

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT LOVE,

COMPLAINANT

v.

WYETH LABORATORIES INCORPORATED,
RESPONDENT

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DOCKET NO. E-28755

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

FINDINGS OF FACT *

1. Complainant Robert Love, a Black male, is an adult individual residing at 484 Douglas Drive, West Chester, PA. (N.T. 4, Complaint)
2. Respondent Wyeth Laboratories, Inc., 611 East Nield Street, West Chester, PA, has at all relevant times employed four or more individuals within the Commonwealth of Pennsylvania. (N.T. 5)
3. Conciliation of this case was attempted subsequent to Commission staff's finding of probable cause to credit the allegations of discrimination; the efforts were not successful. (N.T. 5, 6)
4. Complainant was promoted twice within the Crystalline Department. (N.T. 6)
5. Wyeth as a manufacturer of pharmaceutical products must adhere to a stringent standard of care in its operations.
6. Complainant was discharged because of problems with his performance, not because of his race.

* Findings of Fact are also contained in the Opinion which follows: they are those recitations of factual matters which are followed by citations to pages of the record or reference to specific exhibits.

The following abbreviations are utilized throughout:

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

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 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 made out a prima facie case by proving that:
 - a. He belongs to a protected class;
 - b. He was performing duties which he was qualified to perform; and
 - c. He was discharged from his position.
6. Respondent has met its burden and rebutted Complainant's prima facie case by introducing admissible evidence of a legitimate, non-discriminatory reason for its conduct.
7. Complainant has failed to prove that the reason given by Respondent for its action was pretextual.

O P I N I O N

This case arises on a complaint filed by Robert Love ("Complainant") against Wyeth Laboratories, Incorporated (identified in the complaint incorrectly as Wyeth Pharmaceutical Laboratories) ("Respondent" or "Wyeth") with the Pennsylvania Human Relations Commission ("Commission") on or about May 3, 1984, at Docket No. E-28755. Mr. Love alleged that Wyeth terminated him from his position because of his race, Black, in violation of Section 5 (a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act"). Wyeth has consistently denied any violation of the Act.

Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. The parties and the Commission thereupon attempted to resolve the situation through conference, conciliation and persuasion. The case was approved for public hearing when these efforts were unsuccessful. A hearing was held in Philadelphia on October 20, 21, 22 and 23, 1986, before Commissioners McGill, Echols, and Denson, with Commissioner McGill chairing the hearing panel. The parties waived their rights under the Act to a hearing in West Chester, PA, where the allegedly discriminatory acts occurred.

For reasons not related to any actions of the parties, the reporter on the morning of October 21, 1986, was unable to produce an acceptable transcript of the testimony of Respondent's witness Robert DePhillips. Counsel attempted to fill in the omissions but were unable to do so. By order of Chairperson McGill, a deposition of Mr. DePhillips was taken on May 1, 1987, for the sole purpose of replacing the earlier testimony. That deposition has been made part of the record in place of the earlier section.

Mr. Love, a Black male, began his employment with Wyeth on July 24, 1967, as an Operator Trainee in the Chemical Development Division. He worked

as an Operator in various departments between December, 1967, and August, 1976. On August 23, 1967, he was transferred to the Crystalline Department. He was promoted to Leader Crystalline Operator on November 10, 1980. He was discharged from that position on April 11, 1984. (S.F. 1, 9, 10, 11, 12, 13; N.T. 4, 6)

The events relevant to this case took place at Wyeth's manufacturing facility in West Chester, PA, where it manufactures injectable pharmaceutical products, including antibiotics, narcotic analgesics such as morphine, anti-coagulants, and barbiturates. The Crystalline Department manufactures all of the sterile bulk antibiotics produced at the West Chester plant, including penicillin and ampicillin. (N.T. 210-11)

