

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

VIRGINIA L. MYERS, COMPLAINANT

v.

EDEN HOTEL, VITTLES & GROG, RESPONDENT

DOCKET NOS. E-25950-A and E-26180-A

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

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STIPULATIONS

The following stipulations are hereby admitted by all parties to the above-captioned case and no further proof thereof shall be required:

1. The Complainant herein is Virginia L. Myers, an adult female, who resides at 10 Cedar Acres Drive, Lancaster, Pennsylvania 17602.
2. The Respondent herein is Eden Hotel, Inc., 1703 New Holland Pike, Lancaster, Pennsylvania 17601.
3. The Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act ("Act") of October 27, 1955, 43 P.S. 955(a).
4. The Complainant, on or about July 12, 1983, filed a notarized complaint of discrimination with the Pennsylvania Human Relations Commission ("Commission"), Docket No. E-25950-A, alleging age discrimination by the Respondent due to her having received a cut in working hours. A copy of the formal complaint is attached hereto as Appendix "A" and is incorporated by reference herein as if fully set forth.

5. On July 22, 1983, Commission staff duly mailed to all the parties to this action a copy of the complaint described in item #4 above in a manner which satisfies the requisites of 1 Pa. Code 33.31.
6. In correspondence, dated July 27, 1983, the Respondent acknowledged receipt of the above-captioned complaint.
7. The Complainant, on or about August 8, 1983, filed a notarized complaint of discrimination with the Pennsylvania Human Relations Commission ("Commission"), Docket No. E-26180-A, alleging that she was discharged in retaliation for filing her original complaint of discrimination (Docket No. E-25950-A). A copy of the formal complaint is attached hereto as Appendix "B" and is incorporated by reference herein as if fully set forth.
8. On August 18, 1983, Commission staff duly mailed to all the parties to this action a copy of the complaint in item #7 above in a manner which satisfies the requisites of 1 Pa. Code 33.31.
9. A Fact Finding Conference was held on August 30, 1983.
10. In correspondence, dated July 31, 1984, the Commission staff notified the Respondent that Probable Cause existed to credit the allegations contained in the above-captioned complaints.
11. Subsequent to the determination of probable cause, the Commission attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion but was unable to do so.
12. The Commission and the parties to this action fully complied with all the procedural prerequisites to Public Hearing, in accordance with Section 9 of the Act.
13. In correspondence, dated December 18, 1984, Commission notified the Respondent that it had voted to hold a Public Hearing in the above-captioned cases. A copy of this correspondence is attached hereto as Appendix "C" and is incorporated by reference herein as if fully set forth.
14. ~~The Complainant began working at the Hotel in 1969, and continued her employment as a waitress under new owners (the Respondent) effective August 2, 1976.~~
15. The Complainant was discharged by the Respondent at the end of her work shift on July 23, 1983, (approximately 9 p.m.).
16. The Complainant's final rate of pay with the Respondent was \$2.01 per hour plus tips.
17. Effective Tuesday, June 7, 1983, the Respondent hired Virginia Secker.

WEN
SVB

William E. Haggerty
 William E. Haggerty
 Counsel for Respondent
 9/11/85

 Date

Sidney V. Blecker
 Sidney V. Blecker
 Assistant General Counsel
 Counsel for the Commission on
 Behalf of the Complainant
 9-11-85

 Date

FINDINGS OF FACT

The foregoing Stipulations are hereby incorporated herein as if fully set forth.

To the extent that the opinion which follows recites facts in addition to those set forth here, they shall be deemed to be additional findings of fact.

Key to abbreviations:

- N.T. Notes of Testimony
- C.E. Complainant's Exhibit
- R.E. Respondent's Exhibit

