

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAREN M. PRITTS,

COMPLAINANT

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,  
MAINTENANCE DISTRICT 10-2,  
RESPONDENT

DOCKET NO. E-22713-D

STIPULATIONS OF FACT,

CONCLUSIONS OF LAW

FACTUAL BACKGROUND,

OPINION,

RECOMMENDATION OF A MAJORITY OF THE HEARING PANEL COMMISSIONERS,

FINAL ORDER,

DISSENTING OPINION,

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAREN M. PRITTS,	:	
	:	
Complainant	:	Docket No. E-22713D
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF TRANSPORTATION,	:	
MAINTENANCE DISTRICT 10-2	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	
Respondent	:	

STIPULATIONS OF FACT

1. The Complainant in this matter, Karen M. Pritts, is a female individual who resides at 722 West Fifth Avenue, Warren, Pennsylvania.

2. At the time her complaint in this action was originally filed, Complainant's address was Post Office Box 1765, Butler, Pennsylvania.

3. The Respondent in this action, the Commonwealth of Pennsylvania, Department of Transportation, Maintenance District 10-2 is a Department of the Commonwealth of Pennsylvania with its headquarters located in the Transportation and Safety Building, Harrisburg, Pennsylvania.

4. The Respondent is an employer of four or more persons within the Commonwealth of Pennsylvania.

5. On May 3, 1982 Ms. Pritts filed a verified complaint at the Pittsburgh Regional Office of the Pennsylvania Human Relations Commission in which she alleged that the Respondent had suspended her from her position as a highway maintenance worker due to her sex. A true and correct copy of Ms. Pritts original complaint is attached hereto and made a part hereof and marked as "Exhibit A."

6. Ms. Pritts' original complaint was duly served upon the Respondent by certified mail along with a letter, from Human Relations Representative Belinda Stern, dated May 10, 1982.

7. After conducting an investigation, the Pennsylvania Human Relations Commission's staff found probable cause to credit the allegations of Ms. Pritts complaint. A true and correct copy of the cause finding is attached hereto and made a part hereof and marked as "Exhibit B."

8. Respondent was notified of the Commission's cause finding by a letter, dated January 5, 1983, from Human Relations Representative Belinda Stern.

9. Efforts have been made to conciliate this matter, including the scheduling of a conciliation conference for January 20, 1983, but all conciliation attempts have failed.

10. On March 12, 1986, the Complainant was granted leave to amend her complaint. A true and correct copy of the Commissioner Rita Clark's order is attached hereto and made a part hereof and marked as "Exhibit C."

11. On March 25, 1986 the Complainant filed a verified amended complaint with the Pittsburgh Regional Office of the Pennsylvania Human Relations Commission in which she alleged that the Respondent suspended and subsequently discharged her from her position as a highway maintenance worker due to her sex. A true and correct copy of Ms. Pritts amended complaint is attached hereto and made a part hereof and marked as "Exhibit D."

12. Respondent was served with a copy of the amended complaint on March 27, 1986 when it was hand delivered to the office of Melissa R. Dively, Assistant Counsel.

13. On February 18, 1982 the Complainant was appointed to the position of highway maintenance worker in Engineering District 10-0, Maintenance District 10-2, Butler, Pennsylvania.

14. When the Complainant was hired by the Respondent, she was informed that she would be required to serve a six month probationary period in accordance with a collective bargaining agreement which requires this probationary period be served by all newly hired highway maintenance workers.

15. The position of highway maintenance worker involves unskilled manual labor. Some examples of the work typically performed by highway maintenance workers are: loading and unloading materials and tools, patching highway surfaces, digging ditches and cutting grass.

16. A true and correct copy of the job description of a highway maintenance worker is attached hereto and made a part hereof and marked as "Exhibit E."

17. During her employment with the Respondent, Ms. Pritts was supervised by various foremen including: Kenneth Geibel, Patrick Acquaviva, Grahel Gannon, David Schrecongost and Jack Tiberi.

18. After her first two weeks of employment, Complainant's performance was evaluated by her foreman Kenneth Geibel.

19. In his first evaluation of the Complainant performed in February, 1982, Mr. Geibel rated the Complainant's performance as unsatisfactory in five categories and fair in two categories. A true and correct copy of this evaluation form is attached hereto and made a part hereof and marked as "Exhibit F."

20. At the end of March, 1982, Mr. Geibel performed a second evaluation of the Complainant's performance.

21. In his second evaluation of Ms. Pritts' performance, Mr. Geibel rated her as fair in five categories and good in two categories. A true and correct copy of this evaluation form is attached hereto and made a part hereof and marked as "Exhibit G."

22. On April 16, 1982, the Complainant was notified that she was being suspended from her position indefinitely pending a review of her work performance. A true and correct copy of the notice received by Complainant is attached hereto and made a part hereof and marked as "Exhibit H."

23. On May 4, 1982, the Complainant was notified that her suspension was being converted to a discharge effective

April 16, 1982. A true and correct copy of the letter informing Complainant of her discharge is attached hereto and made a part hereof and marked as "Exhibit I."

24. The Complainant was discharged after completing approximately two (2) months of her probationary period, during which time she had received no written warnings or complaints regarding her job performance.

25. Robert Hovis was hired by the Respondent as a highway maintenance worker effective November 3, 1980.

26. Prior to becoming a highway maintenance worker, Mr. Hovis worked for the Respondent as a summer CETA worker.

27. On December 18, 1980, Richard J. Pitts, highway equipment manager for Respondent, completed a written evaluation of Mr. Hovis' performance.

