

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS F. CRONE,
Complainant

v.

BMY, A DIVISION OF HARSCO,
Respondent

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Docket No. E-39596

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Respondent, BMY, is a Division of Harsco, (hereinafter "BMY") located in York, Pennsylvania, manufactures "Special Purpose Track & Wheel Vehicles." (C.E. 3)

2. The Complainant, Phyllis F. Crone, (hereinafter "Crone") is an adult Female who was employed by BMY from October 20, 1986 to December 11, 1986. (N.T. 148)

CRONE'S WORK HISTORY PRIOR TO BMY

3. Prior to her employment at BMY, Crone's work history included the following positions: (a) 1970-1971 Electronics Assembler, Bendix Corp; (b) 1975-1978 Assembler, York Electro Panel; (c) 1978-1979 Wiring, Ettco Tool & Machine Co; and 1979-1986, Maintenance Electrician, Borg-Warner. (C.E. 2)

4. On April 8, 1986, while employed at Borg-Warner, Crone completed a 4 year apprenticeship program which qualified Crone to be recognized as a journeyman "Maintenance Electrician." (N.T. 152; C.E. 34, 35)

5. During Crone's apprenticeship program Crone had been criticized for her attitude and performance problems. (N.T. 320; R.E. 1, 2)

6. Prior to working at Borg-Warner, Crone had no electronic equipment repair experience. (N.T. 305)

7. Prior to Crone's apprenticeship program at Borg-Warner, Crone had not held a maintenance electrician position at Borg-Warner. (N.T. 310)

*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 Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

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

8. Crone had personally recorded time spent during her apprenticeship on electronics matters at approximately 15½ months total. (N.T. 315, 316)

9. Shortly after completing her apprenticeship at Borg-Warner, Crone was laid off on or about April 1986, and again in August 1986. (N.T. 148, 316)

EMPLOYMENT AT BMY

10. During the relevant time period, there existed a collective bargaining agreement (hereinafter "CBA"), between BMY and United Steelworkers of America, Local Union Number 7687 (hereinafter the "Union").

11. Appendix A of the CBA categorized positions at BMY into Labor Grades 1 through 20. (R.E. 37)

12. Under the CBA, the position of Maintenance Man-Electrical, (hereinafter the "electrical position") is listed as Labor Grade 16. (R.E. 37)

13. The position of Maintenance Man-Electronic Repairman, (hereinafter the "electronics position") is listed as Labor Grade 18. (R.E. 37)

14. BMY's established minimum requirements for the electronic position was 49 months of prior related experience. (N.T. 289, 373, 682)

15. At BMY, job opening generally begin with a requisition generated by a department manager which is forwarded to BMY's personnel office where the requisition is reviewed, and, if the position opening is approved, posted throughout BMY for 2 days for internal employee bids. (N.T. 185, 186, 248)

16. The CBA required job openings to be offered in-house before seeking applicants "off the street." (N.T. 187)

17. After bids have been received, an initial screening is done to separate qualified from unqualified bidders. (N.T. 186)

18. After the initial screening, a list of qualified bidders, if any, is sent to the requesting department for review. (N.T. 186)
19. If a department then felt an individual was qualified, the qualified bidder would be promoted. (N.T. 186)
20. Internally, when no qualified BMY employee can be found, the job is filled externally. (N.T. 187)
21. BMY employees undergo an initial probationary period of 60 days. (N.T. 164, 206; C.E. 41)
22. Probationary employees are usually given a 30 day review and a 60 day report. (N.T. 496)
23. Under the CBA, a probationary employee's 60 day probationary period could be extended for an additional 30 days. (C.E. 41)

