COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOYCE ANN M. HELEY, COMPLAINANT	:	
v.	:	DOCKET NOS. E-26302 and E-26303
QUAKERTOWN COMMUNITY SCHOOL DISTRICT	:	
and	:	
QUAKERTOWN COMMUNITY EDUCATION ASSOC., RESPONDENTS	:	

FINDINGS OF FACT,

CONCLUSIONS OF LAW,

OPINION,

FINAL ORDER

FINDINGS OF FACT *

1. Complainant Heley has taken two unpaid leaves of absence for childrearing during her employment with the District, one beginning in 1980 and one in 1983, each lasting three semesters. (N.T. 30)

2. Complainant is a professional employee of the District; many of the terms and conditions of her employment, including the right to use various sorts of leave, are governed by collective bargaining agreements between the District and the Association. (C.E. 2, 3)

3. The collective bargaining agreements relevant to this case, in effect from 1981 to 1984 and from 1984 to 1987, provide for paid and unpaid leave, the latter to be used for service in an Association office, education or "other purposes", statutory entitlements (military or sabbatical leave), or childrearing. (C.E. 2, 3)

4. Prior to early 1983, the District took the position that seniority accrued during childrearing leaves; the Complainant and other employees were so informed by Paul Barndt, the District's Administrative Assistant for Personnel. (N.T. 8, 9, 30, 31, 32)

5. During the 1982-83 school year the District expected teacher layoffs in the coming (1983-84) school year, and so advised the Association. (N.T. 33, 34, C.E. 16)

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*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 listed here, they shall be considered to be additional Findings of Fact.

The following abbreviations will be utilized throughout:

S.F.	Stipulations of Fact
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit
N.T.	Notes of Testimony

6. Because of the anticipated layoffs, the District and the Association submitted various questions to an arbitrator, including one regarding the accrual of seniority by professional employees during unpaid leaves of absence. (C.E. 4, 16, N.T. 33, 34)

7. The arbitrator's decision was that seniority did not accrue during ". . .other than Military, Sabbatical, Foreign Exchange Teacher or Professional Study leaves of absence." (C.E. 4)

8. No appeal was taken from the arbitrator's decision. (C.E. 16)

9. Pursuant to the arbitrator's decision, the Complainant and all other employees who had used unpaid childrearing leaves had their seniority reduced in amounts equal to the amount of leave so used; all of these employees were female. (C.E. 8a-d, N.T. 30, 31)

10. Under the 1981-84 contract, all unpaid leaves identified by the District as not accruing seniority were taken by females, who made up only 56% of the District's professional employees. (C.E. 8a-d, 12)

11. Under the current contract, all unpaid leaves of absence identified at hearing as not accruing seniority were taken by females, who represented approximately 55% of the District's professional employees. (C.E. 5, 6, 9)

12. Respondents offered no evidence of any business necessity for non-accrual of seniority during unpaid childrearing leaves.

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. Complainant is an aggrieved individual within the meaning of the Pennsylvania Human Relations Act.

4. Respondent Quakertown Community School District is an employer within the meaning of the Act.

5. Respondent Quakertown Community Education Association is a labor organization within the meaning of the Act.

6. Complainant has made out a prima facie case by proving that the nonaccrual of seniority during certain types of unpaid leave, including leave for childrearing, has an adverse impact on the female professional employees of Respondent District.

7. Respondents have not proven that such nonaccrual of seniority is justified by any business necessity.

8. Respondents have discriminated against Complainant and other similarly situated employees on the basis of the sex, female, of those employees, in violation of the Act.

9. A finding of unlawful discrimination empowers the Commission to order relief, including a cease and desist order and such affirmative action as will in the Commission's judgment effectuate the purposes of the Act.

10. Class relief is appropriate here where the Complainant has specifically alleged that other persons were injured by the acts found to be unlawful and where such other persons may be identified with specificity.

