

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

NANCY L. KUTCHKO, :
Complainant :
v. : DOCKET NO. E-14016
BAUM BOULEVARD DODGE, INC., :
Respondent :

FINDINGS OF FACT, CONCLUSIONS
OF LAW, HISTORY OF THE CASE,
OPINION, RECOMMENDATION OF THE
HEARING COMMISSIONERS AND
FINAL ORDER

FINDINGS OF FACT

1. The Complainant herein is Nancy Kutchko, an adult female, who resides at 1835 Pohmar Way, Walnut Creek, California 94598. (S.F. #1).*

2. The Respondent is Baum Boulevard Dodge, Inc., located at Baum and Liberty Avenues, Pittsburgh, Pennsylvania 15224. (S.F. #2).

3. The Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "Act"), Act of October 27, 1955, 43 P.S. 955(a). (S.F. #2).

4. The Complainant, on or about June 2, 1978, filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at docket number E-14016. (S.F. #3).

5. On June 6, 1978, Commission staff duly served all parties to the action with a copy of the complaint described in Finding of Fact #4 above. (S.E. #4).

6. In correspondence, dated September 8, 1978, Respondent filed a Notice of Appearance. (S.F. #5).

7. The Commission, by correspondence dated October 16, 1980, served all parties with a copy of the Commission's Finding of Probable Cause. (S.F. #6).

*EXPLANATION OF ABBREVIATIONS

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

8. Subsequent to the determination of probable cause the Commission attempted, without success, to eliminate the alleged unlawful discriminatory practice through conciliation. (S.F. #7 and 8).

9. The Complainant was hired by the Respondent on February 21, 1977 as a secretary with a monthly salary of \$550.00 (S.F. #9; N.T. 6, 58; C.E. 1).

10. On or about July 15, 1977 the Complainant's salary was increased to 600.00 per month. (C.E. 1).

11. Although the Complainant's duties expanded during the course of her employment, she remained a secretary throughout the course of her employment. (N.T. 62, 86).

12. Complainant did discuss the position of Assistant Fleet Lease Manager with her immediate supervisor, James Wouckley; however, the position never materialized and the leasing department was not established. (N.T. 6, 27, 58).

13. The Complainant, during the course of her employment, told several employees that she was concerned financially with the cost of hiring babysitters for her children during the summer months. (N.T. 23, 61, 83).

14. The Complainant resigned her position on May 31, 1978. (C.E. 2 at p. 2).

15. The Complainant's children got out of school for the summer one day after the Complainant resigned. (N.T. 22).

16. The Complainant listed "quit" as the reason for leaving the Respondent's employ when filling out an unemployment compensation application form immediately

subsequent to her resignation. (R.E. "A").

17. The Complainant did not leave her employment with the Respondent as a result of sexual harassment.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant and the Respondent and the subject matter of the Complaint under the Pennsylvania Human Relations Act, pursuant to Section 9 of the Pennsylvania Human Relations Act (Act). 43 P.S. § 959.

2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter, pursuant to Section 9 of the Act. 43 P.S. § 959.

3. Respondent is an "employer" within the meaning of Section 4(b) and 5(a) of the Act. 43 P.S. § 954(b) and § 955(a).

4. Complainant is an "individual" within the meaning of Section 5(a) of the Act. 43 P.S. § 955(a).

5. Sexual harassment is a form of sex discrimination and is a violation of Section 5(a) of the Act. 43 P.S. 955(a).

6. Where an employer deliberately renders an employee's working conditions intolerable and thus forces the employee to quit his/her job, a constructive discharge occurs.

7. The Complainant has the burden of proving that sexual harassment was engaged in and rendered her working conditions intolerable in order to establish that a constructive discharge occurred.

8. Judgment with respect to the credibility of witnesses, the weight to be given particular evidence and the resolution of conflicting evidence are matters within the sound discretion of the hearing panel as trier of fact.

9. The Complainant failed to establish that she was the victim of sexual harassment while employed by Respondent which resulted in her decision to resign from her position.

