

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES L. THOMAS, JR., :  
COMPLAINANT :  
 :  
v. : DOCKET NO. E-24752D  
 :  
BERKS COUNTY PRISON, :  
COUNTY OF BERKS, :  
RESPONDENT :

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
OPINION,  
RECOMMENDATION OF HEARING EXAMINER AND  
FINAL ORDER

FINDINGS OF FACT \*

1. On or about February 8, 1983, James L. Thomas, Jr., filed a notarized complaint with the Pennsylvania Human Relations Commission. (Request to Admit and Response to Request, No. 1)
2. Complainant testified that his only problem while employed at the prison was Respondent's perception that his absenteeism was excessive. (N. T. 19)
3. Owen Marberger, a white Corrections Officer at the Berks County Prison, had no sick leave left at the end of 1982; Complainant at the time of his termination had a positive sick leave balance of 3.22 days. (C. E. 3, 10; Request to Admit and Response to Request, Nos. 10, 11)
4. Owen Marberger was suspended for ten days in March of 1983 for tardiness, absenteeism and un-cooperativeness as to sick leave procedure. (C. E. 11)
5. Captain Benjamin Johnson testified to receiving numerous complaints about Mr. Thomas from shift commanders, who are the direct supervisors of Corrections Officers. (N. T. 123)
6. Assistant Warden Robert Santora testified that Mr. Thomas was counselled about unacceptable job performance on a number of occasions. (N. T. 141)

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\*The foregoing Stipulations of fact are hereby adopted and incorporated herein as if fully set forth.

To the extent that the opinion which follows recites facts not set forth here, they shall be deemed to be additional findings of fact.

7. Mr. Thomas was suspended for disciplinary reasons on two occasions prior to his termination. (N. T. 111)
8. Mr. Thomas was suspended for three days for refusal to obey an order in July or August of 1981. He pleaded guilty to that charge at his disciplinary hearing but claimed extenuating circumstances. The usual penalty for refusal to obey an order is a five day suspension. (N. T. 53-57, 144)
9. Mr. Thomas was suspended for substandard work in January of 1982 for failure to properly search an inmate. He agreed at the time that he had not been sufficiently alert or aware of the importance of the shakedown. (N. T. 86)
10. Mr. Thomas was cited for substandard work in October of 1981, for breach of security in May of 1981, and for unprofessional handling of an incident with an inmate in September of 1982. (N. T. 99-105)
11. Mr. Thomas' shift was changed as a result of his problems in dealing with one or more inmates. (N. T. 105-106)
12. Mr. Thomas was discharged because of an accumulation of offenses which included absenteeism.
13. No white officer with an employment record substantially similar to Mr. Thomas' was treated more favorably.
14. Mr. Thomas was not discharged from his position because of his race.

### CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("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 has met his burden of establishing a prima facie case by proving that:

a. He belongs to a protected class;

b. He was performing duties that he was qualified to perform;

c. His employment was terminated; and

d. An officer not of his protected class with a worse attendance level than his was less harshly disciplined.

6. Respondent has met its burden of introducing admissible evidence of a legitimate, nondiscriminatory reason for its conduct, namely unsatisfactory performance by Complainant.

7. Complainant has failed to prove that the nondiscriminatory reason given for his discharge was a pretext for discrimination.

8. Complainant has failed to prove by a preponderance of the evidence that he was discharged because of his race, black, in violation of the Act.



OPINION

This case arises on a complaint filed by James L. Thomas, Jr. ("Complainant") against the Berks County Prison, County of Berks ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about February 8, 1983, at Docket No. E-24752. Mr. Thomas alleged that Respondent discriminated against him on the basis of his race, black, by discharging him from his position as a Correctional Officer, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 766, as amended, 43 P.S. §§951 et seq. ("Act"). He alleged that certain white officers who committed similar infractions to those which lead to his discharge were less severely disciplined. Respondent filed a response to the complaint on or about March 13, 1983, denying that it had discriminated against Mr. Thomas.

Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. The Commission and the parties then attempted to eliminate the allegedly unlawful practices by conference, conciliation and persuasion. These attempts were unsuccessful, and the case was approved for public hearing. The hearing was held on July 17 and 18, 1985, in Reading, Pennsylvania, before Hearing Examiner Edith E. Cox. Both parties submitted post-hearing briefs. Respondent then requested and was granted leave to file a reply brief, which it subsequently did.