1. Virginia L. Myers was first employed by the Eden Hotel in 1970, by the previous owner. (N.T. 12)
2. Ms. Myers kept her waitress position when the current owners, William Trimble and Pryor Neuber, took over in 1976. (N.T. 12, 13, 365, 525)
3. Mr. Trimble at one time served as Eden's manager; he later became less involved but continued to interview and hire the managers. (N.T. 365, 384)
4. Mr. Neuber sees Mr. Trimble generally every day; they regularly discuss Eden's operation. (N.T. 525)
5. Mr. Trimble's wife, Helen Trimble, has worked as a waitress at Eden and done other jobs there since 1976. (N.T. 465)
6. Prior to June of 1983, Ms. Myers worked Monday, Wednesday, Thursday, Friday and Saturday, starting at 4:45 p.m., and working until closing time, 11:00 p.m. on weeknights and midnight on Friday and Saturday. (N.T. 13-14)
7. Ms. Myers was Eden's regular close-up person prior to June of 1983. (N.T. 18-19)
8. Ms. Myers was told by Diana Lowe in early June of 1983 that she was no longer to close the restaurant on Thursday and Saturday nights; her hours were to be shortened on those days. (N.T. 18)
9. Ms. Myers' closing duties, on Thursdays and Saturdays were to be performed by Virginia Secher, who was then approximately twenty years old. (N.T. 20)
10. Ms. Myers' hours were in fact reduced. (N.T. 18-20, C.E. 1, 2, 3, 4)
11. Ms. Myers was sixty-one years old in July of 1983. (N.T. 11)
12. Mr. Trimble owns another restaurant; the Roseville Hotel, also in Lancaster, he is full owner of the Roseville. (N.T. 365)
13. Mr. Trimble persuaded June Shope to continue her employment at Eden past the time when she had decided to retire at age sixty-two. (N.T. 382-3)
14. Ms. Lowe testified that she lied about the circumstances surrounding Ms. Myers' discharge on a number of occasions prior to this hearing, including at least one occasion when she was under oath. (N.T. 154-6, 160)
15. There were significant discrepancies between Ms. Lowe's testimony at this hearing and statements made in her deposition in April of 1985 prior to the hearing. (N.T. 132, 162)
16. Ms. Lowe variously testified that the decision to fire Ms. Myers was made in June of 1983, on July 22, 1983, and July 23, 1983. (N.T. 153, 171, 172, 173)
17. Ms. Lowe's testimony on a number of issues was not credible: these included the date on which it was determined that Ms. Myers was to be fired and the reasons for firing her.

18. Mr. Trimble originally liked Ms. Myers but gradually became extremely dissatisfied with her performance. (N.T. 372-79)
19. Mr. Trimble wished to have Ms. Myers fired on a number of occasions but was persuaded not to by his wife. (N.T. 378)
20. Ms. Myers' hours were reduced in the hope that she would resign.
21. While working as a waitress at Eden, Ms. Myers had many loyal regular customers who liked her and asked to be served by her. (N.T. 225-251, 330, 481)
22. Ms. Myers was unwilling to accept supervision. (N.T. 257-59, 477)
23. Ms. Myers was often short-tempered with co-workers and with customers whom she did not wish to serve. (N.T. 258, 259, 260, 273, 341-2, 373-77)
24. Other Eden waitresses were often inconvenienced when Ms. Myers took several tables consecutively in spite of a policy of rotating customers among the waitresses. Some waitresses resented this. (N.T. 292-3, 330-1, 481-2)
25. Mr. Trimble occasionally worked in Eden's kitchen or tended bar if help was short. (N.T. 297)
26. Dorothy Ely was Eden's manager and Ms. Myers' supervisor between 1978 and 1980. (N.T. 256-7)
27. Ms. Myers refused to accept supervision from Ms. Ely. (N.T. 258)
28. Ms. Ely fired Ms. Myers on one occasion; Ms. Trimble immediately hired her back. (N.T. 261-2, 484)
29. Ms. Ely resigned from Eden in 1980 because of frustration resulting from her inability to deal with Ms. Myers. (N.T. 261)
30. The Trimbles were concerned that Ms. Myers would seek revenge if they fired her. (N.T. 378, 484-5)
31. Louise Grindle was hired by Mr. Trimble as Roseville's manager when she was fifty-six years old. (N.T. 602-3)
32. Ms. Grindle retired voluntarily from her position as Roseville's manager when she was sixty-one years old. (N.T. 602, 605)
33. Ms. Myers on direct examination failed to reveal that she had worked regularly between twelve and twenty hours weekly at a convenience store during the summer of 1985. (N.T. 36, 103, 105, 608-9, and R.E. 20)
34. Ms. Myers' hours were not reduced because of her age.
35. Ms. Lowe and Mr. Trimble decided in June of 1983 to attempt to obtain Complainant's resignation by reducing her hours, and to discharge her if she did not resign.
36. The decision to terminate Ms. Myers was made by Mr. Trimble and Ms. Lowe on or shortly before July 22, 1983.
37. Mr. Trimble showed Ms. Lowe a copy of Ms. Myers' complaint on the afternoon of July 23, 1983, and told her to fire Ms. Myers anyway. (N.T. 154, 172)
38. Ms. Myers was not fired in retaliation for filing her first complaint with the Commission.
39. Ms. Myers was not fired because of her age.
40. Ms. Myers was fired because of poor performance.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this action.