Because of the nature of the products it manufactures, Wyeth's operations must be very rigidly controlled. All aspects of its pharmaceutical production are regulated by the United States Food and Drug Administration ("FDA") through the use of Good Manufacturing Practices ("GMPs"), enforceable requirements set out in Title 21 of the Code of Federal Regulations. (N.T. 223, 587, 595) GMPs cover all aspects of the operation of Respondent's manufacturing plant, including equipment to be used and production records, known as "batch sheets" or "batch records" which must be kept. (N.T. 223-224) Batch records are written, step-by-step instructions for the operator, detailing how each aspect of the process is to be performed. Spaces on the sheets are set apart for the operator to enter the time when each step was done, information such as the temperature of the product at a certain point, and the operator's initials; this is properly to be done at the time the step is actually performed. (N.T. 227-229)

Much of the manufacturing done by the Crystalline Department takes place in a large sterile area occupying parts of two floors of the plant.

(N.T. 212-213) The areas are environmentally controlled; all air entering them is filtered to remove bacteria and other particulates. (N.T. 213) Operators working in the sterile areas must wear sterilized protective clothing, including gloves, face masks and goggles. (N.T. 213; R.E. 21)

The Crystalline Department is a round-the-clock operation. Operators frequently work alone, with infrequent direct supervision. The processes include relatively long stretches of time during which the operator need take no active part; it is therefore perhaps not surprising that episodes of sleeping on the job are an occasional problem. (N.T. 26, 42-44)

There are five categories of operator in the Crystalline Department: Operator Trainee, C Operator, B Operator, A Operator, and Leader Operator, with Leader Operators having the greatest responsibility and authority. (N.T. 474-475) Mr. Love entered the Department as an Operator B; he was promoted to Operator A, and became Leader Operator in 1980. (N.T. 6, 23) With one exception, his performance was considered to be satisfactory by Respondent until March, 1982. (N.T. 248; R.E. 8) Starting in that month he was disciplined for a number of incidents, including sleeping on the job, failure to follow standard operating procedures, and falsification of batch records. He was terminated in March, 1984. (N.T. 29-68; C.E. 6, 7, 8, 9, 10, 11A, 11B, 11C, 11D) The question presented by this case is whether that discharge violated the Act.

While not agreeing with all of the particulars of each incident as depicted by Respondent, Complainant does not deny that he committed at least some of the rules violations of which he was accused. The essence of his claim is that White operators who committed or were accused of the same or similar violations were less stringently disciplined. He thus claims that he was the victim of disparate treatment due to his race, Black.

The respective burdens of proof of the parties in such cases are well settled. Complainant bears the initial burden of making out a prima facie case. Should he do so, Respondent must rebut the inference of discrimination thus created by setting forth through the introduction of admissible evidence the legitimate, non-discriminatory reason(s) for the challenged action. 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. PHRC, 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 his 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 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 situations 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. Commonwealth 360, 462 A.2d 292 (1983). In this case we find that Mr. Love 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; and
3. He was terminated from his position.

Phillips v. United Brotherhood of Carpenters, 598 F. Supp. 40 (E.D. Ark. 1985)
Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981); Osbourne v. Cleveland, 620 F.2d 195 (8th Cir. 1980).

Only the second element is contested. Wyeth claims that Mr. Love was not qualified to perform his duties. That question is central to resolution of this case and will be fully discussed below; however, we find it sufficient for purposes of his prima facie case that Mr. Love was employed by Wyeth over a long period of time and was twice promoted within the Crystalline Department. We must therefore consider Respondent's explanation of its actions.

As noted, Respondent's burden is the light one of introducing evidence of a legitimate reason for its actions. This requirement has been more than satisfied here. Wyeth argues that Mr. Love was terminated for poor performance which became a problem only after production and documentation requirements in the Crystalline Department were made stricter in response to internal problems and external pressures. It introduced documents and testimony detailing the series of incidents for which discipline was imposed, including the testimony of Robert DePhillips, particularly at N.T. 245-285, and the testimony of Jonathan Kravitz, particularly at N.T. 372-396. Poor performance is of course a legitimate and non-discriminatory reason for discharging an employee.