28. In his December, 1980 evaluation of Mr. Hovis' performance, Mr. Pitts rated him as good in seven categories. A true and correct copy of the December, 1980 evaluation form is attached hereto and made a part hereof and marked as "Exhibit J."

29. On or about April 10, 1981 Mr. Hovis' probationary period was extended for an additional three months due to his questionable performance. A true and correct copy of the memorandum and agreement extending Mr. Hovis' probation are attached hereto and made a part hereof and marked as "Exhibit K."

30. On July 1, 1981, Mr. Pitts completed a second evaluation of the performance of Mr. Hovis.

31. In his July 1, 1981 evaluation of Mr. Hovis' performance, Mr. Pitts rated him as good in one category, fair in seven categories and unsatisfactory in one category. A true and correct copy of the July, 1981 evaluation form is attached hereto and made a part hereof and marked as "Exhibit L."

32. On July 2, 1981 Mr. Hovis was suspended from his position pending a review of his work performance.

33. On July 16, 1981 Mr. Hovis was notified that he was discharged from his position effective July 13, 1981. A true and correct copy of the letter notifying Mr. Hovis of his discharge is attached hereto and made a part hereof and marked as "Exhibit M."

34. Roger L. Cook was hired by the Respondent as a highway maintenance worker in September, 1981.

35. On September 24, 1981 Mr. Cook received a written reprimand for failing to report off according to the Respondent's work rules. A true and correct copy of this letter of reprimand is attached hereto and made a part hereof and marked as "Exhibit N."

36. In September, 1981 foreman Grahel Gannon performed a written performance evaluation of Mr. Cook in which Mr. Cook was rated as unsatisfactory in five categories and fair in one category. A true and correct copy of

this performance evaluation is attached hereto and made a part hereof and marked as "Exhibit O."

37. In October, 1981 foreman Grahel Gannon completed a second evaluation of Mr. Cook's performance and rated him as fair in six categories. A true and correct copy of this evaluation is attached hereto and made a part hereof and marked as "Exhibit P."

38. In November, 1981 foreman Kenneth Geibel completed an evaluation of Mr. Cook's performance in which he rated Mr. Cook as unsatisfactory in five categories and fair in two categories. A true and correct copy of this evaluation is attached hereto and made a part hereof and marked as "Exhibit Q."

39. In December, 1981 Mr. Geibel completed another evaluation of Mr. Cook's performance and evaluated him as good in one category, fair in five categories and unsatisfactory in one category. A true and correct copy of this evaluation is attached hereto and made a part hereof and marked as "Exhibit R."

40. On January 20, 1982 P. J. Micklitsch, Maintenance Manager, suspended Mr. Cook and recommended, in a memo to the District Engineer, that he be discharged. A true and correct copy of Mr. Micklitsch's memo is attached hereto and made a part hereof and marked as "Exhibit S."

41. On or about February 2, 1982 Mr. Cook was notified that he was discharged from his position with Respondent, effective January 20, 1982. A true and correct copy of the



letter notifying Mr. Cook of his discharge is attached hereto and made a part hereof and marked as "Exhibit T."

42. In December, 1981 David L. Cupps a semi-skilled laborer was demoted to the position of highway maintenance worker and placed on a six month probation status. A true and correct copy of a letter from P. J. Micklitsch to Sharon Wright describing Mr. Cupps demotion is attached hereto and made a part hereof and marked as "Exhibit U."

43. In December, 1981 R. Pitts, an equipment manager, completed an evaluation of Mr. Cupps' performance, rating him as fair in six categories and good in one category. A true and correct copy of this evaluation is attached hereto and made a part hereof and marked as "Exhibit V."

44. In January, 1982 foreman Kenneth Geibel completed an evaluation of Cupps performance rating him as unsatisfactory in three categories, fair in three categories and good in one category. A true and correct copy of this evaluation is attached hereto and made a part hereof and marked as "Exhibit W."

45. In March, 1982 P. J. Micklitsch requested that Mr. Cupps be dismissed. A true and correct copy of Mr. Micklitsch's memo is attached hereto and made a part hereof and marked as "Exhibit X."

46. On March 1, 1982 Mr. Cupps was suspended indefinitely from his position as a highway maintenance worker. A true and correct copy of the letter notifying Mr. Cupps

of his dismissal is attached hereto and made a part hereof and marked as "Exhibit Y."

47. On March 9, 1982 Mr. Cupps was notified that he was being dismissed from his position as a highway maintenance worker effective March 1, 1982. A true and correct copy of the letter notifying Mr. Cupps of his dismissal is attached hereto and made a part hereof and marked as "Exhibit Z."

48. David E. Anthony was hired by Respondent as a highway maintenance worker effective October 31, 1980. A true and correct copy of the letter notifying Mr. Anthony of his hiring is attached hereto and made a part hereof and marked as "Exhibit AA."

49. On December 8, 1980 R. F. Albert, an assistant highway maintenance manager, completed a review of Mr. Anthony's performance rating him as fair in one category and good in six categories. Mr. Albert noted on the evaluation form that he had advised Mr. Anthony that he needed to improve his dependability if he wished to be kept on after his probationary period. A true and correct copy of this performance evaluation form is attached hereto and made a part hereof and marked as "Exhibit BB."

