

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KARLA D. KOWALSKI,  
COMPLAINANT

v.

DR. WILLIAM J. ADAMS, D.D.S.,  
RESPONDENT

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DOCKET NO. E-26679

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

FINDINGS OF FACT \*

1. At the time this complaint was filed with the Pennsylvania Human Relations Commission, (hereinafter "PHRC"), the Respondent, Dr. William J. Adams, D.D.S., (hereinafter the "Respondent"), operated a dental office business located in Pittsburgh, Pennsylvania. (R.A. 1, N.T. 10, 11)
2. In June and July 1983, and at all times relevant hereto, the Respondent was the employer of four or more persons in the Commonwealth of Pennsylvania. (R.A. 2)
3. The Complainant, Karla Diane Kowalski, (hereinafter the "Complainant"), was hired by the Respondent on July 19, 1982, as a dental technician. (N.T. 10)
4. On June 22, 1983, the Respondent sexually assaulted the Complainant. (N.T. 12-20, C.E. 1)
5. On or about June 29, 1983, the Complainant filed criminal charges of indecent assault and involuntary deviate sexual intercourse against the Respondent. (N.T. 11, 23, R.A. 9)
6. On or about July 15-18, 1983, the Respondent learned that the Complainant had filed criminal charges against him. (R.A. 9)
7. The Respondent was arrested on July 19, 1983. (N.T. 24)
8. On July 20, 1983, the Respondent's receptionist called the Complainant to instruct her not to come to work on July 21, 1983. (N.T. 24)

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\* 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
R.A.	Request for Admissions

9. For several more days, the Respondent's receptionist repeated the instructions to the Complainant not to report to work the following day. (N.T. 24)
10. The Complainant came to work on or about July 26, 1983. (N.T. 25)
11. On or about July 26, 1983, the Complainant was informed by the Respondent's wife that she was not to report to work until further notice. (N.T. 25, R.A. 10)
12. On or about July 26, 1983, the Complainant was fired because she had opposed the Respondent's sexual assault which occurred on June 22, 1983. (N.T. 30, R.A. 12)
13. On or about January of 1984, the Respondent retired from his dental practice, and this practice was immediately taken over by Dr. James Edward Vent, D.D.S., (hereinafter "Vent"). (N.T. 32)
14. But for the Respondent's retaliatory discharge of the Complainant, Kowalski would have continued her employment with Vent following the Respondent's retirement. (N.T. 31)

### 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 was terminated; and
  - d. The discharge followed the protected activity so closely that an inference is created that there was a retaliatory motivation.
6. The Respondent failed to offer any evidence of a legitimate, non-discriminatory reason for terminating the Complainant.
7. The Complainant was discharged in retaliation for opposing the Respondent's sexual assault in violation of the Act.
8. The Complainant is entitled to relief which includes lost wages for the period between July 20, 1983, and September 3, 1986, less her actual earnings during that period, plus interest of 6% calculated from the date of her discharge until such time as payment is made.

## O P I N I O N

This case arises on a complaint filed by Karla Diane Kowalski, ("Complainant"), against Dr. William J. Adams, D.D.S., ("Respondent"), with the Pennsylvania Human Relations Commission, ("PHRC"), on or about September 27, 1983, at Docket No. E-26679. In her amended complaint, dated November 19, 1984, the Complainant alleged that the Respondent discharged her in retaliation because she opposed an act forbidden by the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended 43 P.S. §951 et seq. ("PHRA").

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 September 3, 1986, in Pittsburgh, Pennsylvania, before Hearing Examiner Carl H. Summerson.

The Respondent failed to appear at the public hearing and consistent with 16 Pa. Code §42.105 (a) and (b), proof of notice to the Respondent was entered upon the record and the hearing proceeded in his absence. Following the public hearing, both parties were given an opportunity to review the hearing transcript and submit a brief. Only the PHRC regional attorney submitted a brief which was received on February 5, 1987.

The amended complaint in this matter charges both sex discrimination and that the Complainant was discharged in retaliation for the Complainant's opposition to an act forbidden by the PHRA. The following analysis exclusively focuses on the retaliation claim because the Respondent's dental practice closed in January of 1984 when the Respondent retired and left the Pittsburgh area. The Complainant's sex discrimination claim alleges sexual harassment in

the form of a dreadful sexual assault suffered by the Respondent. However, the shocking sexual harassment inflicted upon the Complainant and the Complainant's refusal of the Respondent's sexual advances were clearly not the direct reason for the Complainant's termination. The evidence presented indicates quite clearly that the Complainant was terminated because she filed criminal charges against the Respondent which exposed the Respondent to punishment under the criminal justice system.

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 was discharged; and
4. That the discharge followed the protected activity so closely that an inference is created that there is a retaliatory motivation.

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, 25 Pa. Commonwealth

Ct. 295, 361 A.2d 497 (1976). Section 5(d) of the PHRA states in pertinent part: "It shall be an unlawful discriminatory practice. . . [F]or any employer. . . to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act. . ." 43 P.S. 955 (d).

Clearly the Complainant has shown a prima facie case. First, she was engaged in a protected activity. She quite reasonably opposed the Respondent's outrageous sexual assault by filing criminal charges against the Respondent. Sexual assault of an employee by an employer is clearly a practice forbidden by the PHRA. It cannot be doubted that an objective of the PHRA is to remedy sex discrimination in the form of sexual harassment. The Complainant filed criminal charges against the Respondent alleging indecent assault and involuntary deviate sexual intercourse. Such charges claim blatant forms of shameless sexual harassment actionable under the PHRA.

