

**COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

FLOYD L. TOMLINSON, COMPLAINANT

v.

**COMMUNITY MENTAL HEALTH & MENTAL RETARDATION CENTER,
CATCHMENT AREA #4, RESPONDENT**

Docket No. E-18547

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

AND FINAL ORDER

**COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

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v.

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Docket No. E-18547

STIPULATIONS OF FACT

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

1. The Complainant herein is Floyd L. Tomlinson, an adult male, who resides at 615 Burnham Road, Philadelphia, Pennsylvania 19119.
2. The Respondent herein is Consortium C.A. #4, Inc., 4900 Wyalusing Avenue, Philadelphia, Pennsylvania 19131.
3. The Respondent employed four or more employees in the Commonwealth of Pennsylvania at the time of Complainant's resignation.
4. The Complainant, on July 29, 1980, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-18547. A copy of the complaint is attached as Appendix "A".
5. On or about August 11, 1980, Commission staff served a copy of the complaint on Respondent in a manner which satisfies the requisites of 1 Pa. Code 33.32.
6. In correspondence, dated April 6, 1982, the Commission notified Respondent that probable cause existed to credit the allegations contained in the above referenced complaint.
7. Subsequent to the determination of probable cause, the Commission and Respondent attempted to resolve the matter in dispute between the Complainant and Respondent through conference, conciliation and persuasion, but were unable to do so.
8. In correspondence, dated October 8, 1982, the Commission notified the Respondent that a Public Hearing had been approved in this matter.
9. The Complainant was employed by the Respondent from June, 1971 until May 16, 1980.
10. The Complainant was requested to submit his resignation by Eliasib Santiago, then Deputy Executive Director and Complainant's immediate supervisor. The request came during the course of a meeting with Santiago that had occurred on April 15, 1980.

11. At the time the Complainant's employment was terminated, he held the position of Director of Consultation and Education. The Complainant had functioned in this position for nine years.
12. The Complainant, at the time of his resignation, earned a yearly salary of \$25,358.00 (\$975.31 bi-weekly).
13. On October 27, 1980, Respondent hired Sandra Becks as the new Director of Consultation and Education. Becks was thirty-five (35) years of age at the time of her selection.
14. During each year of employment, at the end of the fiscal year (6/30), Complainant received the maximum authorized pay increment.

The Stipulations of Fact, together with all appendices, and the Witness Lists and Lists of Exhibits of each party will be incorporated into a Pre-hearing Order, will become a part of the official record of this case and will be incorporated into the transcript prepared during the course of any subsequent public hearing held in this matter.

Mark D. Newberger
 MARK NEWBERGER
 Counsel for Complainant

Michael Hardiman
 MICHAEL HARDIMAN
 Counsel for Commission

May 7, 1985
 DATE:

May 7, 1985
 DATE:

Alan C. Milstein
 ALAN C. MILSTEIN
 Counsel for Respondent

May 7, 1985
 DATE:

ADDENDUM TO STIPULATIONS

1. The Complainant was born on October 8, 1919. The records available to the Respondent identified the Complainant's date of birth to be either October 8, 1921 (as listed on the Complainant's "Personnel Data Summary") or October 8, 1923 (as listed on the Complainant's "Position Description And Personal Data Questionnaire").
2. The Complainant died on November 10, 1984.
3. Had the Complainant remained employed by the Respondent from May 17, 1980 through June 30, 1981, and had the Complainant continued to be paid \$975.31 bi-weekly, he would have earned \$28,283.99 during the aforementioned time period.
4. The Complainant began working for the Friends Neighborhood Guild on September 7, 1980. Between that date and June 30, 1981 he earned \$17,930.72.
5. The Complainant did not seek full time employment after June 30, 1981.