Complainant acknowledges that Respondent has met this burden. However, he argues that the explanation offered by Wyeth is pretextual and that racial animus actually caused his discharge. In support of his claim he points to various incidents which he asserts demonstrate that Whites were more leniently treated than he. After a thorough and careful analysis of the complex factual situation presented by this case, we must reject this assertion. Our reasons follow.

We find that the events culminating in Mr. Love's discharge began when Robert DePhillips became manager of the Crystalline Department in November or December, 1981; he had been with Wyeth in various capacities, including Assistant Supervisor of the Crystalline Department, since 1970. His return to Crystalline was prompted by a serious manufacturing problem in that department, which had caused losses of roughly \$1.5 million in the space of a year, and which he was expected to resolve. (N.T. 208, 225-226)

Convinced that the losses were caused by lax procedures within the department, Mr. DePhillips took immediate steps to tighten controls. He met with his entire staff and told them his view of both the problems and their solutions, including strict adherence to the requirements of following the steps set out in batch records, and properly documenting those steps. (N.T. 226-230) He put an end to the practice of having batch sheets retroactively completed at Friday staff meetings. (N.T. 232-234) He also brought Jonathon Kravitz into the department as a shift supervisor, with instructions to make sure that proper procedures were followed, instructions which Mr. Kravitz followed with what most of the operators found to be an excess of zeal. (N.T. 226)

The first of the incidents cited by Wyeth as leading to Mr. Love's discharge occurred in March, 1982. Mr. DePhillips testified credibly that Mr. Love at that time performed a step in the manufacture of sodium ampicillin in too short a period of time, resulting in a wet, lumpy and unacceptable product (N.T. 250-251) He testified that Mr. Love when questioned claimed to have done the procedure correctly, even though his initials on the batch records indicated that it had not been. Product loss was calculated at \$98,000. Mr. Love was suspended for ten days, in part because he had attempted to deny his error. (N.T. 253-256; R.E. 17, 18, 7) Mr. Love's explanation, in essence

that he recorded only part of what he did because he ran out of batch sheets, was not credible.

The next incident occurred in October, 1982, when Mr. Kravitz found Mr. Love asleep in the sterile area, lying on a makeshift pillow, at a time when he should have been monitoring the cool down phase of a batch of ampicillin. We credit the version of this incident recounted by Mr. DePhillips and Mr. Kravitz, to the effect that Mr. Love was asleep at 3:20 a.m., although he subsequently entered a temperature reading on a batch sheet which was purportedly made at that time. (N.T. 257-264, 374-382) Mr. Love was again suspended for ten days, charged with leaving his assigned area, sleeping on duty, and falsifying batch records. Mr. DePhillips testified credibly that his own supervisor wanted to fire Mr. Love at that point, but was dissuaded by the Crystalline Department supervisors (including Mr. Kravitz) who, along with Mr. DePhillips, felt that the situation could still be improved. (N.T. 263)

Mr. Love was next disciplined in November, 1983, when he received a written warning for failure to report a defective switch to Dave Crosson, his supervisor at the time. Product loss was again involved. (N.T. 272-274) Mr. Love's explanation of this event, that he felt extremely pressured throughout this time and was afraid of Mr. Crosson, is puzzling given the gentle demeanor of Mr. Crosson and the seeming absence of prior difficulties between him and Mr. Love. Mr. Love in fact conceded on direct examination that Mr. Crosson's treatment of him following this incident was favorable, and that the ten day suspension was justified. (N.T. 58)