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.
4. Respondent is an employer within the meaning of the Act.
5. At the time of filing her complaints with the Commission, Complainant was protected by the Act from discrimination on the basis of her age.
6. Complainant bears the initial burden of making out a prima facie case of discrimination on each of the bases she asserts. Respondent may rebut the inference of discrimination created by the prima facie case by introducing admissible evidence of a nondiscriminatory reason for its conduct. Complainant may still prevail by demonstrating that the proffered reasons are pretextual.
7. Complainant bears the ultimate burden of persuading the trier of fact that there was intentional discrimination.
8. When a Respondent has introduced evidence of a legitimate reason for its conduct, Complainant's burden of proving a prima facie case merges with her ultimate burden of persuading the trier of fact that intentional discrimination occurred; whether or not she has made out a prima facie case then becomes irrelevant.
9. When a Respondent has introduced evidence of a legitimate reason for its conduct, the trier of fact must decide the ultimate issue, that of whether unlawful discrimination occurred.
10. Complainant has failed to prove that her hours were reduced because of her age.
11. Complainant has failed to prove that she was fired in retaliation for filing a complaint with the Commission.
12. Complainant has failed to prove that she was fired because of her age.

OPINION

This case arises on complaints filed by Virginia L. Myers ("Complainant") against Eden Hotel, Vittles and Grog ("Respondent") with the Pennsylvania Human Relations Commission ("Commission"). In her first complaint, filed on or about July 12, 1983, at Docket No. E-25950-A, Ms. Myers alleged that Respondent discriminated against her on the basis of her age, 61, by reducing her hours, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. ("Act"). In her second complaint, filed on or about August 8, 1983, at Docket No. E-26180-A, Ms. Myers alleged that Respondent retaliated against her for filing the complaint at Docket No. E-25950-A by discharging her on July 23, 1983. The complaints were subsequently amended so that each complaint alleged both reduction of hours and discharge, and so that the discharge was claimed to be based on age and/or to be in retaliation for filing the earlier complaint. Section 5(d) of the Act was also cited.

Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. The parties and the Commission then attempted to resolve the situation by conference, conciliation and persuasion, but were unable to do so, and the cases were approved for public hearing. A hearing on the consolidated cases was held in Lancaster, Pennsylvania, before Hearing Examiner Edith E. Cox on August 14, September 11, 12, and 13, and October 4, 1985. The record was left open so that the deposition of Julie Burkholder could be obtained and admitted in lieu of live testimony. The deposition was taken on November 6, 1985,

and admitted to the record when received. The parties submitted briefs, and Respondent requested and was granted leave to file a reply brief, which it did.

Though called a hotel, the Eden is a restaurant serving (in the words of one of its owners) "...general food...not gourmet or anything like that." (N.T. 365) The current owners are William Trimble, who takes an active part in the restaurant's operation, and Pryor Neuber, whose involvement is much less regular.

Ms. Myers was first employed by the Eden in 1970, by the previous owner. She kept her waitress position when the current owners took over in 1976. Prior to the events giving rise to these complaints, Ms. Myers worked Monday, Wednesday, Thursday, Friday and Saturday, starting at 4:45 p.m. and working until the restaurant closed. Closing time was 11:00 p.m. Monday through Thursday and midnight on Friday and Saturday. She was not the only waitress on duty during the dinner hour, but generally worked alone during the latter part of the evening and always did the final cleanup and closing. Ms. Myers testified that she averaged between thirty-five and thirty-eight hours of work per week during this period.