50. On March 4, 1981 a second evaluation of Mr. Anthony's performance was completed rating Mr. Anthony as fair in one category and good in seven categories and noting that Mr. Anthony and the union had been notified of the need for immediate improvement in Mr. Anthony's attendance and

dependability. A true and correct copy of that performance evaluation is attached hereto and made a part hereof and marked as "Exhibit CC."

51. On May 4, 1981 Mr. Anthony was notified that he had been dismissed from his position as a highway maintenance worker effective April 24, 1981. A true and correct copy of the letter notifying Mr. Anthony of his dismissal is attached hereto and made a part hereof and marked as "Exhibit DD."

52. David Anthony, David Cupps, Roger Cook, Robert Hovis and Karen Pritts were the only highway maintenance workers in probationary status to be dismissed between June, 1981 and June, 1982.

53. In March, 1981 P. J. Micklitsch, the highway maintenance manager for Respondent's Butler facility, received a memo from James Scherner, Respondent's deputy secretary for administration, regarding probationary employees. A true and correct copy of that memo is attached hereto and made a part hereof and marked as "Exhibit EE."

54. Attached hereto and made a part hereof and marked as "Exhibit FF" is a true and correct copy of a document showing the names of all the female highway maintenance workers who were employed in the Respondent's Butler facility between February, 1981 and August, 1982.

55. Attached hereto and made a part hereof and marked as "Exhibit GG" is a true and correct copy of a document showing the ratio of female highway maintenance workers employed by Respondent both statewide and specifically in

the Butler facility as of March 31, 1982 and September 30, 1982.

56. Attached hereto and made a part hereof and marked as "Exhibit HH" is a true and correct copy of Respondent's employee handbook which was published in September, 1981 and was in effect during the time Ms. Pritts was employed by the Respondent.

57. Ms. Pritts began her employment with the Respondent at an annual salary of \$9,897.00. A true and correct copy of the letter notifying Ms. Pritts of her salary is attached hereto and made a part hereof and marked as "Exhibit II."

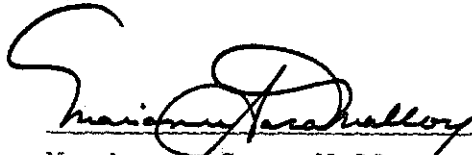
58. Attached hereto and made a part hereof and marked as "Exhibit JJ" are true and correct copies of the salary histories of Andrew Daniels, Merril Wilson, Richard Pease, Franklin Chappel, Brian Cossitor, Vickie Motter Brannon, Thomas Buzanoski and David E. Anthony. All of these individuals were employed by the Respondent as highway maintenance workers for varying amounts of time between October 30, 1980 and October 1, 1983.

59. Attached hereto and made a part hereof and marked as "Exhibit KK" is a true and correct copy of a March 17, 1982 memo, sent by P. J. Micklitsch to all personnel at Respondent's Butler facility, regarding the Respondent's policy on visits by employees to the central office.

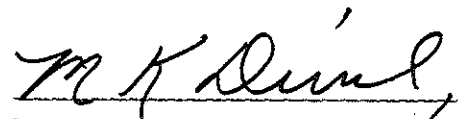
60. Attached hereto and made a part hereof and marked as "Exhibit LL" is a true and correct copy of the Respondent's personnel management system complement control report of August 29, 1985.

The parties to this matter do hereby agree, through their undersigned counsel that the facts recited above are true and correct and that no further proof thereof shall be required at the public hearing in this matter.

FOR THE COMPLAINANT

  
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## CONCLUSIONS OF LAW

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

2. The parties and the Commission have fully complied with all of the procedural prerequisites to a Public Hearing in this case.

3. The Complainant herein, Karen M. Pritts, is an individual within the meaning of the Pennsylvania Human Relations Act.

4. The Respondent herein, the Commonwealth of Pennsylvania, Department of Transportation, Maintenance District 10-2, is an employer within the meaning of the Act.

5. The Complainant has established a prima facie case of unlawful employment discrimination by showing that:

- a. She belongs to a protected group;
- b. She was qualified for her position as a highway maintenance worker;
- c. She was suspended and then discharged; and
- d. That the job remained available after her discharge.

6. Respondent offered legitimate non-discriminatory reasons for discharging the Complainant.

7. The Complainant provided evidence which showed by a preponderance of the evidence that the Respondent's stated reasons for the Complainant's suspension and discharge were a pretext for gender-based discrimination.

8. Respondent suspended and then discharged the Complainant from her position as a highway maintenance worker due to her sex in violation of the Act.

9. Prevailing Complainants are entitled to relief which may include reinstatement and back pay with interest.

10. Sums of money earned by the Complainant from the date of her discharge to the time of the Public Hearing operate to reduce the back pay award.

11. The Complainant is entitled to a back pay award of \$46,701.71 plus interest at the rate of 6% compounded annually which equals \$6,904.52 as of April 30, 1986, for a total damage award of \$53,606.23.

12. Interest on damages at the rate of 6% per annum continues to accumulate until damages are paid.

FACTUAL BACKGROUND \*

In 1979, the Complainant first applied for a job with the Respondent. During approximately July of 1981, the Respondent sent the Complainant a letter offering her an interview for a position as a highway maintenance worker. The Complainant was interviewed by the Butler County Maintenance Manager, Philip Micklitsch, (hereinafter Micklitsch).