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FINDINGS OF FACT

The foregoing "Stipulations of Fact" and "Addendum to Stipulations" are hereby incorporated herein as if fully set forth. The following abbreviations will be utilized throughout:

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

1. Mr. Tomlinson resigned from his position with Respondent, effective May 16, 1980, at the request of his then supervisor, Eliasib Santiago. (N.T. 19; R.E. 1, memorandum from Floyd Tomlinson to Clifford Bell dated April 21, 1980)
2. Mr. Santiago testified that he decided to terminate Mr. Tomlinson because he believed Mr. Tomlinson was not performing adequately and would not be able to improve his performance. (N.T. 20-26, 45-51)
3. Mr. Santiago had supervised Mr. Tomlinson for approximately one week before discharging him. (N.T. 30, 33)
4. Mr. Santiago testified that he at no time reviewed Mr. Tomlinson's personnel file. (N.T. 42)
5. Mr. Santiago testified that he at no time discussed with Mr. Tomlinson the deficiencies in performance which he (Mr. Santiago) claimed to perceive. (N.T. 24-25, 62)
6. Mr. Santiago testified that the primary function of the Department of Consultation and Education was public relations, and that under Mr. Tomlinson that function was not sufficiently "pervasive." (N.T. 19-20)
7. Mr. Santiago told Mr. Tomlinson at the beginning of the April 15, 1980, meeting: "You've been here a long time." (N.T. 24)
8. No reorganization of the Department of Consultation and Education was carried out by Mr. Santiago after Mr. Tomlinson's discharge. (N.T. 58)
9. Mr. Santiago's testimony about his reasons for terminating Mr. Tomlinson lacked credibility.
10. At the time of Mr. Tomlinson's termination, Mr. Santiago had been employed by the Center for approximately fourteen months. (N.T. 30)
11. Donald Yablon was employed by the Center as staff psychologist for the Department of Consultation and Education between 1974 and 1981; until April of 1980 he was under Mr. Tomlinson's supervision. (N.T. 108-109)
12. The function of the Department of Consultation and Education was provision of preventative mental health services. (N.T. 110, 120)
13. Mr. Santiago did not discuss the functioning of the Department of Consultation and Education with Mr. Yablon. (N.T. 111)
14. In 1976, 1977, and 1979, Mr. Tomlinson received performance ratings with the highest possible overall ratings. (C.E. 4, 5, 6)
15. Respondent terminated Mr. Tomlinson because of his age.

CONCLUSIONS OF LAW

1. Complainant is an "individual" within the meaning of the Pennsylvania Human Relations Act ("Act").
2. Respondent is an "employer" within the meaning of the Act.
3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
4. The parties and the Commission have fully complied with all procedural prerequisites to a public hearing in this case.
5. Complainant's cause of action under the Act survives his death and may be maintained by the executor of his estate, pursuant to 20 Pa. C.S.A §§371, 3373 (§975 and supp. 1985).
6. At the time of his termination, Mr. Tomlinson was protected by the Act from discrimination on the basis of his age.
7. Complainant has made out a prima facie case by proving that he was performing duties which he was qualified to perform, he was terminated from his position, at the time of his termination he was protected from discrimination based on his age, and after his termination his employer sought to replace him.
8. Respondent has introduced admissible evidence of a legitimate, non-discriminatory reason for terminating Mr. Tomlinson.
9. Complainant has established by a preponderance of the evidence that the proffered reason for his termination was pretextual.
10. Complainant was terminated from his position because of his age.
11. Prevailing Complainants are entitled to relief which includes wages lost as a result of the unlawful discriminatory conduct.

OPINION

This case arises on a complaint filed by Floyd L. Tomlinson ("Complainant") against Community Mental Health and Mental Retardation Center, Catchment Area No.4 ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about July 29, 1980, at Docket No. E-18547. Mr. Tomlinson alleged that the Center discharged him from his position because of his age, sixty, 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").

Commission staff conducted an investigation into the situation and found probable cause to credit the allegations of discrimination. Thereupon the Commission and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. When these efforts were unsuccessful, the case was approved for public hearing. That hearing was held on Thursday, May 7, 1985, in Philadelphia before Commissioner Benjamin S. Loewenstein, Esq., Chairperson of the panel, Commissioner Joseph X. Yaffe, Esq., Chairperson of the Commission, and Commissioner Thomas L. McGill, Jr., Esq., Hearing Commissioner.