As noted above, Ms. Myers testified that she filed her first complaint with the Commission after being informed that her hours were to be reduced. She filed the second complaint after she was discharged several weeks later. The parties disagree about the reasons for the reduction of Ms. Myers' hours and her subsequent discharge. Ms. Myers' claim, fairly read, is that her hours were reduced because of her age, and that her discharge was because of her age and in retaliation for filing the first Commission complaint. Respondent asserts that Ms. Myers was a difficult, selfish employee who declined to follow legitimate work rules and cared only about herself and her favored customers. While they are of course intimately related, the two complaints and the claims involving age and retaliation must be considered separately, as different theories and elements of proof are involved in each.

Section 5(a) of the Act, cited in the first complaint, provides in relevant part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification...for any employer because of the...age...of any individual...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).

Section 4 (h) provides:

The term "age" includes any person between the ages of forty and seventy inclusive, and shall also include any other person so protected by further amendment to the Federal Age Discrimination in Employment Act.

43 P.S. §954(h).

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 she 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 her 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).

That is the situation here: Respondent introduced evidence of the reasons for its actions. It is therefore unnecessary to determine whether Complainant made out a prima facie case on each of the theories she proposes. Only the ultimate question of whether there was intentional discrimination must be determined.

In support of the claim that her hours were reduced because of her age, Complainant testified that she was told by the Eden's newly appointed manager, Diana Lowe, that she was no longer to close on Thursday and Saturday nights. This task was instead to be performed by another younger employee, Virginia Secher, who needed more hours. She testified that the reduction in hours took place in early June of 1983; she was then sixty-one years old. Ms. Secher was approximately twenty years old.

Ms. Myers also testified that she was never given any indication by Respondent's management that her performance was unsatisfactory. She stated that Mr. Trimble and more particularly his wife, Helen Trimble, made derogatory comments to her about her age, calling her an old lady, saying she was old enough to retire, asking when she was going to retire.

Ms. Myers also presented the testimony of Diana Lowe. Ms. Lowe testified that both Trimbles told her Ms. Myers was too old to do the job. She said Mr. Trimble told her to cut Ms. Myers' hours, as a way to get her to resign. She testified that she used the excuse that Ms. Secher needed more hours, knowing that Ms. Secher was to be transferred to bartending duties. She said the real reason for the reduction in hours was to get Ms. Myers to quit. She said Mr. Trimble instructed her to hire young, preferably single (and, by implication, attractive) women as waitresses.

Complainant also introduced the testimony of Marla Haynick and Roberta McDonnell, both former Eden employees. Ms. Haynick, also a former Eden customer, testified that Ms. Trimble told her that Ms. Myers was too old to work and should retire. This remark was said to have been made while Ms. Haynick was working at Eden, sometime between August of 1981 and February of 1983.

Ms. McDonnell testified that she was hired at Eden as a bartender but left within two months because of her difficulty in getting along with Diana Lowe, the then manager. She further testified to an evening during this period when she had an extremely upsetting argument with Mr. Trimble. She testified to calling Ms. Lowe at home and asking her to come to the bar, as she was still extremely upset. She further testified that during the ensuing conversation, Ms. Lowe said she had her own problems with Mr. Trimble, feeling that he had hired her for the purpose of getting her to fire Ms. Myers because of Ms. Myers' age.

Finally, Complainant introduced the testimony of a number of Eden patrons who had been her regular customers. Each testified that she was an excellent waitress who made them feel comfortable and gave them good service.

Respondent's evidence relating specifically to the question of the reduction in Ms. Myers' hours was limited. Mr. Trimble testified that he left management of the Eden entirely to Ms. Lowe; other than telling her he had had problems with Ms. Myers but suggesting that Ms. Lowe not fire her, he claimed to have given her no instructions regarding Ms. Myers. He testified that Ms. Lowe increasingly complained about Ms. Myers and eventually said she intended to terminate her; he testified that his only response to this was to tell her to do what she had to but to make sure that there was enough help to keep the schedule covered. He denied any involvement in cutting Ms. Myers' hours.

Respondent also attempted, through cross-examination of Ms. Myers and the testimony of Mr. Neuber, to establish that Ms. Myers' hours were in fact reduced minimally if at all. It was suggested that lack of business caused Ms. Myers to be sent home early on those occasions when she was.