The final disciplinary action against Mr. Love, his termination, was the result of two incidents, one on March 13, 1984, the next on March 14, 1984. Mr. DePhillips and Mr. Kravitz testified credibly that twice within those two days Mr. Love was found to have falsified batch records, in each instance

recording actions which they determined he had not taken and at least in the second instance recording prior to the time it should have been taken an inaccurate pressure reading. (N.T. 276-283, 386-396) It was then decided that Mr. Love had to be terminated because of his superiors' loss of trust in him; he was considered to be a risk to the company and to the public. (N.T. 285)

Our scrutiny of the record in this case, combined with the credibility determinations already referred to, persuades us that no White Crystal-line Department operators committed materially similar offenses without receiving similar discipline. A White Operator who was found to have falsified batch records, James Clark, was also discharged. (N.T. 505-506, 623-624, 709, 737) While his discharge did occur much later than Mr. Love's, we are not convinced that there was a causal connection between the two.

Complainant claims that supervisors in the Department continued to ask operators to fill in batch sheets after-the-fact at least through 1984; however, the witness cited for that proposition, Operator Alphonso Newsome, was extremely vague about when the practice actually stopped. Further, we find that there is a distinction between being asked to fill in a blank with correct information by one's supervisor and being discovered by that supervisor to have filled in information which is verifiably incorrect.

Complainant also asserts that White operators were not disciplined for sleeping on the job. We credit Respondent's explanation that dozing off in one's chair was treated differently from the act Complainant admittedly committed, leaving his chair with the clear intent to go to sleep on the floor. Complainant has not pointed to any other employee who did that and escaped discipline.

Nor do we find that incidents for which Mr. Crosson and Mr. Kravits were disciplined were comparable. Mr. Crosson received a verbal warning when

a process which should have been completed by an operator on his shift was left undone, even though Crosson reported the error as soon as he detected it: no attempt at falsification took place. And Mr. Kravitz received a warning for filling in a batch sheet with the initials of the operator who had done the procedure rather than his own. Again no attempt to cover his own error was involved. Further, each incident was just that, a single incident, not the series of difficulties experienced by Complainant.

We note also that, between 1980 and 1984, the Department had an average of nine operators, of whom three were leader operators; two of the three leaders were Black. The other Black Leader Operator, Alphonso Newsome, testified on behalf of Complainant. He however testified under cross-examination that, from his own point of view, discipline in the Crystalline Department did not differ based on the race of the employee. (N.T. 187) Complainant's other witness, a White Operator named James Glisson, similarly conceded under cross-examination that he had earlier expressed his belief that Mr. Love's treatment was not based on race. (N.T. 169) It is significant that Mr. Newsome received no discipline between 1980 and 1984. (N.T. 179)

While the Complainant suggests strongly that it was Mr. Kravitz who was primarily responsible for the claimed different treatment, the record shows that Mr. Kravitz was a strict supervisor of both Blacks and Whites. The complaints in fact were such that Mr. DePhillips called a meeting during which the operators complained directly to Mr. Kravitz; he in turn apologized to them and promised to try to temper his style. (N.T. 269, 403-404) And again, neither Mr. Newsome nor Mr. Glisson accused Mr. Kravitz of racially biased actions.

Finally we note that, as Wyeth emphasized throughout these proceedings, the nature of its products places upon it a high degree of responsibility. Defects in its products may be fatal to those using them. We conclude

clude that Respondent's actions in relation to Mr. Love were motivated by concerns about the quality of its product, not by considerations of race.

Complainant having failed to prove that the reasons given by Respondent for his dismissal were pretextual, his case must be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT LOVE,	:	
	:	
COMPLAINANT	:	
	:	
v.	:	DOCKET NO. E-28755
	:	
WYETH LABORATORIES INCORPORATED,	:	
RESPONDENT	:	

FINAL ORDER

AND NOW, this 4th day of August, 1987, following review of the entire record in this case, including the transcript 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 Panel, 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: Thomas L. McGill, Jr.
 Thomas L. McGill, Jr.
 Chairperson

ATTEST:

John P. Wisniewski
 John P. Wisniewski, Secretary