10. The Complainant failed to establish that she had been constructively discharged from her position with the Respondent.

OPINION

I. HISTORY OF THE CASE

The Complainant, on or about June 2, 1978, filed a notarized complaint with the Commission. In her complaint, the Complainant alleged that her employer, the Respondent herein, had discriminated against her because of her sex, female, in violation of Section 5(a) of the Act, 43 P.S. 955(a) (Supp. Pamp. 1965-80).¹ In essence, the Complainant alleged that she had been the victim of sexual harassment while employed by the Respondent. Ultimately, the Complainant stated, she was forced to resign because of the continued harassment. The Complainant also alleged that she had been refused a raise and had been informed that the only way that she would get the raise was in return for sexual favors. The Complainant further alleged that male employees were not similarly treated (SEE: Pre Hearing Order with attachments for a copy of the complaint).

¹Section 5(a) of the Act makes it an unlawful discriminatory practice:

- (a) For any employer because of the race...sex... of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual,...or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment...43 P.S. 955(a).

Commission staff investigated the allegations found in the complaint and determined that probable cause existed to credit the allegations. Thereafter, the Commission attempted to conciliate the matter but was unsuccessful. Accordingly, a Public Hearing was scheduled. The parties stipulated to the Commission's jurisdiction over the matter and to the fact that all other procedural and substantive prerequisites were satisfied. The parties also agreed to waive their right to a hearing before three Commissioners. (SEE: Pre Hearing Order and attached Stipulations of Fact).

The hearing itself was held on Tuesday, December 22, 1981. During the course of the hearing both parties had the opportunity to present testimony and other evidence in support of their respective positions. Both parties also submitted post hearing briefs.

Commissioner John P. Wisniewski served as chairperson at the hearing. Commissioner Elizabeth M. Scott also served on the hearing panel and participated in the hearing panel's recommendation. Ellen Doyle, Esquire, Assistant General Counsel, appeared for the Commission on behalf of the Complainant. Stephan J. Laidhold, Esquire, appeared on behalf of the Respondent. Michael Hardiman, Esquire, Assistant General Counsel, served as Legal Advisor to the panel.

II. FACTUAL BACKGROUND

The Complainant, on February 21, 1977, was hired as a secretary by the Respondent at a monthly salary of

\$550.00 (S.F. #9; N.T. 6, 58; C.E. 1). On or about July 15, 1977 her salary was increased to \$600.00 per month (C.E. 1). Thereafter, beginning in August, 1977 the Complainant requested to work four days per week rather than five. Accordingly, her salary was reduced to \$500.00 per month (C.E. 1). On or about May 31, 1978 the Complainant resigned from her position (C.E. 2 at p. 2).

During the course of the Complainant's employment her secretarial duties were increased. In addition, she was given other responsibilities to perform and, in fact, participated in the sale of, at least, one vehicle (N.T. 62, 86). The Complainant also discussed with her immediate supervisor (James Wouckley) the creation of a position for her as Assistant Fleet Lease Manager. However, the proposed Leasing Department that she was to help manage never materialized (N.T. 6, 27, 58). While the Complainant contends that she was actually promoted to the position of Assistant Fleet Lease Manager, she concedes that office personnel never recognized the promotion (N.T. 6). From a management standpoint, the Complainant was considered as a secretarial employee throughout the period of her employment (N.T. 63, 76).

Subsequent to leaving employment with the Respondent, the Complainant collected unemployment compensation for a period of time (N.T. 17). Eventually, in February 1979, the Complainant relocated in Phoenix, Arizona and obtained

employment with a starting salary of \$733.00 per month (N.T. 17, 29). Complainant has indicated that she has no desire to return to work for the Respondent (N.T. 17).

III. ISSUE FORMULATION

Was the Complainant sexually harassed by the Respondent during the course of her employment and, if so, was the conduct engaged in by the Respondent of such a nature so as to transform the Complainant's otherwise voluntary resignation into a constructive discharge?