In addition, Respondent introduced evidence bearing generally on its propensity to discriminate on the basis of age and specifically on Ms. Myers' performance. In the first category, it introduced uncontradicted testimony of certain employees who were hired by Eden or another restaurant solely owned by Mr. Trimble, the Roseville Hotel, when they were in their fifties and sixties. In one instance, Mr. Trimble testified without contradiction that he persuaded a Ms. Shope to postpone her retirement so that she could continue to cook for Eden, and personally helped her fill out Social Security forms, ensuring that she could work part time at Eden without reducing her Social Security benefits.

Respondent also introduced the testimony of a number of Eden employees and one Eden customer with highly negative views of Ms. Myers' performance. Their testimony, which will be discussed more fully below, portrayed Ms. Myers as an uncooperative, even belligerent employee whose only concern was taking care of her regular customers. There was also testimony that she threatened to get even with the Trimbles if she were fired.

As this summary shows clearly, resolution of this dispute requires determinations as to the credibility of various witnesses. Questions of credibility, and of the weight to be given to evidence, are for the trier of fact. Harmony Volunteer Fire Co. v. Pennsylvania Human Relations Commission, 459 A.2d 439 (1983).

The only testimony directly relevant to the question of reducing Complainant's hours was that of Ms. Lowe and Mr. Trimble. For the reasons which follow, it is my conclusion that neither version was entirely credible.

Ms. Lowe's version, as noted, was that she was hired to fire Ms. Myers because of her age, and that she was very directly told to do so for that reason by Mr. Trimble. She testified on direct examination that the original written response to the Commission, C.E. 9, signed by her and denying the charges, was untrue. She further testified that although Mr. Trimble had told her exactly what lies to tell in the letter, she had had no understanding of what the letter was about and signed it without reading it. Thus disclaiming knowledge or comprehension of the contents of the letter, she explained that she signed it because she felt threatened with the loss of her job if she did not.

On cross-examination she admitted to lying about the situation on two other occasions, both at a Commission fact-finding conference and at an Unemployment Compensation hearing. On both occasions she had stated that Ms. Myers had been fired for good cause.

By the time of her deposition for this hearing, she had reversed her story; however, there were still significant discrepancies between her testimony at this hearing and in her deposition. On direct examination she testified to being told by Mr. Trimble to hire young, single women for the restaurant; on cross-examination, confronted with her deposition statement that she had had no such direct order, she claimed to have later recalled such an order.

More remarkable given the critical importance of the date was Ms. Lowe's apparent confusion about the date on which she claimed Mr. Trimble told her to fire Ms. Myers. On direct she testified that she was told to fire Ms. Myers on July 23, 1983. On cross-examination, confronted with her deposition statement that the date was July 22, 1983, she revised her earlier testimony and stuck with July 22, 1983, at least until redirect, claiming to have forgotten the correct date.

Notwithstanding this testimony that she was ordered to fire Ms. Myers in July, Ms. Lowe also testified that the decision to fire her was made in June of 1983. Attempting on redirect to reconcile these dates, (and apparently to support Complainant's case), as she had also done during her deposition, Ms. Lowe in response to a question quoted from her deposition that "...the actual bona fide decision was on the 23rd..." (N.T. 209) Asked again when the actual decision was made, she responded that "(t)he final decision was made on the 23rd...It had not been in actuality that we were going to fire her." (N.T. 209) Thus did Ms. Lowe attempt to dismiss her earlier testimony that the decision had been made in June and that she had been hired to fire Ms. Myers.

Ms. Lowe's testimony, in short, was not credible.

Mr. Trimble's testimony on the whole was far more believable. He recounted, credibly, a growing dissatisfaction with Ms. Myers' performance which would have lead to her termination on a number of occasions had not his wife persuaded him to keep her on. He also, as noted, testified that he suggested to Diana Lowe that she work things out with Ms. Myers, and that he did not discuss Myers' termination again until Ms. Lowe advised him on July 22, 1983, or a few

days earlier that she had made the decision to terminate. It is not credible, given his obviously strong feelings about the situation, that he remained so completely uninvolved at this critical point.

Drawing on those aspects of Ms. Lowe's and Mr. Trimble's accounts which were credible, and the reasonable inferences from them, I conclude that the decision to reduce Ms. Myers' hours was made jointly by them, in June of 1983 or earlier, in the hope of encouraging her to resign. I further conclude that she has not met her ultimate burden of persuasion, namely that of proving that the decision was related to her age, for the reasons which follow.