The parties agree that Mr. Thomas was hired by the prison as a Corrections Officer on March 26, 1981. They also agree that his employment was terminated in November of 1982. They do not agree about much of what occurred between those dates. Complainant presents himself as having only an absenteeism problem, which he asserts was no more serious than those of

specified white officers who were not discharged. Respondent depicts him as a troubled employee who was discharged because of a pattern of unacceptable conduct, and only after unsuccessful attempts had been made to help him.

The respective burdens of proof of the parties in cases brought under the Act are well settled. Complainant bears the initial burden of making out a prima facie case. Should he do so, Respondents must rebut the inference of discrimination thus created by setting forth through the introduction of admissible evidence the legitimate, non-discriminatory reason(s) for their conduct. Complainant may then still prevail by proving that the proffered reasons 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. Pennsylvania 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 the 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, 460 U.S. 711 (1983).

McDonnell-Douglas, setting out the elements of a prima facie case of refusal to hire, noted that differing factual settings 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. Cmwlth. 360, 462 A.2d 292 (1983). Complainant here has made out a prima facie case by proving that:

1. He belongs to a protected class;
2. He was performing duties which he was qualified to perform;
3. He suffered an adverse employment consequence;
4. Others not in the protected class but otherwise similarly situated were treated differently.

Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181 (11th Cir. 1984).

The parties stipulated that Complainant is a black male and do not dispute that he is protected by the Act from discrimination on the basis of his race. It is also agreed that his employment was terminated, clearly an adverse employment consequence. Respondent vigorously disputes both Mr. Thomas' claim that he was qualified and his assertion that white officers were treated differently and more favorably. However, based on the evidence introduced by Complainant, it is fair to conclude both that he was qualified for the position and that a Mr. Marberger, a white Corrections Officer at the prison, was absent more than Complainant during 1982 but was not discharged. Further, as in Aikens, supra, Respondent introduced evidence of the reason for its action. The ultimate question, that of whether or not unlawful discrimination occurred, must therefore be decided.

As noted, Complainant's depiction of his difficulties was limited to the issue of absenteeism; he testified on direct examination that his supervisors perceived his absenteeism as excessive (N. T. 19), and that at the meeting on November 7, 1982, which preceeded his termination only his absenteeism and failure to attend a training session were addressed. (N. T.26)

He further argues, and the record bears out, that at the time of his termination he had a positive sick leave balance of 3.22 days, while a white officer, Olin Marberger, at the end of 1982 had a zero sick leave balance but received only a suspension. See C. E. 3, 10, 11.

Respondent's burden of proof, described above, is the relatively light one of introducing admissible evidence of the legitimate, non-discriminatory reason(s) for its action. It met this burden by introducing the testimony of Captain Benjamin Johnson, Assistant Warden Robert Santoro, and Mr. Thomas, first under cross examination and recalled to testify as an adverse witness.

Captain Johnson, the prison's highest ranking officer, testified without contradiction to receiving numerous complaints from shift commanders, the officer's direct supervisors, about Complainant, complaints about his handling of inmates and disobeying orders as well as absenteeism. He testified that Complainant's shift was changed in an unsuccessful attempt to solve these problems.

Mr. Santora testified without contradiction that Mr. Thomas was counseled on a number of occasions about problems in his work performance. He testified to being present at the disciplinary hearing which led to Mr. Thomas' termination, and that an accumulation of offenses which included absenteeism caused that termination, including a prior suspension for willful disobedience.

Mr. Thomas when called by Respondent as an adverse witness testified that he was suspended before being terminated. In January of 1982 he received a two day suspension for substandard work, specifically failure to properly shakedown, or search, an inmate. He testified that at the disciplinary



hearing which preceded the suspension he agreed that he had not been properly alert or aware of the importance of searching the inmate.

On cross examination Mr. Thomas acknowledged a suspension in July or August of 1981 for refusal to obey an order. He described extenuating circumstances: after receiving permission from his shift commander to switch assignments so he could participate in a relative's out-of-town wedding, he made arrangements to cover his shift and attend the wedding. Permission for the duty assignment switch was then denied by a lieutenant. Mr. Thomas, having made elaborate arrangements, went to the wedding anyway. At the subsequent disciplinary hearing he pleaded guilty to refusal to obey an order, and received a three day suspension.