A few weeks after the interview, Micklitsch offered the Complainant a highway maintenance worker position. At the time Micklitsch informed the Complainant of the job offer, she informed Micklitsch that she was pregnant. The Complainant was then sent to one of the Respondent's physicians for a pre-employment physical. Subsequently she was instructed to have her own doctor review a physical demands list and a job demand list and seek a release from her doctor after his review.

The Complainant did obtain her doctor's release and gave it to the Respondent. The Respondent's Clerical Supervisor, Tereza Albert, called the Complainant's Doctor, Dr. Tolentino, and questioned his release. During this telephone conversation, Dr. Tolentino retracted his release. Accordingly, the Respondent delayed hiring the Complainant until February 18, 1982.

When Micklitsch advised the Complainant that her pregnancy barred her from being hired, he told her, "that [the Respondent] could not, if for no other reason, morally offer her a job with the department. . ." Micklitsch did tell the Complainant that she would be placed in the next available vacancy after her baby was born and her doctor released her to work.

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\*The foregoing "Stipulations of Fact" are hereby incorporated herein as if fully set forth. These Stipulations of Fact are quite comprehensive and are hereby adopted as our "Findings of Fact". However, to the extent that the narrative Factual Background and Opinion which follows recites facts in addition to those listed in the Stipulations of Fact, such facts shall be considered additional Findings of Fact.



The Complainant was subsequently hired and on February 18, 1982, she reported to the Respondent's Butler County Office. On the Complainant's first day, she was given an orientation by Assistant Maintenance Manager, Richard Albert. The Complainant testified that Richard Albert explained the Respondent's disciplinary rules, and the performance evaluation process. The Complainant denied being instructed on the proper procedures for visiting the personnel office.

Following the Complainant's orientation she was assigned to a work crew where she immediately assumed the duties of a highway maintenance worker. This position is a manual unskilled laborer position which uses simple hand tools on highway maintenance and construction projects. A highway maintenance worker's duties might include: loading and unloading materials and tools from trucks; patching potholes; cleaning the pothole repair area; cutting grass; erecting fences and signs; acting as a flagman on a maintenance operation, or a variety of other odd jobs which simply required some physical exertion.

The Respondent's operation is broken down into separate maintenance districts. The Butler County Maintenance Department is a part of the Department of Transportation Maintenance District 10-2. At the relevant times of this action, Butler County had a maintenance manager, three assistant maintenance managers, several foremen, equipment operators, highway maintenance workers, and clerical staff.

When someone is hired as a highway maintenance worker, they are required to go through a six month probationary period before they are given full union benefits and rights under the terms of a collective bargaining agreement between the Respondent and the union. During the probationary period, each probationary employee's work would be evaluated in order to

determine which employees would be kept on permanently.

The Complainant only lasted approximately two months of her probationary period before she was suspended and shortly thereafter she was terminated. During her probationary period, the Complainant was assigned to work on several work crews. She worked for three separate foremen, (Ken Geibel, Patrick Acquaviva, and Grahel Ganon), and two additional equipment operators, (David Schrecongost and John Tiberi), who filled in as acting foremen during short absences of the regular foremen.

The Complainant was first assigned to Geibel's crew. The Complainant indicated that on the first day with Geibel, he gave her no instructions or explanations regarding her duties. She also suggests that he did not even introduce her to other crew members. The Complainant worked on Geibel's crew approximately three weeks during which time she mainly assisted in either hanging signs or patching potholes.

The Complainant testified that the only time Geibel commented on her work performance was when she inquired regarding how she was doing. The Complainant tells us that Geibel told her she was doing "fine, good, no problem."

Geibel testified that the Complainant was not the first woman to work on his crew. He suggested that the Complainant's talking interrupted the work of his crew and that she did not show initiative. He indicated that although the Complainant improved from her first evaluation to the second one, she had not improved to the point where she should have been kept permanently. Geibel also testified that he did tell the Complainant that she was doing a good job and that he never told her of the shortcomings he perceived.

The Complainant's next assignment was with Ganon. She worked on Ganon's crew for only three days and again patched potholes. The same was

true with the Complainant's next assignment with Acting Foreman Schrecongost. She worked on Schrecongost's crew approximately one week, during which time she again assisted in the pothole patching process.

The Complainant's next Foreman was Acquaviva. Again she only worked with his crew between one and two weeks. The Complainant indicates that she asked Acquaviva about her work performance and was told that her "work was fine, no problems." Acquaviva's testimony corroborated the Complainant's testimony on this point.

The Complainant's last Acting Foreman with whom she worked was Tiberi. The Complainant was assigned to Tiberi's crew for approximately two weeks. The Complainant testified that like Acquaviva and Geibel, Tiberi was asked how she was doing and he told her that her work was "fine, no problems."

Although Tiberi's testimony corroborated the Complainant's statement that Tiberi found her work satisfactory, his testimony also suggested that the Complainant was taken off the job site approximately five to seven times to go to the restroom. Additionally, Tiberi testified that he had asked Micklitsch to reassign the Complainant to another crew.

The overall testimony was consistent on one point. The Complainant was almost never personally given criticism regarding her work performance. On one occasion when the Complainant was on Tiberi's crew, Robert Albert came to the worksite and observed her leaning against a post idle. Robert Albert instructed Tiberi to criticize her and to insure that she was not allowed to remain idle. This incident was almost the only evidence that the Complainant was ever directly informed of a job performance deficiency.

Tereza Albert testified that she also directly criticized the Complainant regarding repeated unauthorized visits to the personnel office.

