COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHNNIE RENNER, COMPLAINANT

v.

MONTOUR SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-28299

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT

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

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

1. Mr. Renner never received a traffic citation or speeding ticket while working for Respondent as a school bus driver. (N.T. 11)
2. Mr. Renner had only one minor accident charged to him while working for Respondent as a school bus driver. It took place in 1980, and did not involve another vehicle or injury to any person. (N.T. 10-11)
3. No child riding on Mr. Renner's school bus was ever injured. (N.T. 12)
4. Mr. Renner was not disciplined by Respondent for anything other than occasional lateness. (N.T. 13)
5. The Montour School District continued to need the services that Mr. Renner had performed. (S.F. 17, 21, 23, 24)
6. Respondent would not have forced Mr. Renner to retire in March of 1984 had he not reached his seventieth birthday. (N.T. 79, 99, 100, 102)

7. Although Messrs. Joseck, Pavucek and Ringer testified to concerns about .Mr. Renner's driving ability which began at least two years before his retirement, none could adequately explain why he was allowed to continue driving after these concerns arose.
8. Mr. Renner was forced to retire because of his age, seventy.
9. Mr. Renner lost $6,012.25 in wages as a result of Respondent's unlawful treatment of him.

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.
4. Respondent is an employer within the meaning of the Act.
5. At the time of his forced retirement, Complainant was protected from discrimination on the basis of his age.
6. The record in this case contains direct evidence that Respondent forced Complainant to retire because of his age.
7. Where a Complainant produces credible direct evidence of discriminatory conduct, the Respondent is required to prove that it would have taken the challenged action without regard to discriminatory considerations.
8. Respondent has not established that Mr. Renner would have been retired even if he had not reached his seventieth birthday.
9. Respondent has failed to prove that requiring school bus drivers to retire at the age of seventy actually established a bona fide occupational qualification for that position.
10. Mr. Renner was forced to retire because of his age, seventy, in violation of Section 5(a) of the Act.
11. Respondent's right to due process of law was not violated by the hearing procedure used in this case, where both the hearing examiner and the prosecuting attorney were employed by the Commission.
12. Complainant is entitled to an award of all wages lost as a result of Respondent's discriminatory conduct, plus interest of 6% per annum.

OPINION

This case arises on a complaint filed by Johnnie Renner ("Complainant" against the Montour School District ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about March 20, 1984, at Docket No. E-28299. Mr. Renner alleged that Respondent discriminated against him on the basis of his age, seventy (70), by forcing him to retire from his position of school bus driver, 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"). Respondent filed an answer to the complaint which argued that the Act's coverage does not extend to persons who have passed their seventieth birthdays. It was also asserted that Mr. Renner's ability to safely operate a school bus was impaired as a result of his advanced age, so that his continued employment could have endangered school children riding on his bus.

Commission staff conducted an investigation and found probable cause to credit the allegations of discrimination. The parties and the Commission then attempted to eliminate the alleged unlawful, discriminatory practice through conference, conciliation and persuasion. These efforts were unsuccessful, and the case was approved for hearing. A public hearing was held on November 8, 1985, before Hearing Examiner Edith E. Cox.

At threshold, it is necessary to determine whether Mr. Renner was protected by the Act at the time of the action which he challenges here. Section 5 (a) of the Act provides in relevant part:

> It shall be an unlawful discriminatory practice...for any employer because of the...age...of any individual to refuse to hire or employ, or to bar or discharge from employment such individual...
>
> 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 parties disagree on the precise meaning of "between the ages of forty and seventy inclusive." Complainant argues that individuals are protected by the Act until the day before their seventy-first birthdays. Respondent argues that the Act reaches individuals only up to the day before their seventieth birthdays; after that, it is asserted, they are in their seventy-first year and beyond the Act's coverage. The issue is one of first impression. For the reasons which follow, I conclude that the position taken by the Complainant is that intended by the legislature in adopting the cited language.

First, the language itself is not ambiguous. "Inclusive", as Complainant points out, is defined as "comprehending the stated limits or extremes." <u>Black's Law Dictionary</u>, 687 (5th ed. 1979). The stated extreme is the age of seventy; one is understood to be of that age from the day of one's seventieth birthday until the next year when one attains the age of seventy- one.