The parties stipulated that Mr. Tomlinson died on November 10, 1984. The case was then pursued by his widow, Ms. Georgia Tomlinson, in her capacity as executor of her husband's estate, as authorized by 20 Pa. C.S.A. §§371, 3373.

Many of the facts giving rise to this dispute are not contested. Mr. Tomlinson began his employment at the Center in June of 1971. In April of 1980 he was functioning as Director of Consultation and Education, as he had for nine years. On April 15, 1980, he met with Respondent's then Deputy Executive Director, Eliasib Santiago, his immediate supervisor. During that meeting Mr. Santiago requested Mr. Tomlinson's resignation. Mr. Tomlinson therefore resigned, effective May 16, 1980. At the time of his termination Mr. Tomlinson was known by Respondent to be at least fifty-six years old. (He was actually sixty; Respondent's records apparently contained a discrepancy regarding his birth date.) In October of 1980, Sandra Becks was hired into the position of Director of Consultation and Education. She was thirty-five years old at the time of her selection.

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 its 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).

McDonnell-Douglas, setting out the elements of a prima facie case of refusal to hire, noted that differing factual settings 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. Cmwlth. 360, 462 A.2d 292 (1983). In this case we find that Complainant has met the burden of making out a prima facie case by proving that he belonged to a protected class, was performing duties which he was qualified to perform, was asked for his resignation, and was replaced by a person not in the protected age group. Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979).

We agree with Complainant that proof of replacement by a younger worker is not a necessary element of his prima facie case; proof of continuing efforts to employ others would suffice. In this case proof of replacement presumes efforts to replace.

Respondent has stipulated explicitly to all but the third (qualifications) of these elements (and does not in any event dispute the existence of a prima facie case). As to Complainant's prior qualifications, Respondent has also stipulated that Complainant performed the same functions for nine years and received in each year the maximum salary increase granted by the Center. In its detailed response to the complaint the Center admitted that it had never informed the Complainant that he was doing a poor job, or indeed that his performance was anything other than satisfactory. We find this sufficient to establish the element of Complainant's qualifications, and turn to Respondent's explanation of his termination.

As noted, Respondent's burden is to introduce admissible evidence of one or more non-discriminatory reasons for its actions. The burden is generally characterized as one of production; the burden of persuasion remains at all times with the Complainant. Winn v. TWA, 484 A.2d 392 (1984). Respondent has met this burden by introducing the testimony of Eliasib

Santiago. Mr. Santiago testified in essence that he decided to terminate Mr. Tomlinson because he believed that Mr. Tomlinson was not performing adequately and would not, based on his "track record", be able to bring his performance up to an acceptable level. Unsatisfactory performance is of course a legitimate and non-discriminatory reason for terminating an employee; Complainant however argues that this purported reason for his discharge is pretextual. For the reasons which follow, we agree.

Mr. Santiago admitted on cross examination that he had been Mr. Tomlinson's supervisor for roughly one week before he discharged him and that he had at no time reviewed Mr. Tomlinson's personnel file. No mention was made of discussions with Mr. Tomlinson's former supervisors. Nor did Mr. Santiago at any time discuss with Mr. Tomlinson the deficiencies which he claimed to have perceived.

Asked on direct examination to describe those deficiencies, Mr. Santiago indicated that the primary function of Consultation and Education was public relations. He testified that "...the function was not as pervasive as I wanted it to be." (N.T. 20) The sole concrete example he gave of this non-pervasiveness of function involved a community group next door to the Center. In the course of a conversation about the Center's leaves filling the organization's gutter, Mr. Santiago claimed to have learned that the organization had no knowledge of the Center's function. He attributed this ignorance to some failing on Mr. Tomlinson's part. The only other example given, so vague as to lack any probative value, involved a speech which he and Mr. Tomlinson were to give together. He testified that "...the way it turned out..." (N.T. 22), he himself had to prepare and make the presentation. No explanation was given as to why it had turned out that way.

