewood Aircraft Service, Inc., 512 F.Supp. 176 (E.D.Pa. 1981).

Finding that successor liability could be imposed in a Title VII case, the Sixth Circuit Court of Appeals emphasized the relevant policy considerations of assuring full relief to victims of discrimination and preventing successors from benefitting from predecessors' discriminatory practices. EEOC v. McMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). The Court listed several factors which bear on the individualized determination of whether liability should be imposed, including:

(1) Whether the successor had notice of the charge;

(2) The ability of the predecessor to provide relief;

(3) Whether there has been substantial continuity of business operations;

(4) Whether the new employer uses the same physical plant;

(5) Whether the new employer uses the same or substantially the same workforce and supervisory personnel;

(6) Whether the same jobs exist under the same conditions; and

(7) Whether the same product is produced.

Id. at 1092.

The policy considerations listed by the McMillan court are equally significant in cases brought under the Human Relations Act. SEE: General Electric v. PHRC, Pa. 365 A.2d 649 (1976), holding that Title VII is the federal analogue to the Act. We therefore find that successor liability may be imposed under the Act, as well, and turn to consideration of the facts of this case.

Credible testimony and documentary evidence established that Teeny Tot was an independent entity until approximately October of 1975. At that time Teeny Tot entered into a subcontract with the Farrell respondents. As subcontractor, Teeny Tot provided day care services for the Farrell School District, which in turn received funds for that purpose from the Pennsylvania Department of Welfare. During this subcontractual period, Teeny Tot and the school district had a close relationship. Teeny Tot employees received their paychecks from the Farrell School District; indeed, Teeny Tot employees were not put on the payroll until they had been approved by the school board. School district personnel monitored Teeny Tot's compliance with the subcontract and with DPW requirements.

Teeny Tot subsequently began to have difficulties; when the state Department of Labor and Industry refused to approve the building it occupied, Teeny Tot was offered space by the Farrell School District. It moved into that space during the spring of 1976, and never moved out. In 1978, Teeny Tot's operation was merged into the school district. Teeny Tot ceased to function. Up to the time of the hearing

it continued to exist in name only, as a non-profit corporation incorporated under the laws of the Commonwealth of Pennsylvania.

We find that these facts establish continuity of operation amounting to a consolidation or merger under the criteria set out above, sufficient to hold the Farrell Respondents liable as successor employers. The Farrell Respondents were deeply involved in Teeny Tot's operations between 1975 and 1978. After Teeny Tot ceased to operate, the Farrell Respondents assumed all Teeny Tot operations, and hired some Teeny Tot employees. When asked on cross examination the date of Teeny Tot's merger with FADCC, Respondent's witness Dewey Lorance, a former president of Teeny Tot's board, responded that the merger had taken place some time after 1976. We find that this was an accurate description of what occurred.

Respondent's reliance on 15 P.C.S.A., § 7921 is misplaced. That section is permissive; it authorizes consolidation or merger under Pennsylvania's corporate laws of certain specified classes of corporations. It does not speak to the issue of imposing successor liability. None of the caselaw governing successor liability requires formal consolidation or merger under a jurisdiction's corporate statutes: the relevant inquiry is whether the transaction in question "amounts to" a consolidation or merger. We find that it does. We must therefore determine the merits of Mr. Deiger's claim.

As noted, Mr. Deiger asserts that he was not hired for the position of Teacher-Director because of his race, white, and sex, male. In support of this claim he argues that he was better qualified than the successful applicant, Patricia

Woodbridge. Substantial, credible evidence introduced at the hearing bears out this claim.

In order to prevail on this claim, Complainant bears the initial burden of proving that he is a member of a protected class or classes, that he applied for a position for which he was qualified, that he was not hired for the position, and that the employer continued to seek other applicants or hired a person not of the Complainant's protected class or classes. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); General Electric Corp. v. PHRC, Pa. 365 A.2d 202 (1976). The burden then shifts to Respondent to establish that its conduct did not violate the Act, see: Philadelphia Electric Co. v. PHRC, Pa. Cmwlth. 448 A.2d 701 (1982), which it may do by proving that the successful candidate was the best able and most qualified for the position; Complainant may then prove that the proffered reasons are pretextual. General Electric, supra.

We find that Mr. Deiger has met his initial burden, and that Respondent have failed to show that Ms. Woodbridge was better qualified. Teeny Tot required the holder of the Teacher-Director position to have at least eighteen credit hours of college coursework in early childhood. Complainant's testimony and documentary evidence established that he had the requisite eighteen hours as part of a college degree program with a major concentration in elementary education and a high secondary concentration in early childhood education. Ms. Woodbridge, on the other hand, had a total of twelve credit hours in early childhood; her college major was in art education.

Janis Rubeo, Teeny Tot's outgoing Teacher-Director at the

time of Complainant's application, testified to her involvement in the interviews of Ms. Woodbridge and Mr. Deiger. She acknowledged writing to DPW to ensure that Ms. Woodbridge had sufficient coursework for the position. Significantly, she also testified to having been sure at the time of the interviews that Complainant did have enough coursework to meet the qualifications.