Most significant, I credit the testimony of those of Respondent's witnesses who addressed the problems with Ms. Myers' performance. The picture which quite believably emerged was that of an employee whose only concerns were for herself and her unquestionably loyal following of regular customers. She was good to her regulars but often short-tempered and demanding with co-workers, and essentially unable, or unwilling, to accept supervision. And her following created problems for the other waitresses, who frequently had to wait for customers or go without while Ms. Myers' took several tables consecutively, in spite of Eden's professed policy of assigning customers in sequence to the waitresses covering a given meal.

Dottie Ely, manager of Eden and Complainant's supervisor between 1978 and 1980, testified credibly that there were serious, continuous problems with Ms. Myers' performance during this period. She testified that Ms. Myers ignored any attempt to reprimand her, and threw down the copy of Eden's rules which was handed to her, and everyone else, at a staff meeting. She testified credibly that she finally resigned after all of her attempts to deal with Ms. Myers failed, including one occasion when she fired Complainant and Ms. Trimble promptly rehired her.

The complaints voiced by Ms. Ely were echoed by other witnesses, including Laurie McKinney, a former waitress and hostess whose last connection with the Eden was in 1984. Both Trimbles testified credibly to their concern that Ms. Myers would seek revenge if fired, perhaps by attempting to ensure that her regular customers stopped patronizing the restaurant.

Also significant, Mr. Trimble was obviously willing, even eager, to hire other employees of equivalent age. His testimony about persuading June Shope to stay on at Eden past her anticipated retirement at age sixty-two has already been mentioned. Louise Grindle testified without contradiction that Mr. Trimble interviewed her and offered her the position of manager at Roseville, where she had been waitressing, when she was approximately fifty-six years old; she retired voluntarily at the age of sixty-one. Diana Lowe's testimony that Mr. Trimble was displeased about the hiring of sixty-four year old Mary Gingrich, until he realized it would help him defend against accusations of age discrimination, was not credible.

Finally, I do not find that the Trimbles made the derogatory remarks about Complainant's age attributed to them by her and Diana Lowe. Ms. Lowe's lack of credibility has already been explored at length. Significant aspects of Ms. Myers' testimony also lacked credibility. Notably, on direct examination about her employment since leaving Eden, she failed to reveal a part time job at a local convenience store. Challenged on this by Respondent's counsel, she unwillingly admitted that she "...helped them sometimes", (N.T. 105), perhaps eight or twelve hours a week.

In fact, as she admitted when confronted with Respondent's Exhibit 20, she had regularly worked there throughout the summer of 1985 for twelve to twenty hours weekly.

Ms. Myers' first complaint, alleging that Respondent reduced her hours because of her age, must therefore be dismissed, and her second complaint resolved.

The second complaint as amended alleged that Ms. Myers was dismissed on July 23, 1983, because of her age and/or in retaliation for having filed the first complaint. The claim of retaliation will be considered first. As with the first complaint, it is not necessary to determine whether Complainant made out a prima facie case, since Respondent did all that would have been required of it had she done so. Aikens, supra. Only the ultimate question, that of whether Ms. Myers was discharged for having filed the first complaint, must be resolved. That determination is not dependent upon a finding that the first complaint had merit; in Pennsylvania Human Relations Commission v. Thorp, Reed & Armstrong, 361 A.2d 497 (1976), Commonwealth Court upheld a claim of retaliation for filing a complaint with the Commission where the merits of the original complaint had not yet been determined by the Commission.

Section 5(d) of the Act provides in relevant part:

It shall be an unlawful discriminatory practice...for any employer...to discriminate in any manner against any individual...because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.
43 P.S. §955(d).

The parties stipulated that Ms. Myers' first complaint, filed on or about July 12, 1983, was mailed by Commission staff to all parties on July 22, 1983. They also stipulated that she was discharged on July 23, 1983, at approximately 9:00 p.m. Their versions of what occurred between July 22 and July 23, 1983, diverge widely.

In support of her claim that she was discharged in retaliation for filing the first complaint, Ms. Myers testified that she received her copy of the complaint in the mail on July 23, 1983, and was fired that same night. She also testified to having told several co-workers during the period between July 13 and July 17, 1983, that she had filed the complaint, testimony which was seriously undermined during cross-examination.