O P I N I O N

This case arises on complaints filed by Joyce Ann M. Heley ("Complainant") against the Quakertown Community School District ("District" or "Respondent") and the Quakertown Community Education Association ("Association" or "Respondent") with the Pennsylvania Human Relations Commission ("Commission") at Docket Nos. E-26302 and E-26303. The original complaint was filed on or about August 23, 1983. Both Respondents subsequently moved to dismiss the complaint as untimely filed. The District also filed an Answer. Complainant then filed an Answer to the Motions to Dismiss, and a Motion to Amend Complaint. By order dated December 14, 1983, the Motions to Dismiss were denied. An Amended Complaint was docketed by the Commission on or about January 5, 1984.

Each complaint alleged a violation of Sections 5(a), 5(c) and 5(e) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §§951 et seq. ("Act") in Respondents' refusal to permit Complainant to accrue seniority during unpaid maternity leaves of absence. It was claimed that this refusal discriminated against Complainant on the basis of her sex, female. The amended complaint, filed on behalf of Complainant and all others similarly situated, reiterated the basic allegations and added factual allegations filling in the history of the dispute.

Commission staff after investigation found probable cause to credit the allegations of discrimination. The Commission and the parties then attempted to resolve the situation through conference, conciliation, and persuasion. When these efforts were unsuccessful, a public hearing was approved. The hearing was held on February 19, 1986, in Doylestown, Pennsylvania, before Hearing Examiner Edith E. Cox.

Respondent District, which is an employer within the meaning of the

Act, has at all relevant times employed Complainant Heley as a teacher; Respondent Association, a labor organization within the meaning of the Act, has functioned at all relevant times as her duly certified collective bargaining organization. During the course of her employment Complainant has on two occasions taken an unpaid leave of absence for the purpose of childrearing. Each leave lasted three semesters. As a result of events in early 1983, Complainant did not accrue seniority during these leaves. It is this nonaccrual which has given rise to this dispute.

Allowance for various sorts of leave is a term, condition or privilege of Complainant's employment within the meaning of Section 5 of the Act. The terms governing the use of leave are contained in collective bargaining agreements entered into between the District and the Association. Two agreements are relevant to this case, one in effect from 1981 to 1984 (C.E. 2) and the other from 1984 until June of 1987 (C.E. 3).

Each agreement provides for both paid and unpaid leave. Paid leave is granted for urgent reasons, bereavement, and compensable injuries and illnesses. Unpaid leave may be taken for service in an Association office, education or other purposes, statutory leave entitlements (sabbatical or military leaves as proscribed by the School Code, 24 P.S. §§1-101 et seq.), or childrearing. While C.E. 2 refers to "maternity" leave and C.E. 3 to "childrearing" leave, the provisions are materially similar in that they are not designed for the period of disability associated with childbirth. For the sake of clarity this opinion will refer only to "childrearing" leave.

Until the early months of 1983, the District took the position that seniority did accrue during childrearing leave. The Complainant and other District employees, during late 1982 and early 1983, were so advised by Paul

Barndt, acting in his capacity as the District's Administrative Assistant for Personnel. Controversy about the question had however developed, apparently because the District had advised the Association that it contemplated teacher layoffs at the beginning of the next school year. Seniority had therefore become a critical issue, since both the collective bargaining agreement and the School Code provided that staff reductions were generally to occur in inverse order of seniority. See C.E. 2, Article VI, and 24 P.S. §11-1125.1(a).

Presumably because of this controversy and the impending layoffs, the District and the Association submitted certain questions to an arbitrator. The only one relevant to this proceeding was whether professional employees covered by the collective bargaining agreement (C.E. 2) accrued seniority while on unpaid leave of absence. At the conclusion of a proceeding on March 25, 1983, the arbitrator at the request of the parties issued an oral decision, followed on April 29, 1983, by a written opinion which was admitted to the record as Complainant's Exhibit 4. His conclusion was that seniority did not accrue during "...other than Military, Sabbatical, Foreign Exchange Teacher or Professional Study leave of absence." (C.E. 4, p. 1) No appeal was taken from this decision.

As a consequence of this decision, the Complainant and all other professional employees who had ever used unpaid childrearing leave had their seniority reduced in amounts equivalent to the total amount of leave so used. The Complainant for example had already taken three semesters of childrearing leave, beginning in January of 1980; her seniority was thus immediately reduced by three semesters. Ms. Heley at the time was expecting her second child in June of 1983; she therefore also learned in March or April of 1983 for the first time that, despite the District's prior assurances, no seniority

would accrue during the childrearing leave which she planned to take starting in September of 1983. After unsuccessful attempts to resolve the situation informally, she filed her complaint with the Commission.

