

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BUREY,
Complainant

v.

DARAN MANAGEMENT CO., INC.,
Respondent

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Docket No. E-43053

JOINT STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BUREY, :
 :
 Complainant :
 :
 v. : Docket No. E-43053-D
 :
 DARAN MANAGEMENT CO., INC., :
 :
 Respondent :

JOINT STIPULATIONS

The Pennsylvania Human Relations Commission, by Diane Blancett-Maddock, serves the following Request for Admissions upon the Respondent, pursuant to 16 Pa. Code §42.94, and requests answers to the following request.

1. Kimberly Burey was employed by Respondent as a secretary from May, 1985 till November, 1987.
2. During the time of issue of the complaint, respondent employed four or more employees within the Commonwealth of Pennsylvania.
3. Kimberly Burey is a member of a protected class, female.

4. In September 1987, Complainant was employed as a full-time secretary.

5. In September 1987, Complainant informed Respondent, David Padawer, that she was pregnant.

6. On November 6, 1987 Respondent, Randi Padawer, reduced Complainant's position from full-time to part-time.

7. Complainant was told by Randi Padawer that the reduction in hours was due to Respondent's financial situation.

8. Complainant's position was the only position reduced to part-time status.

9. The part-time position did not include medical benefits.

10. Kim Burey worked the part-time hours from November 9, 1987 to November 13, 1987.

11. Kim Burey's last day of work was November 13, 1987.

12. On November 30, 1987, respondent hired Barry Donahey as a fulltime secretary.

13. Respondent hired Kathy Hanno on January 26, 1988 as a full-time secretary to replace Barry Donahey.

14. Kim Burey was unemployed from November 13, 1987 until she became reemployed by Respondent.

15. Kim Burey was unable to work from April 23, 1988 through June 6, 1988 due to pregnancy leave.

16. In November 1987, Kim Burey was paid an hourly rate of \$4.00 per hour plus medical benefits for a 40 hour week.

17. On part-time status, Kim Burey was paid an hourly rate of \$4.00 per hour for 19.5 hours per week.

Daran Management Co
Daran Management Co., Inc.
Respondent *David K. ... May 22, 1991*

Diane Blancett-Maddock *May 22, 1991*
Diane Blancett-Maddock
PA Human Relations Commission
State Office Building - 11th Flr.
300 Liberty Avenue
Pittsburgh, PA 15222-1210

(412) 565-7979

Attorney for Commission

FINDINGS OF FACT*

1. The Complainant is an adult individual residing in the Commonwealth of Pennsylvania. (N.T. p. 8).
2. The Respondent ("Daran Management Co., Inc.") is a company doing business in Pennsylvania and employs more than four employees in the Commonwealth of Pennsylvania. (S.F. #2)
3. The Respondent co-owners are David Padawer and Randy Padawer, who are husband and wife. (N.T. pp. 12, 13)
4. The Complainant was employed by Respondent as a receptionist/secretary from May, 1986, until November, 1987. (N.T. p. 9)
5. The Respondent employed two full-time secretaries, the Complainant and Angie DiMarcelli. (N.T. pp. 12, 29)
6. In September, 1987, the Complainant informed Respondent owner, David Padawer, that she was pregnant. (N.T. p. 14)
7. Approximately two months later in November, 1987, the Complainant was informed by Respondent that her hours would be reduced from full-time to part-time. (S.F. #6)
8. The part-time position did not include any medical benefits for the Complainant. (S.F. #9)

* The foregoing "Stipulations of Facts" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
S.F. Stipulations of Fact