Mr. Santiago nevertheless claimed to have determined based on Mr. Tomlinson's "track record" that it would be a waste of time to afford him an opportunity to mend his ways. The sources of his knowledge about Mr. Tomlinson's track record were two. The first, essentially osmosis, was put forth during cross examination in response to an inquiry about Mr. Santiago's opportunity (if any) to review Mr. Tomlinson's work before becoming his supervisor:

A. Well, you know, when you work in an organization you get an understanding for what takes place in that organization. Having not been a supervisor, you don't spend your days studying a specific department; you just -- you know, you get impressions of functions. (N.T. 43)

In addition, Mr. Santiago claimed to have had informal discussions with Mr. Tomlinson's staff, during which he discussed with them the department's operation and function, ostensibly to satisfy his own curiosity. He claimed to have determined as a result of these conversations that Mr. Tomlinson's staff didn't "...understand how everything fit together. (N.T. 40) Interestingly, Mr. Santiago did not testify to having had any similar conversations about the department's operation with Mr. Tomlinson himself.

Thus informed, Mr. Santiago decided to terminate Mr. Tomlinson during the meeting of April 15, 1980, a meeting which he admitted he began by telling Mr. Tomlinson: "You've been here a long time." Asked on direct examination about the significance of that remark, Mr. Santiago

essentially testified that it had none, that it was simply "...a way of introducing a conversation." (N.T. 24)

In the response to the complaint submitted by the Center, Mr. Santiago's narrative indicated his intent to reorganize Mr. Tomlinson's department. (R.E. 2, p. 2 of "Data and Documents") Cross-examined about this, Mr. Santiago eventually admitted that he had done nothing in the way of reorganization; although Mr. Tomlinson's replacement was not hired until October of 1980, Mr. Santiago testified that he had not had time to make any changes in Consultation and Education after firing Mr. Tomlinson.

Mr. Santiago's testimony, quite simply, lacked credibility. He could adequately articulate neither Mr. Tomlinson's specific shortcomings nor the source of his knowledge about them. He claimed that the termination was part of a reorganization which never occurred. He professed to have evaluated Mr. Tomlinson's "track record" without resort to the opinions of his previous supervisors, after a week as his supervisor and perhaps a year as an employee of the Center. He determined that Mr. Tomlinson was unable to conform to a new set of expectations without explaining those expectations or even once discussing with him Consultation and Education's supposed shortcomings. Asked how he was able to determine that Mr. Tomlinson hadn't simply been doing exactly what previous supervisors had wanted him to do, Mr. Santiago was flatly unable to respond. (N.T.68)

Unquestionably Mr. Santiago's decision was subjective and thus inherently suspect. General Electric v. Pennsylvania Human Relations Commission, ___ A.2d ___ We find further that his remark to Mr. Tomlinson about the latter's longevity on the job was clear evidence of discriminatory motivation. Langesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). The logical weaknesses of his testimony as developed by Complainant's counsel on cross-examination have already been explored. And Complainant's position as to the pretextuality of Respondent's defense does not rest solely upon the weakness of Mr. Santiago's testimony. Additional evidence of pretextuality was introduced.

Complainant's rebuttal witness, Donald Yablon, testified that he was employed by the Center as staff psychologist of Consultation and Education between 1974 and 1981; up to April of 1980 he was supervised by Mr. Tomlinson. Mr. Yablon testified credibly that the primary function of the department was provision of preventative mental health services, not public relations. As he concisely stated, "You don't staff your program with two psychologists to do PR. " (N.T. 111) He also testified credibly that Mr. Santiago never discussed with him the functioning of the department.

Mr. Yablon's view of the primary function of Consultation and Education as preventative was echoed by Complainant's other rebuttal witness, Cheri Owens. Ms. Owens, employed at all relevant times by the Philadelphia Office of Mental Health and Mental Retardation, participated in 1979 in a systems review of Respondent's cooperation, as program analyst for Consultation and Education.

Finally, Complainant introduced a number of documents, all available to Mr. Santiago but none of which he reviewed. Complainant's performance evaluations for 1976, 1977, and 1979 were

admitted; in each case his overall rating ("Satisfactory", "Satisfactory" and "Outstanding", respectively) was the highest possible on the given year's form. These evaluations provided strong, objective, and totally positive information about Mr. Tomlinson's "track record".