CRONE'S APPLICATION PROCESS WITH BMY

24. Following several layoffs from Borg-Warner, the last of which was in August 1986, Crone called BMY looking for a job in the electrical field. (N.T. 151, 189)
25. When Crone first called BMY, BMY was very interested in Crone because BMY had no women in the trades categories. (N.T. 189, 708-709)
26. As a government contractor, BMY was concerned about certain EEO affirmative action goals. (N.T. 190, 737)
27. During Crone's initial call to BMY, BMY expressed an interest in Crone, and Crone was instructed to forward her resume and documentation regarding her apprenticeship program. (N.T. 152, 189)
28. Also during Crone's initial discussions with BMY's personnel administrator, Bruce Eveler, (hereinafter "Eveler"), the subject of electronic positions at BMY was discussed. (N.T. 190)

29. Crone indicated to Eveler that she would like to eventually get into the electronics area. (N.T. 190)
30. Eveler indicted to Crone that he thought she was not qualified for an electronic position but since Crone's journeyman certificate was as an electrician, Crone appeared qualified for a maintenance electrical job. (N.T. 195)
31. Crone was also advised that with future experience, Crone could bid on an electronic repair position. (N.T. 196)
32. For an electrical position at BMY, an applicant's qualifications were reviewed by Eveler, however, the final word on qualifications came from BMY's first level supervisor, Barry Hivner, (hereinafter "Hivner") and the General Foreman, William Miller, (hereinafter "Miller"). (N.T. 196)
33. Crone was interviewed by both Hivner and Miller. (N.T. 202)
34. After interviewing Crone, Hivner was of the opinion that Crone lacked sufficient hands-on experience and was only marginally qualified for an electrician position. (N.T. 202, 204)
35. Crone had not been the only applicant for the open electrical position. (N.T. 407, 409, 400)
36. Eighteen male BMY employees had unsuccessfully bid on the opening. (N.T. 253)
37. Men with comparable backgrounds were interviewed and not hired. (N.T. 205, 400)
38. Hivner felt none of the applicants he had considered were what he was looking for. (N.T. 402)
39. Specifically, Hivner raised reservations that Crone lacked experience on welders and doing crane work. (N.T. 402)

40. Despite the reservations raised regarding Crone's specific qualifications, BMY gave Crone an opportunity under BMY's affirmative action program goals. (N.T. 204, 223, 407, 756)

41. Hivner testified that BMY had never hired anyone for an electrical position with as little experience as Crone. (N.T. 406)

DAVIS HIRED FOR ELECTRONIC REPAIR POSITION

42. In November 1985, Dennis Davis (hereinafter "Davis"), applied for a job with BMY. (N.T. 198; 460)

43. Davis was offered a job contingent upon passing a physical. (N.T. 200)

44. A hernia prevented Davis from passing the physical. (N.T. 200, 716)

45. Davis was instructed that if he were to have the hernia surgically repaired, Davis would be offered a position at BMY. (N.T. 200, 469-470, 716)

46. Davis' hernia was surgically repaired on March 6, 1986. (N.T. 721; R.E. 38)

47. Davis' prior work history included work on the same type of machinery as that in the BMY facility. (N.T. 448, 451)

48. On October 27, 1986, Davis began working at BMY in an electronic position. (N.T. 468; 475, 483, 687)

49. Davis accepted the electronic position on October 20, 1986. (N.T. 482, 687, 730; C.E. 39)

50. Prior to Davis accepting a position at BMY, the electronics position had been internally posted. (N.T. 630)

51. Three men in electrical positions had bid on the electronic position which was eventually given to Davis. (N.T. 631; R.E. 48)

52. One of the unsuccessful bidders had been a maintenance electrician for almost nine years. (N.T. 631)

53. BMY did not seek outside applicants for the position given to Davis. (R.E. 48)

CRONE'S JOB ASSIGNMENTS AT BMY

54. Crone was employed by BMY in the position of Maintenance Man-Electrical from October 20, 1986 to December 11, 1986. (N.T. 148)

55. Crone was placed on BMY's second shift under the second shift electrical maintenance foreman, Hivner. (N.T. 160)

56. On Crone's 2nd or 3rd day at BMY she unsuccessfully bid on an electronic repair position and additionally, she tried to change shifts from the 2nd shift to the 3rd. (N.T. 331; R.E. 4,5)