9. The Complainant was told by Respondent that the reduction in hours was necessary because the Respondent Company was experiencing financial difficulties. (N.T. p. 43)
10. The Complainant was the only employee whose hours were reduced from full-time to part-time. (N.T. pp. 16, 32)
11. The Complainant worked part-time at Respondent's place of business from November 9, 1987, until November 13, 1987. (S.F. #10)
12. As a result of the reduction in hours and the resultant removal of medical benefits, the Complainant resigned her position with the Respondent. (N.T. p. 17)
13. On November 30, 1987, less than three weeks later, the Respondent hired Barry Donahey, a male, as a full-time secretary to replace the Complainant. (S.F. #12)
14. On January 26, 1988, the Respondent hired another full-time secretary, Kathy Hanno, to replace Barry Donahey. (S.F. #13)
15. The Complainant was not given the opportunity to interview for the November, 1987, opening for a full-time secretary for which Barry Donahey was hired. (N.T. p. 18)
16. Also, the Complainant was not contacted nor interviewed when the Respondent hired another full-time secretary in January, 1988. (N.T. p. 18)
17. The Complainant had her baby on May 4, 1988. (N.T. p. 18)
18. In November of 1987, when Complainant left the Respondent, she was making \$4.00 an hour.
19. In 1987, the Complainant, before the reduction in hours, was working 40 hours per week. (N.T. p. 9)
20. The Complainant's weekly pay was \$160.00. (N.T. p. 9)

21. The Complainant was unemployed from November 13, 1987, until she returned to work for Respondent in January of 1989. (S.F. #14)

22. Soon after the birth of her child, the Complainant moved to the Lancaster area to look for work. (N.T. p. 18)

23. The Complainant was unemployed, relevant to this complaint, from November 13, 1987, until April 22, 1988, and from June 6, 1988, until January 13, 1989. (N.T. p. 40)

24. During the time period of April 22, 1988, until June 6, 1988, the Complainant was on temporary disability due to her pregnancy. (N.T. p. 40)

CONCLUSIONS OF LAW

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

2. The parties have fully complied with the procedural prerequisites for a public hearing in this case.

3. Complainant is a female, a protected class within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. The Respondent employs more than four employees and, therefore, is an employer within the meaning of the PHRA.

5. The Complainant established a prima facie showing of sex discrimination by showing:

- a) she is a member of a protected class;
- b) she was qualified to perform her job duties;
- c) that, despite her qualifications, the conditions of the job were made so intolerable by Respondent that Complainant was forced to resign her job duties; and
- d) the Respondent continued to seek others with similar qualifications to perform the job duties.

6. Once the Complainant establishes a prima facie case, the burden of production shifts to the Respondent to produce evidence of a legitimate non-discriminatory reason for its action.

7. The Respondent provided evidence of a legitimate non-discriminatory reason for its action.

8. Once the Respondent meets its burden of production, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination.

9. The Complainant has met her ultimate burden of persuasion by showing that the Respondent's proffered explanation is pretextual and unworthy of credence.

10. Once a finding of discrimination is made, the Commission has broad discretion in fashioning a remedy.

11. The PHRC is permitted to award interest in back pay awards at the rate of 6 percent per annum.

OPINION

This case arises on a complaint filed by Kimberly Burey (hereinafter "Complainant") against Daran Management Co., Inc., (hereinafter "Respondent") on or about February 9, 1988, at Docket No. E-43053. The Complainant alleged that the Respondent forced her resignation from her position as secretary at Respondent's company because of her sex, female. The Complainant claimed that Respondent's action violated 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. (hereinafter the "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for Public Hearing. The hearing was held on May 22, 1991, in Pittsburgh, Pennsylvania, before Phillip A. Ayers, Permanent Hearing Examiner. Diane Blancett-Maddock represented the state's interest in the complaint. David S. Padawer, owner of Daran Management Co., Inc., represented the Respondent. Commission counsel filed a post-hearing brief. Mr. Padawer did not file a post-hearing brief.

The instant case is clearly an allegation of disparate treatment based on sex. In such a disparate treatment case, the order and allocation of proof shall follow the oft-repeated general pattern first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and clarified by the Pa. Supreme Court in Allegheny Housing Rehabilitation Corp. v. P.H.R.C., 516Pa. 124, 532 A.2d 315 (1987). The Pennsylvania Supreme Court's guidance indicates that a Complainant must first establish a prima facie case of

discrimination. If a Complainant establishes a prima facie case, the burden of production shifts to the Respondent to simply produce evidence of a legitimate non-discriminatory reason for its action. If the Respondent meets this production burden, in order to prevail a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent, or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

In reference to sex-based disparate treatment cases, the elements of the prima facie showing in a constructive discharge case are:

1. that the Complainant is a female;
2. that Complainant was qualified for the job she was performing;
3. that despite Complainant's qualification, the conditions of the job were made so intolerable by Respondent that Complainant was forced to resign her job duties;
4. the Respondent continued to seek applicants of equal qualifications after rejecting her.