Employment discrimination cases in general fall into one of two categories, depending on the theoretical underpinnings of the case: either disparate treatment or adverse impact may be shown. See generally Shlei and Grossman, Employment Discrimination Law, 2d ed. (1983).

Disparate treatment cases require proof that one or more employees have been treated differently because of a proscribed consideration such as race or sex. These cases involve, as the United States Supreme Court has opined, the most easily understood type of discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324 at 335-336, n. 15 (1977). Intent to discriminate must be shown, either directly or by inference. The familiar burden of proof analysis set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) is utilized; once a Complainant has made out a prima facie case, the Respondent can prevail by merely articulating a non-discriminatory reason for its action. The Complainant to prevail must then prove that the articulated reason was pretextual. Different treatment cases as noted may involve one or more employees.

Adverse impact cases differ in several significant ways. By definition the cases involve groups of employees. Proof of intent to discriminate is not necessary. And a different burden of proof analysis is utilized.

That format has evolved from the seminal adverse impact case, Griggs v. Duke Power Co., 401 U.S. 424 (1971); see also Dothard v. Rawlinson, 433 U.S. 321 (1977). The Complainant must prove the existence of a facially neutral standard which has a significantly greater impact on members of a pro-

tected class than on other employees. In Griggs for example it was shown that the requirement of a high school diploma operated to bar significantly greater numbers of blacks than whites from employment. If this showing is made, the employer must show a "manifest relationship" to the employment involved; it must in other words prove business necessity. See General Electric Co. v. Pennsylvania Human Relations Commission, 365 A.2d 655 (1976).

Complainant here argues that Respondents were motivated by discriminatory attitudes. She particularly emphasizes their action in seeking clarification of the seniority issue in 1983 where no grievance had been filed, a procedure which does appear to have been unusual. However, she acknowledges that proof of such intent is not relevant to the theory under which she chooses to proceed, namely that the denial of seniority pursuant to the arbitrator's decision has had an adverse impact on the District's female employees.

Turning first to the situation under the 1981-84 contract, it is obvious that Complainant's contention is correct. Not only were all unpaid leaves for childrearing purposes taken during this period taken by females; all unpaid leaves identified by the District as not accruing seniority during this period were taken by females. Throughout this same period the District employed both male and female professional employees; as of January, 1983, only 56% of these were females. (C.E. 8a-d, 12) The entire impact of the facially neutral leave policy was thus felt by the group comprising just over half of the District's professional employees.

The situation under the present contract is materially similar. The current contract specifies that seniority shall not accrue during unpaid childrearing leaves, now made available to both males and females. While the

contract appears to require nonaccrual of seniority during all other unpaid leaves as well, the reality is that seniority still accrues during unpaid military leave (pursuant to statute; see 24 P.S. §11-1178 (d)) and unpaid leave for educational purposes (see the stipulation of the parties to this effect at N.T. 9).

The actual policy under the present contract thus is that seniority does not accrue during unpaid leaves for childrearing, disability, Association service, and "other purposes." [1] Evidence as to usage of such leaves again shows that they are being used solely by females: thirty-three unpaid leaves during which no seniority accrued are identified, thirty-two for childrearing and one for service in an Association office. All were taken by females; during the same period females continued to represent approximately fifty-five percent of the District's professional employees. (C.E. 5, 6, 9)

As Complainant notes, much discussion in federal adverse impact cases addresses the question of just how disproportionately the protected class must be impacted before the difference is considered statistically -- and legally -- significant. In this case it need only be decided that a policy whose impact is entirely felt by members of a protected class which comprises roughly half of the relevant employee group has an adverse impact on that class -- here, the District's female professional employees. Complainant has therefore met her burden of proof, and it is necessary to consider the

[1] Complainant correctly argues that unpaid leave days, used when an employee has exhausted his or her paid leave days for illness or personal business, should be viewed differently from the unpaid leaves of absence which are the subject of this case. Several distinctions are apparent: unpaid leave days are taken a few at a time, as a matter of discretion, through an informal procedure; such usage is mentioned almost in passing in the collective bargaining agreement. (C.E. 3, 9) Leaves of absence in contrast are lengthy; their use is covered in detail in the collective bargaining agreement.

justification offered by Respondents. As noted above, a showing of business necessity is required for them to overcome a showing of adverse impact.