IV. PRELIMINARY CONSIDERATIONS

Insofar as this case involves the issues of sexual harassment and constructive discharge, this is a case of first impression for the Commission. That is to say, the Commission, to date, has not issued any opinions, subsequent to the holding of a public hearing, that deal with these two issues in tandem. Of necessity, therefore, certain underlying concepts must be discussed.

Initially, it is important to note that the Act itself nowhere explicitly provides that sexual harassment constitutes a violation of the Act. However, sex discrimination is a violation of the Act and federal courts, in interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., have uniformly held that sexual harassment is a form of sex discrimination and is, therefore, prohibited. SEE: Tompkins v. Public Service Electric and Gas Co., 568 F.2d 1044, 1046 (3rd Cir. 1977); AND SEE: Gan

v. Kepro Circuit Systems, Inc., 27 EPD 32,379 (E.D. Mo. 1982).

Title VII, in turn, has been recognized by the Pennsylvania Supreme Court as the federal analogue to the Pennsylvania Human Relations Act. General Electric Corp. v. Cmwlth., Human Relations Com., 469 Pa. 202, 265 A.2d 649, 654 (1976).

The Commission has also adopted Guidelines On Sexual Harassment which indicate that harassment on the basis of sex violates the Act. SEE: Guidelines On Sexual Harassment, 11 Pa. Bulletin No. 5 p. 522 (1/31/81). Sexual harassment is defined in the Guidelines as:

(a) Harassment on the basis of sex is a violation of the Pennsylvania Human Relations Act. Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

It is also clear from federal court decisions that sexual harassment violates Title VII notwithstanding the fact that economic detriment is not sustained on the job. It is sufficient that the sexual harassment engaged in results in the creation of a hostile or offensive working environment. SEE: Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

A second underlying concept centers on the constructive discharge issue. A constructive discharge is said to have occurred where, "...an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job." Muller v. United States Steel Corporation, 509 F.2d 923, 929 (10th Cir.), cert. denied, 423 U.S. 825 (1975); SEE ALSO: Young v. Southwestern Savings and Loan Ass'n., 509 F.2d 140, 144 (5th Cir. 1975) and Thompson v. McDonnell Corporation, 552 F.2d 220, 223 (8th Cir. 1977). While the constructive discharge concept was developed in labor law cases, it has been consistently applied in civil rights cases as well. Thompson, supra, at p. 223. Moreover, constructive discharge has been applied to cases involving sexual harassment. Gan v. Kepro Circuit Systems, Inc., supra, at p. 23,648.

As is apparent from the Commission's Guidelines On Sexual Harassment, the Commission is of the opinion that sexual harassment is a violation of the Act. Further, the Commission now concludes that where such conduct deliberately renders the employee's working conditions intolerable and thus forces her/him to quit her/his job a constructive discharge has occurred. The burden of proof in this regard rests upon the Complainant. SEE: Muller, et al, cited supra.

With a clear understanding of the Commission's jurisdiction in this area, it is now possible to examine the particulars of the case at hand to determine whether a violation of the Act has been demonstrated.

V. DISCUSSION

As is immediately apparent from a review of the record in this case, conflicting evidence abounds.

The Complainant testified at the hearing that she was repeatedly harassed by both the President (Teitelbaum) and the Secretary/Treasurer (Kruglak) of Baum Boulevard Dodge (N.T. 8, 13). According to the Complainant, both men both verbally and physically harassed her. The verbal harassment engaged in by the President included the use of crude and vulgar sexual remarks in response to questions asked by the Complainant (N.T. 8-11). The physical actions, according to the Complainant, occurred on two separate occasions when Teitelbaum "smacked me on the rear" (N.T. 11-13). The second time that Teitelbaum did this occurred on the last Friday in May, 1978 and, as the Complainant testified, resulted in her decision to quit (N.T. 12).