The second element of the Complainant's prima facie case is established by the fundamental evidence that the Respondent was arrested following the Complainant's accusations. Additionally, on the Complainant's final day of work, the Respondent's wife proposed a settlement to end the problems being experienced by the Respondent. Clearly, the Respondent knew that charges had been lodged against him.

Equally clear is the simple fact that on or about July 20, 1983, the Complainant was effectively terminated. On the day of the Respondent's arrest, the Complainant was called and told not to report to work the following day. The Complainant continued to receive similar instructions each subsequent day for approximately one week. When the instructions ceased, the Complainant went into work. However, it was abundantly obvious that she was unwelcome there.

Dr. Vent, another dentist in the Respondent's office testified that he was told that the Respondent could not have the Complainant working there since she had pressed charges. The Complainant's evidence clearly establishes that she was terminated.

The final element is also clearly established. The Respondent's immediate reaction to his arrest was to cause the Complainant to be advised not to report to work. This case presents more than an inference that a retaliatory motive caused the Complainant's termination. The unrebutted evidence of the Respondent's retaliatory motive is unambiguous and provides certainty that the only possible motive for the discharge of the Complainant was retaliation for the criminal charges filed.

Accordingly, the Complainant has shown a prima facie case of retaliatory discharge by a preponderance of the evidence. This initial burden having been met, the burden shifts to the Respondent to articulate a non-discriminatory reason for the Complainant's discharge. See Texas v. Dept. of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP 113 (1981).

As noted, the Respondent failed to appear at the Public Hearing, thus, the Complainant's prima facie case was unrebutted. Accordingly, a finding must be made that the Respondent's termination of the Complainant was violative of the PHRA.

Having found that the Complainant's discharge was retaliatory, consideration of appropriate relief is necessary. The Complainant seeks and is entitled to a back pay award as such an award will effectuate a vital purpose of the PHRA. Williamsburg Community School District v. PHRC, \_\_\_ Pa. Commonwealth Ct. \_\_\_, 512 A.2d 1339 (1986); Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1974).



The aim of the discretionary authority to award back pay is to make a victim of unlawful discrimination whole by restoring them, so far as possible, to a position they would have been in were it not for the unlawful discrimination. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Here, the Respondent retired from his Pittsburgh dental practice in January of 1984. However, the Respondent's dental practice maintained a substantial continuity of business operations because it was taken over by Dr. Vent, a dentist who had previously worked for the Respondent.

Dr. Vent's testimony reveals that he would have kept the Complainant as a dental technician at the time of the Respondent's retirement, but for the Complainant's retaliatory discharge. At the time of the Respondent's retirement, another dental technician held the Complainant's old position. It would have been unfair to this incumbent individual to have been replaced by Dr. Vent at the time of his assumption of the Respondent's dental practice.

The Complainant's injury was thereby extended beyond the period of the Respondent's retirement. Had she not been unlawfully discharged, she would have continued working as a dental technician in Dr. Vent's new practice. Accordingly, the Complainant is entitled to a back pay award which encompasses any lost wages between her discharge on July 20, 1983, and September of 1986, the time of the public hearing.

Initially, the record reveals the Complainant made efforts to minimize her damages. Following her discharge, the Complainant worked as another dentist's dental technician for approximately one year. The Complainant also waitressed for approximately four months and for approximately one and one-half years she worked as a dental lab technician with Kress Dental Ceramics. At the time of the hearing, the Complainant was employed full-time

by Eye Works as an optometric assistant. Clearly, the Complainant took measures to minimize the damages resulting from the Respondent's discriminatory termination.

The computations contained on Complainant's exhibit number 3 were carefully reviewed and are considered to be a comprehensive outline of wages lost and actual earnings of the Complainant during the period between July 19, 1983, and September of 1986. Annual interest was also considered on exhibit number 3. The calculation of total loss made therein is accepted as the amount which will make the Complainant whole. The sum of \$20,267.03 represents the amount which but for the Respondent's discrimination the Complainant would have earned in addition to her actual earnings plus 6% annual interest.

Relief is therefore ordered as specified in the Final Order which follows.


COMMONWEALTH OF PENNSYLVANIA

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RESPONDENT	:	

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that the Respondent did unlawfully discriminate against the Complainant by retaliatorily discharging her, in violation of Section 5(d) of the Pennsylvania Human Relations Act. Accordingly, it is recommended that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission.



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Carl H. Summerson  
Hearing Examiner

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FINAL ORDER

AND NOW, this 5th day of March, 1987, following review of the entire record in this case, including the transcript of testimony, exhibits, brief, 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. Respondent shall pay Complainant, within 30 days of the effective date of this Order, the lump sum of \$20,267.03 being the total of her lost wages and interest between her discharge and the date of the hearing in this case, less her actual earnings during that period.

2. In addition, Respondent shall pay Complainant interest of 6% per annum on the amount specified in paragraph 1 above, calculated from September of 1986 until such time as payment is made.

3. Within 30 days of the effective date of this Order, Respondent shall report on the matter of compliance with the terms of this Order by letter addressed to Marianne S. Malloy, Esquire, at the Commission's Pittsburgh Regional Office, 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

John P. Wisniewski

John P. Wisniewski  
Assistant Secretary