In the instant case, there is no dispute that the Complainant meets the first requirement of the prima facie showing. The Complainant is a female and, therefore, a member of a protected class.

Secondly, the Complainant was qualified to perform the job duties as secretary for Daran Management Co, Inc. From May 1986, the Complainant worked, until she left in November 1987. There is no indication in the

record that the Respondent was ever dissatisfied with the Complainant's performance and quality of work. Also, the Respondent later rehired the Complainant to a full-time position. Clearly the Complainant has shown that she was qualified to perform the job duties.

The next element of the prima facie case is whether the Complainant was constructively discharged. The leading Federal case in the area of constructive discharge is Bourque v. Powell Electrical Manufacturing Co., 617 F.2d 16, 22 FEP Cases 1191 (5th Cir. 1980). In Bourque, the court ruled that, in order to find a constructive discharge, "the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." Id at 65, quoting Alicea Rosado v. Garcia Santiago, 652 F.2d 114, 119 (1st Cir. 1977). The Third Circuit has adopted the doctrine of constructive discharge as formulated in the Bourque case. E.E.O.C. v. Hay Associates, 545 F. Supp. 1064, 1085-1087, 29 FEP cases 994 (E.D. Pa. 1982).

In the instant case, the record indicates that the Respondent, after knowledge of the Complainant's pregnancy, reduced her work hours from full-time to part-time. The reduction in work hours was, instead of a full-time job, the Complainant's hours were reduced to 9:00 a.m. to 12:00 Noon. Also, this change in work hours resulted in the Complainant losing medical coverage. Clearly, given the financial impact of the reduction of hours on the Complainant and the loss of benefits, the conditions of her job were intolerable in that she could not afford to work part-time, without any medical benefits. These changes in the Complainant's working conditions were the reason for the Complainant leaving her position with Respondent.

The final portion of the prima facie case is whether the Respondent continued to seek someone with similar qualifications to perform the job. The Respondent has stipulated that a full-time male secretary was hired on November 30, 1987, to replace the Complainant. Furthermore, on January 26, 1988, the Respondent hired another full-time secretary to replace the individual hired on November 30, 1987. Accordingly, the Complainant has met the fourth prong of the prima facie case, and has indeed made a prima facie showing.

As indicated in many cases, the prima facie showing should not be an onerous burden, but rather flexible and adaptable to a particular factual situation. Following the analysis presented in cases of this nature, once the Complainant has made a prima facie showing, the burden of production is on the Respondent. The Respondent has the burden of simply producing evidence of a legitimate non-discriminatory reason for its action. The Respondent in this matter has articulated that the reasons for its action was that the company was experiencing severe financial difficulties. The Respondent also asserts the reduction in hours was only intended for two months because of seasonal business.

Once the Respondent has produced evidence of a legitimate non-discriminatory reason for its action, the Complainant must demonstrate by a preponderance of the evidence that she was a victim of intentional discrimination. The Complainant can meet her ultimate burden of persuasion by showing that the Respondent's proffered explanation is pretextual and/or unworthy of credence.

It has been stipulated that the Complainant's position was the only position reduced to part-time (Stipulation No. 8). It is extremely

significant in this case that the Respondent took this action only after the Complainant told him she was pregnant.

The record is also clear that after indicating to Complainant that the financial condition of the company was so bad, the Respondent, three weeks later, hired a full-time secretary with medical benefits. Testimony at the Public Hearing revealed that the Respondent always indicated that the business was in bad financial shape. However, unchallenged testimony indicates that no one at the company ever missed a paycheck. No one other than Complainant had their hours reduced to part-time.

Recognizing that the Complainant has the ultimate burden in this matter, one must look at the issue of credibility. In dealing with credibility, one must take into account each witness's motive, state of mind, strength of memory, demeanor and manner while testifying. In the instant case, the Complainant has alleged that she was told that she was put on part-time because the company was going bankrupt. The Respondent is in agreement that the stated reason given to the Complainant was the company's financial condition. However, in looking at the Respondent's company, it appears that financial conditions never had a negative impact on anyone but the Complainant. As noted above, no one else missed a paycheck, and no one else had their hours reduced. Furthermore, soon after the Complainant was told of Respondent's "bad" financial condition, the Respondent hired a male secretary in a full-time position. Also, the Respondent now argues that its action in reducing Complainant's hours was only a temporary action for two months.