Tereza Albert suggested that the Complainant did not follow proper procedures when she visited the office. The Complainant was described as being congenial at first but becoming progressively problematical until she eventually got to the point where she was very belligerent. Tereza Albert testified that she had reported the Complainant's conduct to Micklitsch. The Complainant denied making more than one unauthorized office visit, and that was because she was unaware of the proper procedure.

Micklitsch testified that he was initially faced with some particular personnel concerns when he first became Butler County's Maintenance Manager. One specific concern was deciding which probationary employees to keep and which to fire. When Micklitsch came to Butler County, Butler was described as a problematic County. Before Micklitsch arrived, Butler had been rated among the lowest Counties in the Commonwealth. Micklitsch assumed the duties of Butler County Maintenance Manager in February of 1981 and held that position until August of 1982.

Before Micklitsch took over, Butler was managed by an acting interim manager who Micklitsch described as not too concerned with who was and was not kept after probationary periods. Thus, Micklitsch believed there were probationary employees who should have been fired but who became permanent employees both during his immediate predecessor's term and before.

Micklitsch also suggested that his foremen were union employees and as fellow union members, they were not entirely forthright regarding providing detrimental information about a co-worker's work performance. When Micklitsch took over he introduced a monthly evaluation process for probationary employees. Micklitsch indicated that he used the monthly evaluations as a flag to warn him to look closer at a probationary employee who had been given a low

monthly evaluation.

The Complainant's first performance evaluation from Geibel had five unsatisfactory and two fair ratings. Her second evaluation, also from Geibel, contained five fair and two good ratings. Although she had shown some improvement, the Complainant was suspended pending a review of her work performance. When the Complainant received the suspension notice, she requested and was granted a meeting with Micklitsch. During this meeting, Micklitsch told the Complainant that she worked circles around some men on the crews to which she had been assigned.

Micklitsch suggested his comment to the Complainant merely indicated that as a probationary employee, she had worked better than some union employees who were considered problem employees.

## OPINION

This case arises on a complaint filed by Karen M. Pritts, ("Complainant") against the Commonwealth of Pennsylvania, Department of Transportation, Maintenance District 10-2, ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about May 3, 1982, at Docket No. E-22713-D. Complainant alleged that the Respondent had discriminatorily suspended her from her position as a highway maintenance worker because of her sex, female. She alleged a 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"). On March 25, 1986, Complainant amended her complaint to further allege that her suspension subsequently became a discharge due to her sex.

The Commission investigated the allegations found in the complaint and in correspondence, dated January 5, 1983, informed the Respondent that probable cause existed to credit the Complainant's allegations. Thereafter, the Commission and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. These efforts proved unsuccessful. Thereafter, the Commission notified the Respondent that it had approved the convening of a public hearing.

The hearing convened on April 21, 1986, with Commissioner Rita Clark presiding and Commissioners Elizabeth M. Scott, and Carl E. Denson also serving on the hearing panel. Additional testimony was heard on April 22, 1986.

### Analysis

In the leading case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973), the U.S. Supreme Court set forth the basic allocation of burdens and the order of presentation of proof in a Title VII employment

discrimination case. Under this formula, which has been adopted by the PA Supreme Court for analyzing evidence in a case under the PHRA, General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976), the Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. If the Complainant succeeds, the burden then shifts to the Respondent to produce evidence which demonstrates a legitimate, non-discriminatory reason for the adverse employment decision. If the Respondent is successful, the Complainant must have a full and fair opportunity to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. This burden merges with the Complainant's ultimate burden of persuading the fact finder that she has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U.S. 248-252-53, 25 FEP 113 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983). A properly established prima facie case allows an inference of illegal discrimination, creating a legally mandatory, rebuttable presumption against the Respondent. Burdine, 450 U.S. at 254 n. 7; Casillas v. United States Navy, 735 F.2d 338, 343, 34 FEP 1493 (9th Cir. 1984).

McDonnell Douglas set forth the specific elements of a prima facie case of employment discrimination. Under this now familiar test, a Complainant must show: (1) that she belongs to a protected group; (2) that she applied for and was qualified for a job for which the Respondent was seeking applicants; (3) that, despite her qualifications, she was rejected; and (4) that, after her rejection, the position remained open and the Respondent continued to seek applicants from persons of her qualifications. McDonnell Douglas, 411 U.S. at 802. It has repeatedly been emphasized that this four part test is not rigid; its satisfaction depends on the facts of each case. See Furnco

Construction Corp. v. Waters, 438 U.S. 567, 575-76, 17 FEP 1062 (1978); Spaulding v. University of Washington, 740 F.2d 686, 700 35 FEP 217 (9th Cir. 1984); White, 605 F.2d at 458; Reed v. Printing Equipment Division of Western Gear, 75 Pa.Cmwlt. 360, 462 A.2d 292 (1983).

Since McDonnell Douglas involved a refusal to hire, not suspension and discharge, the four prong formula must be adapted. In the PHRC case of Oliver et al. v. Miley Security Services, Inc., Docket Nos. E-18942 and E-18943, we outlined the elements of a prima facie case in a case alleging a discriminatory discharge. These elements are:

1. That Complainant belongs to a protected group;
2. That Complainant was qualified for the position of highway maintenance worker;
3. That despite her qualifications, the Complainant was discharged; and
4. That the job remained available after Complainant's discharge.

Citing Ray v. Safeway Stores, 614 F.2d 729, 22 FEP 49 (10th Cir. 1980).