The Complainant also testified that Kruglak harassed her in a variety of ways. She indicated that he asked her to go with him on a trip to Florida, to play tennis with him and to have dinner with him (N.T. 14). The Complainant also testified that Kruglak once put his arms around her (N.T. 15). The Complainant indicated that she repeatedly told him that she was not interested in his proposals and requested that he stop asking her (N.T. 14). The Complainant stated that the problem was so serious that she informed her immediate supervisor (Wuckley) of the situation (N.T. 14-16).

The Complainant also called as a witness an individual (Madden) who worked for several months at the Respondent's facility although he was not employed by the Respondent (N.T. 38). Madden testified that the Complainant had shared her concerns with him and that he had witnessed a number of the acts of harassment (N.T. 39-40).

The Complainant also introduced into evidence a copy of a transcript from an Unemployment Compensation hearing at which Kruglak admitted that he had on one occasion, "grabbed her from the rear" (C.E.2, p. 11).

The Respondent, on the other hand, denied that any sexual harassment ever occurred. Teitelbaum testified that he never, either physically or verbally, harassed her (N.T. 113-115). He specifically denied ever patting her on her buttocks (N.T. 115). He also indicated that she never complained to him about any sexual harassment that might have been occurring (N.T. 116).

Kruglak admitted to several of the events described by the Complainant but phrased them in a different light. Thus the dinner invitations, according to Kruglak, were no more than luncheon invitations, made by one employee to another (N.T. 82). The offer of the trip to Florida, Kruglak stated, was made in jest on a day in January when Pittsburgh was in the midst of a snowstorm (N.T. 80). The tennis invitation, Kruglak indicated, was no more than that. It was simply an offer to see if the Complainant had any interest in playing tennis (N.T. 81).

The Respondent also called the Complainant's immediate supervisor (Wouckley) to testify. Wouckley denied that the Complainant ever complained to him about sexual harassment (N.T.61). He also contradicted the Complainant's testimony regarding her claim to have been promoted to Assistant Fleet Lease Manager. While acknowledging that discussions had occurred, he stated that a Leasing Department was never established (N.T. 58-59). Wouckley testified that he considered the Complainant as his secretary (N.T. 58, 63). Wouckley also testified that he had not observed Madden spending approximately six hour per week in the Complainant's office and stated that he would have been aware if Madden had (N.T. 63-64).

Wouckley, in addition, testified that the Complainant had discussed problems that she was having obtaining a babysitter for her children (N.T. 61).

Another Respondent witness, office manager (Noethling), indicated that she was not aware of any other female employee ever complaining about sexual harassment (N.T. 108). She also testified as to the relative stability of the female workforce (N.T. 100).

Other evidence presented included a copy of Complainant's claim for unemployment compensation benefits, filed shortly after leaving Respondent's employ, on which she simply listed "quit" as the reason for leaving (R.E.A). No mention of sexual harassment is found on the claim form.

Several Respondent witnesses also indicated that the Complainant had complained on several occasions prior to leaving about the expense of hiring a babysitter for her children during the summer. The Complainant admitted having made the statement and also testified that her children finished school that year one day after she quit (N.T. 22). The Complainant characterized the events as "coincidental" (N.T. 26).

As was stated earlier, and as the above summary of testimony reveals, the record is strewn with conflicting evidence. Consequently, credibility is the key to resolution of this matter. In fact, both parties acknowledge the determinative role that credibility will play in their post hearing briefs.

The Commission is also amply aware that judgment of credibility is a responsibility entrusted to the hearing panel as the trier of fact. Carr v. Com., State Board of Pharmacy, 48 Pa. Cmwlt. 330, 409 A.2d 941, 944 (1980); Boughter v. Com., Dept. of Public Welfare, 55 Pa. Cmwlt. 521, 423 A.2d 806, 809 (1980); and SEE: Pennsylvania Human Rel. Com. v. Hemfield Township, 23 Pa. Cmwlt. 351, 352 A.2d 218, 220 (1976). Moreover, where the evidence is conflicting, as here, the hearing panel is responsible for resolving the conflict and for deciding the weight to be awarded to particular evidence. Hamilton v. Unemployment Compensation Bd. of Review 181 Pa. Super. 113, 124 A.2d 681, 683 (1956),

Unemployment Compensation Bd. of Review v. Wright, 21 Pa. Cmwlth, 637, 347 A.2d 328, 329 (1975). Palmer v. Celebrezze, 334 F.2d 306 (3rd cir. 1964). Further, as stated earlier, the Commission has concluded that the burden of proving a constructive discharge rests with the Complainant. In this regard, the Complainant's burden is to prove her allegation by a preponderance of the evidence.