Comparison of the Act with the Federal Age Discrimination in Employment Act ("ADEA") is also instructive. That statute protects "...individuals, who are at least forty years of age <u>but less than seventy years of age</u>, " 29 U.S.C. §631(a) (emphasis added). While Respondent argues that the Act and the ADEA should be interpreted consistently, the two cited passages are quite obviously different. The Pennsylvania legislature, while free to adopt the exact terminology of the ADEA, chose not to do so. Instead it chose to adopt language giving additional protection.

Nor is Respondent's argument that coverage ceases when one passes one's seventieth birthday and enters one's seventy-first year persuasive. As Complainant argues, that interpretation would have the odd result of extending the Act's coverage to individuals who had reached their thirty-ninth birthdays. Further, the Act's language is not unclear; the only reason for resorting to alternative phrasing such as "entering one's seventy-first year" is to support an alternative interpretation.

Having concluded that the Act protects individuals until the day of their seventy-first birthdays, it is necessary to consider the merits of Mr. Renner's complaint.

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 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 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 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 or not 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 Mr. Renner can make out a prima facie case by proving that:

1. At the time of the challenged action he belonged to a protected class;
2. He was performing duties which he was qualified to perform;
3. He was discharged from his position; and
4. There was a continued need for the services he had been performing.

Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979).

The parties stipulated that Mr. Renner was born on March 19, 1914, and that he was employed by Respondent as a school bus driver from January of 1974 until March 19, 1984, his seventieth birthday. It was also stipulated that he was forcibly retired on his seventieth birthday. He was thus seventy years old at the time of the challenged action and, as already determined, protected by the Act from discrimination based on his age.

Evidence introduced by Complainant also establishes that he was at the time of his forced retirement performing duties which he was qualified to perform. He had obtained in December of 1983 a physician's certificate which attested to his physical ability to perform that job. During the time that he drove for Respondent he never received a traffic citation. No child riding on his bus was ever injured. He had only one minor accident charged to him, in 1980, the circumstances

of which are not clear from the record; it is clear that no other vehicle was involved, and no injuries resulted. He was not disciplined for anything other than occasional lateness.

There can be little question that Respondent continued to need the services which had been performed by Mr. Renner. No mention was made of job elimination or reductions in force. Further, as Complainant asserts, Respondent was able to stipulate with precision to what he would have earned had he remained in his position for an additional year. This would not have been possible had there not been a continued need for the services he had been performing.

As noted, the parties stipulated that Mr. Renner was forcibly retired on his seventieth birthday. He received a letter dated February 22, 1984, from Fred Ringer, Montour's Superintendent, which stated in its entirety:

> You have served the families of the Montour School District as a school bus driver for the past ten years. You shared the enormous responsibility of providing for the safety and welfare of thousands of children, who depend on us daily for transportation to and from school.
>
> The Montour School District, in conjunction with the Age Discrimination in Employment Act, and the Pennsylvania Human Relations Act, is mandating retirement at the age of seventy (70) where public safety is the issue. On March 19, 1984, you will celebrate your seventieth (70th) birthday. The Montour School District acknowledges this day as your last day of active service and wishes to congratulate you in reaching this milestone.
>
> Your contribution to the excellence maintained in our transportation system is deeply appreciated. Best wishes to you for a long and rewarding retirement.
>
> Stipulation Exhibit, Mislabeled Exhibit D.

Two aspects of this letter are particularly significant. First, it establishes by direct evidence that age was a (if not the) determinative factor in Respondent's decision to retire Mr. Renner. Second, it refers to no factor other than age which played any part in that decision.

Mr. Renner has thus established that he belonged to a protected class, was performing duties which he was qualified to perform and for which Respondent had a continuing need, and that he was forcibly retired. As he has made out his prima facie case, it is necessary to consider Respondent's explanation of events.