Respondents do not offer such justification. Counsel for the District in an opening statement indicated that the question was "immaterial" to the District's interests (N.T. 22); Association counsel similarly denied an interest in the matter, candidly referring to both the Association and the District as "stakeholders." (N.T. 26) Consistent with these statements of position, neither Respondent offered any evidence of business necessity.

Complainant has therefore established that the policy she challenges adversely impacts upon the District's female professional employees and in so doing violates the Act. Following such a finding, Section 9 of the Act empowers this Commission to award appropriate relief.

Complainant here requests two sorts of relief. She asks that she and all other similarly situated employees of the District have their seniority adjusted so as to restore to them seniority which should have accrued during unpaid leaves of absence for childrearing purposes; she also seeks to enjoin future refusal to allow accrual of seniority during such leaves. Finally, she seeks attorney's fees for her private counsel.

The request for attorneys fees must be denied. Complainant cites no authority for such an award; nor has independent research revealed such authority.

Complainant is however entitled to the other relief which she requests. The purpose of any remedy is to make whole the victim or victims of a discriminatory act. Pennsylvania State Police v. Pennsylvania Human Relations Commission, ___ A.2d ___ (1986). Clearly employees injured by unlawful denial of seniority pursuant to a collective bargaining agreement can only be

made whole by having their lost seniority restored. The Act itself requires a cease and desist order following a finding that a Respondent is engaging in an unlawful discriminatory practice. And relief for the affected class is appropriate and necessary where, as here, the conditions set forth in Pennsylvania Human Relations Commission v. Freeport Area School District, 359 A.2d 724 (1976) have been met: the complainant has alleged that other persons have been affected by the unlawful practice, and the other persons entitled to relief may be described with specificity. Relief is therefore directed as described in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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v.	:	DOCKET NOS. E-26302 and E-26303
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and	:	
QUAKERTOWN COMMUNITY EDUCATION ASSOC., RESPONDENTS	:	

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondents discriminated against Complainant and other similarly situated employees because of their sex, female, in violation of Section 5 of the Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law and Opinion be adopted by the full Commission, and the following Final Order entered, pursuant to Section 9 of the Act.

Edith E. Cox /eaf

Edith E. Cox
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

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FINAL ORDER

AND NOW, this 6th day of April, 1987, following review of the entire record in this case, including the notes of testimony, exhibits, briefs, and pleadings, 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 :

1. Respondents shall cease and desist from discriminating against the Complainant and all other similarly situated employees with respect to the terms and conditions of their employment.
2. Respondent School District shall cease and desist from refusing to permit the accrual of seniority during unpaid leaves of absence for childrearing.
3. Respondents shall cease and desist from adhering to that portion of the current collective bargaining agreement which prohibits accrual of seniority during unpaid leaves of absence for childrearing.

4. Respondent District shall provide appropriate seniority credit to all current professional employees who have utilized, at any time during their latest period of continuous employment, an unpaid leave of absence related to childrearing.

5. Respondent District shall publish a seniority list reflecting all seniority adjustments made pursuant to this Order.

6. Respondent District shall notify in writing each professional employee whose seniority is adjusted pursuant to this Order.

7. Respondent District shall post, in the usual place for posting of notices to professional employees, a notice informing professional employees that seniority will accrue during unpaid leave for childrearing.

8. Respondents shall take any other action which is necessary to comply with the terms of this Order.

9. Within thirty days of the effective date of this Order Respondents shall notify the Commission of their compliance with the terms of this Order by letter addressed to Michael Hardiman, Esquire, at the Commission's Philadelphia Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

Raquel O. de Yiengst
Raquel O. de Yiengst
Assistant Secretary