However, the Complainant, who is a very credible witness, did not indicate that there was any mention of the Respondent's action being temporary. Surely, at the time the Respondent talked with Complainant about the reduction in hours, that conversation would be the most opportune time to mention the temporary reduction. Given the evidence in the record, it is clear that the stated reason of the Respondent is pretextual, and the Complainant has met its burden of proving that the reason is pretextual.

Having found that the Respondent, in forcing the Complainant to resign, violated Section 5(a) of the Pennsylvania Human Relations Act, we now move to the issue of damages. Once there is a finding of unlawful discrimination, a remedy shall be fashioned to grant the Complainant "make whole relief" and to deter future discrimination. PHRC v. Alto Reste Park Cemetery Assn., 453 Pa. 124, 306 A.2d 881 (1973). Also, the Pennsylvania Human Relations Commission has broad discretion when it fashions an award to a Complainant. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985). In the instant case, the Complainant is asking for back pay for a specific time period. There is also evidence in the record that the Complainant sought other employment and attempted to mitigate her damages. The Respondent has not argued to the contrary.

From the limited evidence submitted, a discretionary estimate on damages must be made. In making this computation, two principles are entertained: (1) unrealistic exactitude is not required; and (2) uncertainties should be resolved against a discriminating employer. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 7 FEP 1115 (5th Cir. 1974). The specific time periods for the Complainant were from November 13, 1987, until April 22, 1988, and from June 6, 1988, until

January 13, 1989. The time period between April 22, 1988, and June 6, 1988, is not included because the Complainant was unable to work because of a temporary disability due to pregnancy. Also, in 1987, the Complainant was making \$4.00 per hour, and in 1989, when she returned, she made \$5.00 per hour. Therefore, it is not unduly speculative to set Complainant's salary in 1988 at \$4.50 per hour. As aforementioned, the record does not indicate what the male secretary made in salary when he was hired by the Respondent, so it is not possible to compare those figures. Therefore, absent such evidence, it is reasonable to estimate that Complainant would have made \$4.50 per hour in 1988. When the Complainant left the employ of the Respondent on November 13, 1987, she was being paid \$4.00 per hour and was working 40 hours per week. Therefore, the amount of damages for the Complainant in 1987 is as follows:

November 9 - November 13, 1987	\$ 100.00
November 13 - December 31, 1987.	<u>1,170.00</u>
1987.	\$1,270.00

As aforementioned in 1988, the Complainant would have made \$4.50 per hour. The calculations, which have been reduced by interim wages for 1988 are as follows:

January 1 - December 31, 1988.	\$9,360.00
April 23 - June 6, 1988 (temporary disability due to pregnancy)	Less 1,260.00
\$5.00 X 25 X 8 weeks (part-time employment) Less	<u>1,000.00</u>
1988.	\$7,100.00
Total Damages	\$8,370.00

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BUREY,
Complainant

v.

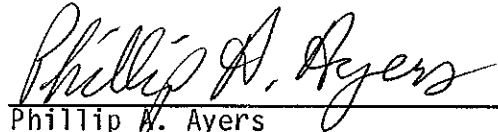
DARAN MANAGEMENT CO., INC.,
Respondent

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Docket No. E-43053

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has proven discrimination in violation of §5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.



Phillip W. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KIMBERLY BUREY,
Complainant

v.

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Docket No. E-43053

FINAL ORDER

AND NOW, this 25th day of August, 1992, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Joint Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Joint Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

1. That the Respondent shall pay to the Complainant, within 30 days of the effective date of this Order, the lump sum of \$8,370.
2. That the Respondent shall pay additional interest of 6 percent per annum, calculated from November 13, 1987, until payment is made.

3. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order, by letter addressed to Diane Blancett-Maddock, Esquire, at the Commission's Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: *Raquel Otero de Yienst*
Raquel Otero de Yienst
Vice-Chairperson

ATTEST:

Gregory J. Celia
Gregory J. Celia, Secretary