Respondent's burden under the McDonnell-Douglas-Burdine analysis summarized above is the light one of introducing admissible evidence of a legitimate, non-discriminatory reason for its conduct. The situation here is different, however. Where as here there is direct evidence that a challenged action is based on discriminatory considerations, there is substantial and persuasive federal authority for the proposition that a Respondent must prove by a preponderance of the evidence that it would have made the same decision without regard to the discriminatory factor. Lee v. Russell *Co.* Board of Education, 684 F.2d 769 (11th Cir. 1982); Ramirez v. Sloss, 615 F.2d 163 (5th Cir. 1980); Crawford v. Western Electric *Co.,* Inc., 614 F.2d 1300 (5th Cir. 1980);

and see Mt. Healthy School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977). The direct evidence removes the need for the .McDonnell-Douglas analysis, the purpose of which is to isolate the factor underlying the challenged action. Also, where there is direct evidence of an employer's intent, there is *no* need for independent proof of pretext. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), cert. denied 454 U.S. 860 (1981); Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979).

Respondent here offers two explanations for its conduct. It is asserted that Mr. Renner behaved in a bizarre manner during his last few years of employment, such as to demonstrate that he posed a threat to the safety of the children riding his bus. It is also claimed that the requirement that bus drivers retire at age seventy was actually the establishment of a bona fide occupational qualification ("BFOQ").

The second contention can be quickly resolved. This Commission's regulations provide:

> A bona fide occupational qualification allowing discrimination in employment is permissible only when the employer can prove a factual basis for believing that all or substantially all members of a class covered by the Act would be unable to perform safely and efficiently the duties of the job involved.
>
> 16 Pa. Code §41.71(c).

Nothing in this record is probative of the ability of substantially all individuals aged seventy -- or indeed of any individual other than Mr. Renner -- to safely operate a school bus. Respondent's reliance on cases where a mandatory retirement age was upheld as a bona fide occupational qualification for a number of occupations, including bus driver, cannot overcome the total lack of evidence here about the abilities of other members of Mr. Renner's class. As Complainant concedes, the issue of public safety lessens Respondent's evidentiary burden in establishing a BFOQ; it does not eliminate that burden altogether. Respondent has failed to provide a factual basis for the proposition that all or substantially all individuals who have reached the age of seventy are unable to safely and efficiently drive school buses. It has in fact not even met the lighter Burdine burden of introducing evidence relevant to that issue. Respondent’s BFOQ argument must therefore be rejected.

Respondent has also failed to establish that it would have retired Mr. Renner even without regard to his age. While the record contains much discussion of supposedly inappropriate behavior and potential risks to school children on his bus, Respondent's witnesses did not testify that these factors alone would have caused them to retire him absent consideration of his age. On the contrary, the record quite clearly establishes that his age was the factor which precipitated their decision, and that he would have remained in Respondent's employ had he not reached his seventieth birthday.

Three Respondent witnesses addressed that issue: Robert Joseck, the district's transportation supervisor and Complainant's immediate supervisor, Andrew Pavucek, Transportation Director (and Mr. Joseck's supervisor); and Fred Ringer, Respondent's Superintendent.

Mr. Joseck testified that he recommended to Mr. Pavucek and Mr. Ringer that Mr. Renner be retired. While testifying that Mr. Renner's driving had deteriorated to the point of endangering children's lives for the last few years before his retirement, he was unable to explain why Mr. Renner had been allowed to continue driving after he was perceived as a hazard to his passengers.

Mr. Ringer testified to his own "...general observation of how [Mr. Renner] was sort of going downhill." (N.T.82) Most significant was the following exchange which took place during cross examination by Complainant's counsel:

Q If, over a two -- or three-year-period [Mr. Pavucek and Mr. Joseck] thought [Mr. Renner] was creating a hazard, why did you not do anything at all about it until he turned seventy?

A I generally go by their recommendations. They did not recommend that we do anything.

Q But you do have the ultimate responsibility for everything that happens in that school district is that not correct?

A Most definitely. (N.T. 86)

The most direct testimony about the rationale for retiring Mr. Renner came from Mr. Pavucek. Asked directly by Respondent's counsel what the reason for that retirement was, Mr. Pavucek responded that "(h)is age definitely became the factor that caused us to write the letter..." (N.T. 99) Asked if Mr. Renner would have remained employed had he not turned seventy on March 19, 1984, Mr. Pavucek responded that he would have, with the qualification that a harder look would have been taken at Mr. Renner's abilities. There was no suggestion in this testimony that the district in February of 1984 believed that it had justification independent of his age to retire Mr. Renner -- only that there were concerns which would have merited attention.