Mr. Thomas also acknowledged a number of other incidents leading to disciplinary action and having nothing to do with absenteeism. These included a citation for substandard work in October of 1981, a citation for breach of security in May of 1981, and a citation in September of 1982 after, in Mr. Thomas' own words, an inmate made a threatening motion at him and "I swung with [my] other hand. I had keys in the other hand, and I stopped his assault." (N. T. 102) It was following this last incident that Respondent referred Mr. Thomas to a psychiatrist, who from all accounts did not conclude that Mr. Thomas was emotionally disturbed. Respondent's ultimate conclusion at that point was that Mr. Thomas had used poor judgment. Mr. Thomas' shift assignment was changed shortly thereafter; there was conflicting testimony about whether this was done to limit his contact with inmates in general or with the inmate involved in the last incident in particular. And while the record is less than crystal clear about the exact date and nature of each incident, it reflects a number of other citations as well.

These incidents were offered by Respondent to establish the legitimate, nondiscriminatory reason for discharging Mr. Thomas, namely unacceptable performance. As noted, Respondent's burden of proof on this issue was met, requiring Complainant to prove that the proffered reasons were pretextual or that Respondent was more likely than not motivated by a discriminatory reason. Burdine, 450 U.S. at 256. This he has failed to do.

As noted, Complainant argues that the reason for his discharge was excessive absenteeism. The record however bears out Respondent's assertion that he was dismissed for an accumulation of offenses including two situations in which Mr. Thomas freely acknowledged his culpability, disobeying an order and substandard performance. And, while not agreeing that discipline was called for in each case, he did not deny the occurrence of other events leading to discipline, such as that involving the inmate and the keys.

Further, documents prepared by Respondent show that Complainant's entire record, not only absenteeism, caused his discharge. The report of his final disciplinary hearing, originally admitted to the record as the second page of C. E. 4 and referred to in C. E. 5, describes two recent events ". . . plus a past pattern [of] incidents [which] seemed to show a disregard for his obligations as an officer." The Office of Employment Security was advised of lateness, absenteeism, and ". . . disregard of the standards of behavior which the employer has the right to expect of and (sic) employee." (C. E. 12) And the Assessment and Career Direction Center was advised of ". . . violation of Officers Rules, abuse of Leave, tardiness and failure to attend training." (C. E. 7) In no case did Respondent state that the discharge was only the result of excessive absenteeism.

The comparison with Mr. Marberger is therefore inapposite. Were absenteeism the only issue, it would be clear that Mr. Thomas was treated



less favorably. That is however not the case. Mr. Thomas does not suggest and the record does not show that Mr. Marberger's total employment record was substantially similar to Mr. Thomas'. Nor does Mr. Thomas identify any other white officer with a record similar to his own who received more favorable treatment.

Mr. Thomas attempts to demonstrate pretext through the testimony of Lieutenant Charles Eckenroth, one of his shift commanders and the author of a citation on November 7, 1982, which was one of the final events precipitating Mr. Thomas' discharge. Lieutenant Eckenroth testified credibly that he was ordered to write the citation on pain of being cited himself, even though he had no complaints about Mr. Thomas. The testimony, while disturbing, does nothing to alter the disciplinary record of Mr. Thomas described above. Nor does it persuade me that Mr. Thomas' race was a factor in his discharge.

Complainant having failed to prove that his discharge violated the Act, his case must be dismissed. An appropriate order follows.



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RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondent did not violate the Pennsylvania Human Relations Act, and therefore recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, and that a final order of dismissal be entered, pursuant to Section 9 of the Act.

*Edith E. Cox*  
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Edith E. Cox  
Hearing Examiner

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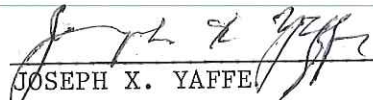
AND NOW, this 26th day of March, 1986, the Pennsylvania Human Relations Commission hereby adopts the foregoing findings of fact, conclusions of law, and opinion, in accordance with the recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S :

that the complaint in this case be, and the same hereby is, dismissed.

Pennsylvania Human Relations Commission

By:

  
JOSEPH X. YAFFE  
Chairperson

Attest:

  
ELIZABETH M. SCOTT  
Secretary