The Complainant's initial burden to establish a prima facie case is not onerous, see Burdine, 450 U.S. 248 (1981). In this case, the Complainant has no trouble showing a prima facie case. It is undisputed that the Complainant is a woman who was qualified for her job. She was clearly suspended and later fired from her position and the position of highway maintenance worker was available following her discharge.

The proof obligation thus shifted to the Respondent to come forward with evidence of non-discriminatory reasons for the challenged employment decisions. Here, the Respondent submits that the Complainant was suspended and ultimately discharged not because she is a woman but because the Complainant disrupted work crews by talking excessively, and asking too frequently to



be taken to a restroom. Additionally, the Respondent suggests that the Complainant had violated office visit policy, and procedures, and she failed to show initiative.

In support of this position the Respondent called numerous witnesses and offered documentation regarding the Complainant's work record. The Respondent's witnesses included the five foremen who had directly supervised the Complainant. Four of the five did have some unflattering things to say regarding the Complainant. One had asked that the Complainant be put on another crew. Another indicated that the Complainant appeared to have a negative attitude towards approximately one half of her job. Two of the foremen complained that their crews were disrupted by the Complainant's frequent requests to be taken off the job site to a modern bathroom facility. Two suggested she did not show initiative and two offered that her talking on the job interrupted work.

The Respondent also called Tereza and Richard Albert. Tereza Albert testified that the Complainant not only violated office visit procedures, but she was belligerent in doing so. Richard Albert related an incident where he discovered the Complainant standing idle on a job site. Richard Albert also testified generally that the Complainant was not the type of probationary employee the Respondent wanted to keep.

The Respondent's final witness was Micklitsch, the man who held the hiring and firing strings in the Respondent's Butler County facility. Micklitsch's testimony submitted that the Complainant's disruptive behavior and lack of initiative primarily motivated his decision to terminate the Complainant. The Respondent's position also relied on two performance evaluations which reflect poor performance.

As a whole, such evidence is sufficient to meet the Respondent's burden at this stage in the order of the presentation of proof under McDonnell Douglas. Accordingly, the Respondent simultaneously rebutted the presumption of discrimination created by the initial finding of a prima facie case, and framed the factual issues with sufficient clarity so that the Complainant had a full and fair opportunity to demonstrate that the Respondent's stated reasons are pretext.

The third and final stage in the presentation of proof thus shifts back to the Complainant. She must demonstrate that the legitimate non-discriminatory reasons given by the Respondent are not the true reasons for the Respondent's adverse employment decision. This burden merges with the Complainant's ultimate burden of persuasion that she has been the victim of sex-based discrimination.

The Complainant relied on a variety of circumstances to support her assertion that the Respondent's reasons were pretextual. Some of the incidents and comparisons cited by the Complainant are subtle, some are more glaring. However, after a thorough review of this record, we agree that the Respondent's stated reasons were a pretext and that the real reason the Complainant was terminated was because of her sex, female.

First, during one of Micklitsch's first contacts with the Complainant after Micklitsch was informed of the Complainant's pregnancy, Micklitsch delayed hiring the Complainant and told her "he could not, if for no other reason, morally offer her a job. . ." Later, during a meeting after Micklitsch suspended the Complainant, the Complainant testified that Micklitsch told her in effect, that being a highway maintenance worker was not her line of work. He told her, "you have a good signature, you would make a good secretary." This blatant sexist statement by Micklitsch was never directly denied. It also

followed a statement by Micklitsch to the Complainant that she worked circles around some of the men on the crews with which she had worked.

Micklitsch was not the only overtly sexist supervisor the Complainant had to deal with. Ganon, one of the foreman for whom the Complainant worked was equally sexist. During his cross examination he proudly agreed that he had said ". . .the work [we are] doing is heavy work, and who's kidding who, a woman cannot do it." Shortly later in his testimony Ganon again showed a callousness towards equality for women. He later stated, "...I had eight guys. I mean, I had a sufficient amount of people. I couldn't see any reason to take a woman out there."

Clearly, the Complainant was faced with significant adversity to women on the job. Despite this fundamental hurdle in front of her, the Complainant continually strived to elicit feedback from her supervisors to help her make her performance better. The Complainant specifically asked three of her foremen how she was doing. Each responded that her work was "fine, no problems."

None of the Complainant's five foremen ever personally found anything sufficiently wrong with her performance to bring a deficiency to her attention. Instead, either the Complainant was no different than other employees or she was being ignored. Either way, it would be unfair to characterize her performance as anything but satisfactory.

Similar to the foremen's lack of criticism, neither Richard Albert nor Micklitsch ever warned the Complainant that she was deficient in any way. Micklitsch suggests that since the position requires such basic skills, he prefers to allow a probationary employee to just act naturally without warning.

Micklitsch contends that if he were to warn a probationary employee of a deficiency, they would simply correct the problem until the probationary period was over then he would be stuck with a problem employee.

Although Micklitsch describes this as his philosophical approach to probationary employees, in reality, Micklitsch's practice varied substantially. Several other male probationary employees were treated differently in that they were given some form of warnings during their probationary period. For example, Roger Cook received a warning letter when he did not report to work and had not called in; Robert Hovis, a probationary employee who abused leave, lacked dependability, could not follow instructions, and tended to be idle, had his probationary period extended beyond six months pursuant to an agreement with the union; David Cupps, a union employee demoted and placed on probationary status for serious poor performance, received written reprimands during his probationary period; and David Anthony, another probationary employee was warned on two occasions about some of his work attitudes. These four men clearly received more favorable consideration and were given much more of a chance than the chance given to the Complainant. Micklitsch explains giving the male employees warnings as an effort to give them a "fair deal", or because he "had nothing to lose." It would have been equally a "fair deal" to give the Complainant the same opportunity to improve her performance as was given to the male probationary employees.