Central to those concerns was said to be the issue of the safety of Mr. Renner's passengers. Close examination of the testimony just referred to draws into question the actual seriousness of that concern, however. It is simply not credible that there was fear for the safety of Mr. Renner's passengers during the last two or three years that he was allowed to drive; were that the case, it would have been grossly irresponsible to have permitted him to continue driving. Under the method of analysis set forth in Burdine, supra, Respondent's purported concern with safety was clearly pretextual. For present purposes that expression of concern fails utterly to prove that Respondent would have terminated Mr. Renner absent consideration of his age.

Further, the incidents cited by Respondent in support of the assertion that Mr. Renner was a safety hazard actually tend to show that he was an extremely cautious driver; the complaints were about actions such as pulling out onto the road too slowly after picking up passengers, and hesitating for five seconds before pulling into the school bus garage. Respondents other concerns were with supposedly bizarre behavior such as neglecting his personal hygiene and keeping (for a few months in 1982 or 1983) a few stuffed animals in his car. Neither was advanced as justifying dismissal; moreover, the record contains credible evidence that Mr. Renner's hygiene was perfectly acceptable, and that the stuffed animals were simply part of a joke between himself and some friends. Finally, as Complainant argues, his own appearance at hearing was the best

possible demonstration that Respondent's stereotypical concerns about mental deterioration and impending senility were groundless. He appeared to be alert and intelligent, and his responses were perfectly lucid.

It is therefore my conclusion that Respondent forced Complainant to retire on the basis of his age, seventy, in violation of the Act. Before considering appropriate relief it is necessary to briefly discuss Respondent's claim that the proceeding here used by the Commission was unconstitutional because both the hearing examiner and the prosecuting attorney are employed by the Commission. The argument is without merit; similar arguments have been rejected by Commonwealth Court in earlier cases. See e.g. Pennsylvania Human Relations Commission v. Thorp, Reed & Armstrong, 25 Pa. Commonwealth 295, 361 A.2d 497 (1976). The process here utilized, where the case was tried before a hearing examiner whose only function at the Commission is as hearing examiner, provided more separation of function than the procedure approved by Commonwealth Court in Thorp, Reed. Respondent's constitutional challenge must therefore be rejected, and appropriate relief considered.

Following a finding of unlawful discrimination the Commission is empowered by Section 9 of the Act to award relief which includes wages lost as a result of the illegal conduct. The parties here have stipulated to the amount which Mr. Renner would have earned had he remained in Respondent's employ until his seventy-first birthday, when he was no longer protected by the Act. Interest of six percent per annum on this amount may also be awarded. Goetz v. Norristown Area School District, 16 Pa. Commonwealth 389, 328 A.2d 579 (1979). An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHNNIE RENNER, COMPLAINANT

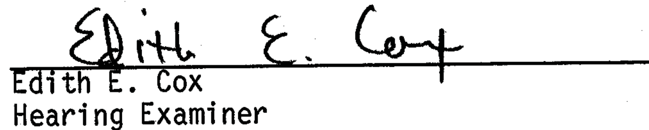
v.

MONTOUR SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-28299

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that Respondent violated Section 5 (a) of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission.



Edith E. Cox
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHNNIE RENNER, COMPLAINANT

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MONTOUR SCHOOL DISTRICT, RESPONDENT

DOCKET NO. E-28299

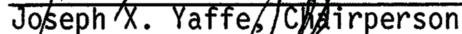
FINAL ORDER

AND NOW, this 2nd day of July, 1986, 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 Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

0RDERS

1. Respondent shall cease and desist from discriminating on the basis of age;
2. Respondent shall pay Complainant, within thirty days of the effective date of this order, the lump sum of $6,012.25, being the total of his lost wages as determined by adding the amounts listed in Stipulations No. 17, 21, 23, and 24.
3. Respondent shall pay Complainant interest of six percent per annum on the amount specified in paragraph 2 above, calculated yearly from March 19, 1985, until such time as payment is made. Payment of all amounts due shall be by check payable to Johnnie Renner delivered in care of Marianne Malloy, Esquire, at the Commission's Pittsburgh Regional Office.
4. Within thirty days of the effective date of this order Respondent shall report on the manner of its compliance with the terms of this order by letter addressed to Marianne Malloy, Esquire, at the Commission's Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 
Joseph X. Yaffe, Chairperson

ATTEST:

John P. Wisniewski, Assistant Secretary