Further, Complainant had far more experience in working with very young children, including student and substitute teaching and working with five year olds at a day camp. Ms. Woodbridge's experience with young children was limited to her former employment working with emotionally disturbed children as a counselor at a Family Guidance Clinic.

It has been stipulated that Teeny Tot stated it hired Ms. Woodbridge because of her prior experience working with parents in a supervisory capacity. At hearing, Ms. Rubeo also indicated that she recommended Ms. Woodbridge because of her awareness of community social service agencies, and because of her intelligence and maturity. In view of Mr. Deiger's superior academic qualifications and greater experience in working with young children, we find these reasons fail to establish that Ms. Woodbridge was better qualified. The Teacher-Director was required to administer the center as well as teaching a day care class. It is therefore especially noteworthy that Ms. Woodbridge herself noted on her application that her limiting condition was that she had not done administrative work.

We therefore conclude that Teeny Tot refused to hire

Complainant because of his race and sex, in violation of Section 5 of the Act. Having previously decided that the Farrell Respondents may properly be held liable for this act, we must consider appropriate relief.

The purpose of back pay relief is to return a victim of discrimination to the position in which he or she would have been, absent the discrimination. Back pay calculations must be reasonable and realistic; they need not be mathematically precise. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974).

We find that Mr. Deiger is entitled to receive the difference between his actual earnings and what he would have earned had he been hired as Teacher-Director, from the time his application was rejected until he began earning a salary higher than that of the Teacher-Director, in August of 1978. We reject Respondent's argument that back pay should be cut off as of June of 1976, when the position again became vacant, Mr. Deiger again applied, and was again rejected. No evidence was introduced to prove that Mr. Deiger would have left the position at that time. Nor does Ford Motor Co. v. EEOC, U.S. 101 S. Ct. 3057 (1982), cited by Respondent, compel that result. In Ford Motor, the Supreme Court held that back pay liability was tolled by an offer of reinstatement without retroactive seniority. No offer of the position he sought was made to Mr. Deiger. We therefore direct that relief be provided as described in the Order which follows.

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of Section 5 of the Pennsylvania Human Relations Act, 43 P.S. §§ 951 et seq. ("Act").

2. Respondents Teeny Tot Day Care Center, Farrell Area Day Care Center, and Farrell Area School District are employers within the meaning of Sections 4 and 5 of the Act.

3. The Pennsylvania Human Relations Commission ("Commission") has jurisdiction over the parties and subject matter of this case.

4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

5. To prevail on its claim that the doctrine of laches should bar further action in this case, Respondent must prove both that unreasonable delay occurred and that the delay prejudiced its defense of the case. Respondent has failed to establish either element of the defense.

6. Liability may be imposed against a successor employer under the Act.

7. Complainant has proved by substantial evidence that there was continuity of operation between Teeny Tot and the Farrell Area Day Care Center and School District such as to amount to a consolidation or merger.

8. Complainant may establish a prima facie case of discrimination by proving that he was a member of a protected class or classes, that he applied for a position for which he was qualified, that he was not hired, and that the Respondent hired a person not of Complainant's protected class or classes.

9. Complainant has met his burden of establishing a prima facie case.

10. Respondent has the burden, if Complainant establishes a prima facie case, of proving that its conduct did not violate the Act. It may do this by proving that the successful candidate was the best able and most qualified candidate for the position.

11. Respondent has not established that its conduct did not violate the Act.

12. After a finding of discrimination, the Commission may award relief which includes all wages lost as a result of the discrimination, plus interest.

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT D. DEIGER, Complainant	:	
vs.	:	DOCKET NO. E-10182
TEENY TOT DAY CARE CENTER, et al., Respondent	:	

RECOMMENDATION OF HEARING COMMISSIONER

Upon consideration of the entire record in this case, the Hearing Commissioner concludes that Respondents discriminated against Complainant in violation of Section 5 of the Act, and recommends that the attached Findings of Fact, Conclusions of Law, Opinion and Final Order be adopted and entered by the full Pennsylvania Human Relations Commission.

Rita Clark
RITA CLARK
Hearing Commissioner

DATE: June 18, 1983

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT D. DEIGER, Complainant	:	
v.	:	DOCKET NO. E-10182
TEENY TOT DAY CARE CENTER, et al., Respondent	:	

FINAL ORDER

AND NOW, this 5th day of July, 1983, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of Hearing Commissioner, pursuant to Section 9 of the Act, and therefore

O R D E R S:

1. That Respondents cease and desist from discriminating on the basis of race and sex;

2. That Respondents Farrell Area Day Care Center and Farrell Area School District pay to Robert D. Deiger back pay as specified below, by check payable to Robert D. Deiger delivered in care of Michael Foreman, Esquire, Pennsylvania Human Relations Commission, State Office Building, 11th Floor, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222, within 30 days of the date of this Order;

3. That Respondents pay to Complainant in the manner specified above the amount of $11,363.52, which amount includes lost wages and interest of 6% per annum.

4. That Respondents report by letter addressed to Mr. George Simmons, Regional Director, Pennsylvania Human Relations Commission, State Office Building, 11th Floor, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222, upon the manner of compliance with the terms of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, Chairperson

ATTEST:

_____
ELIZABETH M. SCOTT, Secretary