This discrepancy adds a great deal of credibility to the Complainant's undisputed testimony that both the union president and office personnel told her that Micklitsch and his assistants wanted to get rid of her. Similarly, the Complainant testified that Harry Brown, a co-worker, told the Complainant that he was present during a conversation between Geibel and

Micklitsch at which Micklitsch told Geibel to make it hard on the Complainant. Micklitsch's testimony drastically watered down the bluntness by suggesting he told Geibel that the Complainant was to be treated no different than any other worker. Micklitsch further testified that he said she was not to be shown special considerations, she was not to be expected to do any more or any less than other employees, and she had to be assigned work so she could be fairly evaluated.

Micklitsch's credibility was shaken to its very foundation when Geibel testified that Micklitsch had simply phrased his instruction as "make it hard on her." It was clear that Micklitsch only wished that his instructions had been as he testified.

Another fundamental factor works to erode Micklitsch's credibility. Micklitsch indicated that he did not make personal observations of the Complainant. Instead, he relied on the opinion of assistant managers and foremen. The Complainant's suspension was supposedly done to provide Micklitsch with an opportunity to review the Complainant's work performance.

Although Micklitsch testified that he repolled his foremen and assistant managers, his foremen did not support Micklitsch's contention. On the contrary, Acquaviva testified that he told Micklitsch he did not have any problems with the Complainant; Schrecongost never discussed the Complainant with either Richard Albert or Micklitsch; and neither Tiberi nor Ganon was ever repolled. Only Geibel was asked about the Complainant after her suspension. Accordingly, Micklitsch's review was quite different from his testimony. We chose to believe five foremen who say they were not repolled rather than Micklitsch who testified that he did repoll his foremen.

The record as a whole and these discrepancies in particular persuade us that Micklitsch's stated reasons for the Complainant's suspension and termination have been shown by a preponderance of the evidence to be a pretext for gender discrimination. Thus, the Complainant has met her ultimate burden of proving that she was treated more harshly and eventually discharged because she is a woman.

Following a finding of illegal discrimination the Commission is empowered by Section 9 of the Act to fashion a remedy, the purpose of which is not to punish the Respondent but to make the Complainant whole by restoring her to the position she would have been in but for the discriminatory act.

To be entitled to a back pay award a Complainant need only show that she has actually suffered a loss from the Respondent's improper conduct, see United States v. U.S. Steel Corp., 371 F.Supp. 1045, 1048 (N.D. Ala. 1973); PHRC v. Transit Casualty Insurance Co., 20 Pa.Cmwlt. Ct. 43, 340 A.2d 624 (1975). Once a Complainant meets her initial burden of showing economic loss, the burden shifts to the Respondent to show by "clear and convincing" evidence that back pay should not be awarded, see Johnson v. Goodyear Tire and Rubber Co., 491 F.2nd 1364 (5th Cir. 1974). In this case, the Respondent has introduced no evidence showing why back pay should not be awarded. In calculating lost wages, the method of calculation need not be mathematically precise but should be ". . . a reasonable means to determine the amount [the Complainant] would probably have earned. . ." absent the discriminatory act. PHRC v. Transit Casualty Insurance Co., 20 Pa.Cmwlt. Ct. 43, 340 A.2d 624, 630 (1975).

Based upon the wages earned by similarly situated employees, the Complainant lost \$48,431.71 in wages during the period between her discharge

and the date of the Public Hearing. This amount must then be reduced by the Complainant's actual earnings. PHRC v. Transit Casualty Insurance Co., Id.

Since the Complainant earned \$1,730.00, the back pay award should be \$46,701.71, plus interest at the rate of 6% per annum on this amount. Goetz v. Norristown Area School District, 16 Pa.Cmwlt. 389, 328 A.2d 579 (1979).

Finally, the Complainant requests the affirmative remedy of reinstatement. The Complainant should be offered the next available laborer position in Butler County and be given retroactive seniority from the date of her original date of hire.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAREN M. PRITTS,  
COMPLAINANT

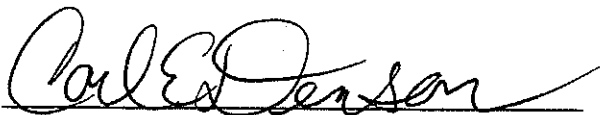
v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,  
MAINTENANCE DISTRICT 10-2,  
RESPONDENT

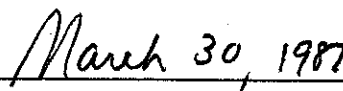
DOCKET NO. E-22713-D

RECOMMENDATION OF MAJORITY OF THE HEARING PANEL COMMISSIONERS

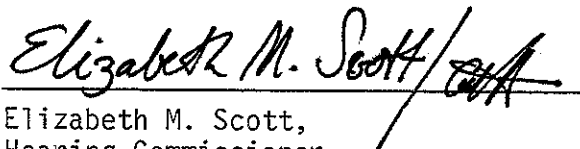
Upon consideration of the entire record in this matter, including the Complaint, Stipulations, Exhibits, Notes of Testimony, and Briefs filed on behalf of the parties, we hereby adopt the attached as our proposed Conclusions of Law, Factual Background, Opinion, and Final Order, and recommend that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.