Complainant's only direct evidence in support of the claim of retaliation was the testimony of Diana Lowe, some of which has already been summarized. Ms. Lowe testified to being at work at the Eden on July 23, 1983, during the afternoon and seeing the mailman come in. Shortly afterwards, she testified, Mr. Trimble called her back to the stock area, showed her the complaint, and said in Ms. Lowe's words: "And he said that he didn't care, fire her anyway tonight." (N.T. 154, emphasis added) She had also used that language, "fire her anyway", at deposition when, as already noted, she said Mr. Trimble had given her the order to fire Ms. Myers on July 22, 1983. She also said, as noted, that the decision to fire Ms. Myers had been made in June of 1983.

Mr. Trimble testified that on July 22, 1983, or a few days earlier, Ms. Lowe told him she had decided to fire Ms. Myers. He denied knowledge of when this was to occur. He claimed to have

learned that the discharge had occurred just after midnight of July 23, 1983, when a kitchen employee met him in Eden's parking lot and informed him. He testified that he then went in to his apartment above the Eden, where he went through the mail which he had picked up only moments before, and found Ms. Myers' first complaint. He testified that he awakened his wife and showed her the complaint, testimony which was corroborated by Helen Trimble.

As with the testimony reviewed in connection with the first complaint, and for essentially the same reasons, it is my conclusion that neither account is entirely credible. Again drawing on those aspects of Ms. Lowe's and Mr. Trimble's testimony which were credible, I conclude that the decision to deal with Ms. Myers by termination if necessary was made jointly by Ms. Lowe and Mr. Trimble in June of 1983, and that her hours were reduced at that time in the hope that she would resign. Perhaps because no resignation was forthcoming, I further conclude that on or shortly before July 22, 1983, Ms. Lowe and Mr. Trimble decided that Ms. Myers was to be discharged at the end of that week after finishing her shift on Saturday, July 23, 1983. Ms. Lowe's testimony that Mr. Trimble showed her the complaint on that Saturday afternoon and told her to fire Ms. Myers anyway was credible. I therefore conclude that Ms. Myers was fired, not because of, but in spite of filing her complaint with the Commission.

Complainant vigorously asserts that the coincidence of the complaint arriving on the same day as she was fired is too unlikely, and that only a retaliatory act by Respondent can explain the events of that day. She fails however to address the testimony of both Ms. Lowe and Mr. Trimble that the decision to discharge was made before July 23, 1983. Nor does she explain the phrase consistently used by Ms. Lowe, "...fire her anyway." The coincidence is indeed remarkable; it is not however sufficient to establish, especially given the testimony just reviewed, that the discharge was retaliatory.

For all of these reasons I conclude that Complainant was terminated because of the performance problems described above, which predated Diana Lowe's tenure as manager of Eden, and that the decision to terminate was made by Diana Lowe and Bill Trimble. This finding also disposes of Complainant's contention that she was fired because of her age. No evidence is advanced in support of that claim which has not already been discussed. Ms. Myers' claim of discriminatory discharge must therefore also be dismissed.

An appropriate order follows.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

VIRGINIA L. MYERS, COMPLAINANT

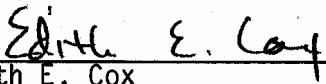
v.

EDEN HOTEL, VITTLES & GROG, RESPONDENT

DOCKET NOS. E-25950-A and E-26180-A

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, Conclusion of Law, and Opinion be adopted 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
Hearing Examiner

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

VIRGINIA L. MYERS, COMPLAINANT

v.

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DOCKET NOS. E-25950-A and E-26180-A

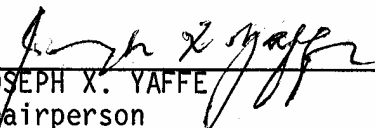
FINAL ORDER

AND NOW, this 29th day of April, 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

ORDERS

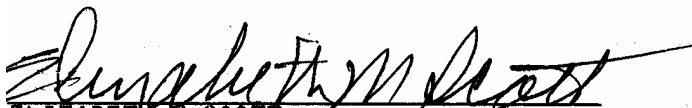
that the complaints in these cases be, and the same hereby are, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



JOSEPH X. YAFFE
Chairperson

Attest:



ELIZABETH M. SCOTT
Secretary