After a careful review of the record as a whole and at the totality of the circumstances, the Commission has concluded that the Complainant failed to demonstrate that sexual harrassment was the reason for her resignation. In coming to this conclusion, the Commission has resolved the conflicting evidence in favor of the Respondent.

No one single item has persuaded the Commission to reach the decision that it now enters. However, concerning the "smacking" incident which purportedly led to the resignation, the Commission notes that the Complainant, although previously indicating that the event had been witnessed by several individuals (C.E. 2 at p. 3), failed to call any of these individuals to testify in her behalf. Yet, clearly it was this incident which the Complainant testified led to her resignation (N.T. 12).

Moreover, the Complainant did admit to having a financial concern with hiring a babysitter during the summer months (N.T. 23). The Complainant also testified that her children were released from school for the summer on the day following her resignation (N.T. 22). Also, the

Complainant did list nothing other than "quit" on her unemployment compensation claim form which was filled out immediately after the resignation (N.T. 34; R.E."A"). While she explained that unemployment bureau personnel advised her in this regard, no witness was presented from the bureau to support her explanation.

Apart from the above, the Complainant also testified that she had been promoted to Assistant Fleet Lease Manager (N.T. 6). Yet, she subsequently admitted that the Leasing Department did not come into existence, at least not while she remained employed (N.T. 27).

In the end, the Commission simply found the Respondent more creditable and, therefore, resolved the conflicting evidence in its favor.

VI CONCLUSION

In cases where resolution of the matter rests with a weighing and balancing of conflicting evidence, absolute certainty is rarely achieved. Nonetheless, the Commission is convinced that the Complainant failed to demonstrate by a preponderance of the evidence that she was constructively discharged by the Respondent because of sexual harrassment.

COMMONWEALTH OF PENNSYLVANIA


GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

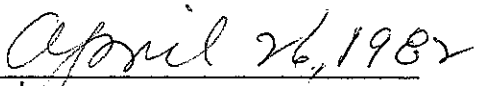
NANCY L. KUTCHKO, :
Complainant :
v. : DOCKET NO. E-14016
BAUM BOULEVARD DODGE, INC., :
Respondent :
:

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter the hearing panel concludes that Respondent did not discriminate against the Complainant in violation of section 5 (a) of The Pennsylvania Human Relations Act. Accordingly, it is the Panel's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted by the full Pennsylvania Human Relations Commission.



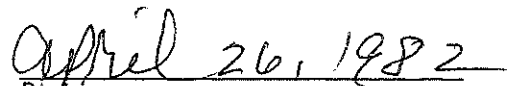
JOHN P. WISNIEWSKI, Chairperson



Date



ELIZABETH M. SCOTT, Commissioner



Date

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

NANCY L. KUTCHKO, :
Complainant :
vs. : DOCKET NO. E-14016
BAUM BOULEVARD DODGE, INC., :
Respondent :

FINAL ORDER

AND NOW, this 30th day of April, 1982, upon consideration of the Findings of Fact, Conclusions of Law and Opinion, and pursuant to Section 9 of the Pennsylvania Human Relations Act, as amended, the Pennsylvania Human Relations Commission hereby:

ORDERS

That the complaint in the above captioned matter be dismissed with prejudice.

Pennsylvania Human Relations Commission

BY: Doris M. Leader
DORIS M. LEADER, VICE CHAIRPERSON

ATTEST:

BY: Elizabeth M. Scott
ELIZABETH M. SCOTT, SECRETARY