Carl E. Denson, Hearing Commissioner



Date



Elizabeth M. Scott,  
Hearing Commissioner



Date





4. That the Respondent offer the Complainant the next available laborer position in Butler County, and give her retroactive seniority from February 18, 1982, the date the Complainant was originally hired.

5. That the Respondent shall provide written verification of its compliance with this Order to the Pennsylvania Human Relations Commission within 30 days of the entry of this Order by mailing such verification to Marianne Sara Malloy, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222-1210.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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Chairperson

ATTEST:

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Secretary

## DISSENTING OPINION

In deciding that the Complainant established that the Respondent's stated reasons were pretext for gender discrimination, the majority of the Hearing Panel relied on factors which in my opinion do not amount to a preponderance of the evidence.

The most glaring difference in our analysis rests with the comparison employees which the majority conclude were treated more favorably than the Complainant. In my opinion, the Respondent clearly distinguished each compared employee's situation from that of the Complainant's. About the only close similarity between the Complainant, Robert Hovis, David Anthony, David Cupps, and Roger Cook was that all were discharged during their probationary period.

Of these individuals, the Complainant and Cook were the only employees Micklitsch hired directly. When Micklitsch came to Butler County, he took over from an interim County Maintenance Manager who Micklitsch felt may not have been as concerned as he should be regarding who was kept permanently. Micklitsch also testified that upon his taking over, he made some policy changes which directly affected probationary employees.

Anthony and Hovis were both hired by Micklitsch's predecessor. All Micklitsch did was give them a fresh start when he arrived. After Micklitsch arrived, Anthony lasted approximately three and one-half months before being fired, and Hovis lasted only two and one-half months.

Cupps was particularly different from the Complainant in that Cupps was a problem union employee who was demoted and placed on probation. Although Cupps was on probation he maintained rights under the collective bargaining agreement. Thus, he was treated differently, but only because of his

special status. Despite Cupps' receipt of written reprimands, he too was fired approximately three months after being placed on probation.

Cook's situation is distinguishable in that Cook was a new employee who broke a major work rule. The Complainant's problems did not amount to infractions of major work rules but instead she had problems with her attitude. Cook failed to show up for work and he did not call in. Micklitsch felt that perhaps Cook did not understand the rules and merely advised Cook of the strict attendance rules.

In effect, each individual to whom the Complainant's situation was compared was under entirely different circumstances. To prevail, the Complainant should show a male employee who was comparably situated who was retained. The Complainant's main problem was in selecting employees who were also discharged and who were in extremely different factual settings.

Exhibit MM makes it readily apparent that Micklitsch was not reluctant to impose disciplinary measure against employees he determined evidenced shortcomings. The Complainant was simply one of many disciplined for perceived deficiencies.

Clearly, the Complainant had deficiencies during her probationary period. Despite the fact that many of her foremen thought she was doing OK, Micklitsch was aware from several sources of her problems. For example, Geibel did not consider the Complainant a quality employee that he wanted to pass the probationary period. Geibel told us she lacked initiative and talked excessively. This he told Micklitsch. Also when asked whether he would hire the Complainant for his own business, if he had one, Geibel told Micklitsch that he would not.

Tiberi asked that the Complainant be put on another crew. Tiberi was also asked to address the problem of the Complainant being idle at the

worksite. Schrecongost believed the Complainant had a negative attitude towards approximately  $\frac{1}{2}$  her job and lacked initiative. Only Acquaviva did not find some fault with the Complainant.

Micklitsch had considerable reason to suspend and eventually discharge the Complainant. To attach a discriminatory motive to Micklitsch's actions is speculative without a clear basis in the evidence submitted in this case.

Accordingly, I conclude that the Complainant failed to establish by a preponderance of the evidence that she was discharged because she is a woman. The weight of the evidence reveals that she was discharged because of deficiencies in her job performance and her negative attitude. The Complainant's claim of sex discrimination should therefore be dismissed.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAREN M. PRITTS,

COMPLAINANT

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,  
MAINTENANCE DISTRICT 10-2,  
RESPONDENT

DOCKET NO. E-22713-D

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

Upon consideration of the entire record in this case, it is my opinion that the Complainant failed to meet her ultimate burden of proof that the Respondent violated the Pennsylvania Human Relations Act. I therefore recommend that a Final Order of dismissal be entered, pursuant to Section 9 of the Act.

*March 30, 1987*

Date

*Rita Clark*

Rita Clark  
Hearing Panel Chairperson

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAREN M. PRITTS,  
COMPLAINANT

v.

COMMONWEALTH OF PENNSYLVANIA,  
DEPARTMENT OF TRANSPORTATION,  
MAINTENANCE DISTRICT 10-2,  
RESPONDENT

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DOCKET NO. E-22713-D

FINAL ORDER

AND NOW, this 6th day of April, 1987, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the PA Human Relations Commission by a 5 to 4 decision, hereby adopts the foregoing Opinion in accordance with the Recommendation of the Hearing Panel Chairperson, pursuant to Section 9 of the PA 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. / att  
Thomas L. McGill, Jr.  
Chairperson

ATTEST:

John P. Wisniewski / att  
John P. Wisniewski  
Secretary