In short, we are persuaded by Complainant that Mr. Santiago was not in fact motivated by any concern about competence, but by Mr. Tomlinson's age. This conclusion is in large part a function of Mr. Santiago's lack of credibility; it is simply not plausible that he fired Mr. Tomlinson for failing to meet standards which were never explained to Mr. Tomlinson and which were based on a view of Consultation and Education which was apparently held by Mr. Santiago alone. That his credibility may fairly be attacked by Complainant in an effort to demonstrate pretext, we have no doubt; any other conclusion would have the effect of binding us to any plausible explanation advanced by a Respondent, and would effectively deprive Complainant of a meaningful opportunity to demonstrate pretext. We therefore conclude that Respondent terminated Complainant because of his age, in violation of Section 5 of the Act, and turn to consideration of appropriate relief.

Following a finding of unlawful discrimination we are empowered by Section 9 of the Act to award relief which may include lost wages. The parties have stipulated to most of the facts necessary to determine the exact amount of damages. At the time of his termination, Complainant was earning \$25,358.00 annually. (S.F. 12) He found alternate employment at the Friends Neighborhood Guild shortly after his discharge; between September 7, 1980, and June 30, 1981, he earned \$17,930.72. (A.S.F. 4)

He did not seek full time employment after June 30, 1981. (A.S.F. 5) Had he remained at the Center between the date of his resignation and June 30, 1981, he would have earned \$28,283.99. (A.S.F. 3) Complainant argues that backpay should be awarded in the amount of \$10,353.27 plus interest, that being the difference between what he would have earned between his resignation and June 30, 1981, and his actual earnings during that period. We agree, and reject Respondent's assertion that backpay should be reduced because no date was imposed upon Complainant as the effective date of his resignation. Even if that was so (and Complainant's resignation memorandum suggests that he believed a date had been imposed), we agree that it would unreasonably penalize an employee fired under circumstances such as those in this case to require him to remain in an untenable situation in order to mitigate his damages. We therefore direct entry of the final order which follows.

**COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

FLOYD L. TOMLINSON, COMPLAINANT

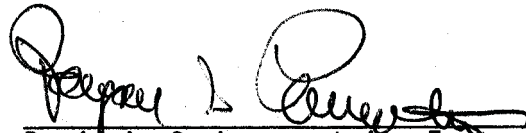
v.

**COMMUNITY MENTAL HEALTH & MENTAL RETARDATION CENTER,
CATCHMENT AREA #4, RESPONDENT**

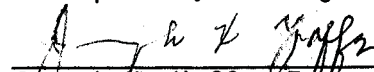
Docket No. E-18547

RECOMMENDATION OF HEARING PANEL

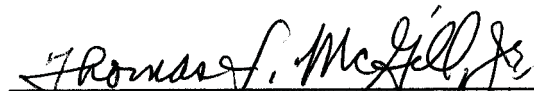
Upon consideration of the entire record in this case, the Hearing Panel concludes that Respondent violated Section 5 of the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.



Benjamin S. Loewenstein, Esq.
Chairperson, Hearing Panel



Joseph X. Yaffe, Esq.
Chairperson, PA Human Relations Comm.
Hearing Commissioner



Thomas L. McGill, Jr., Esq.
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
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Docket No. E-18547

FINAL ORDER

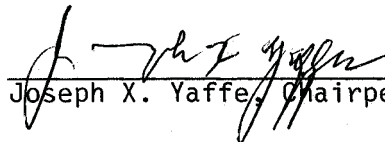
AND NOW, this 31st day of October, 1985, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the recommendation of the Hearing Panel, pursuant to Section i of the Pennsylvania Human Relations Act, and therefore

ORDERS

1. Respondent shall cease and desist from discriminating on the basis of age;
2. Respondent shall pay to Complainant's estate through its executor, Georgia Tomlinson, the lump sum of \$10,353.27, plus 6% interest per annum, within thirty (30) days of the effective date of this Order.
3. Within thirty (30) days of this Order, Respondent shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Michael Hardiman, Esq., in this Commission's Philadelphia Regional Office.

Pennsylvania Human Relations Commission

BY:


Joseph X. Yaffe, Chairperson

Attest:


Elizabeth M. Scott, Secretary