57. Approximately 3½ weeks into her employment, on November 13, 1986, Crone again bid on another job as a research and development engineering technician. (N.T. 334; R.E. 7)

58. In 1986, BMY was undergoing plant expansion and new office construction causing a lot of electrical construction type of work. (N.T. 410)

59. It was customary for new employees to be assigned to work with another electrician for a period of plant familiarization, then to be assigned minor jobs alone. (N.T. 410-411)

60. Although Crone testified that she did not understand she would be assigned construction work and believed she had an agreement with Eveler that she would be assigned machine repair work and not construction work, Crone understood the electrical position to include construction work. (N.T. 303, 326-327, 328-329, 372)

61. Crone was assigned construction work which she did not like and never wanted to do. (N.T. 329-330, 331, 429)
62. All electricians, and at times employees in electronic positions, were assigned construction work. (N.T. 412)
63. On one occasion when Crone was assigned a job to do alone, Crone sought help because she was unable to hook up a 3 way switch, a basic wiring task. (N.T. 413)
64. On another occasion, Crone was discovered having set up a ladder in a condition deemed unsafe. (N.T. 414)
65. When assigned to repair a crane, Crone expressed her dislike for height. (N.T. 414)
66. Crone complained about getting dirty from ducts on which she was working. (N.T. 414)
67. Crone's direct supervisor was Hivner, whose supervisor was Miller, whose supervisor was, the Superintendent of the Maintenance Department, Tom Kohanski, (hereinafter "Kohanski"). (N.T. 352, 735, 736)
68. At one point, Kohanski observed Crone just standing by for approximately 1 hour while a co-worker worked. (N.T. 737-739, 758)
69. Kohanski advised Miller and the matter eventually became the subject of a memorandum. (N.T. 739; R.E. 19)
70. Hivner indicated that on another occasion he had to send another electrician back to redo a job which had been assigned to Crone. (N.T. 429)
71. Hivner kept written records on employees when an employee was experiencing or becoming a problem. (N.T. 487, 640)

72. Hivner had very few problems with employees he was supervising. (N.T. 492)

73. Periodically, Hivner spoke with Crone about matters he considered problem areas. (N.T. 497, 642; R.E. 16, 17)

74. At some point, Hivner approached Miller and discussed Crone's troubles and unsatisfactory performance. (N.T. 430)

75. Hivner came up with the option of offering Crone an additional 30 days on her probationary period. (N.T. 430)

76. Hivner testified that he never had a probationary employee with as many problems as Crone was having. (N.T. 639)

77. Thirty day reviews had been done on most electrical maintenance department probationary employees, but not all. (N.T. 219; 495, 732)

78. Crone was one of several probationary electrical maintenance department employees not given a 30 day review. (N.T. 171)

79. Hivner testified that normally he did not give a probationary employee a bad 30 day review, but instead he wanted to give a problem employee more of an opportunity to do the job and prove themselves so Hivner might possibly be able to give a satisfactory 60 day report. (N.T. 496)

CRONE'S PAY AT BMY

80. The terms and conditions of the employment of BMY union employees were dictated by the CBA, and other agreements between BMY and the union which supplemented the CBA. (N.T. 208)

81. In addition to the CBA, BMY and the union agreed to follow a Job Description and Classification Manual (hereinafter the "Manual") which recognized a number of variables when establishing wage rates. (N.T. 208, 696; R.E. 14)

82. Under the manual, three wage rates were established:
- A. A "standard rate" equal to the plant standard hourly wage scale rate for the respective job class of the job.
 - B. An "intermediate rate" at a level two job classes below the standard rate.
 - C. A "starting rate" at a level four job classes below the standard rate.

(N.T. 210; R.E. 14)

83. It was not unusual for both new employees and individuals promoted in-house to be paid at wage rate B during a familiarization period of six months. (N.T. 209, 210, 216, 454, 563, 596-597, 602-603, 627-628, 689, 706-707; R.E. 41)

84. One or two had even begun at wage rate C. (N.T. 217)

85. Hivner and Miller decided which wage rate should be applied to new employees in the electrical maintenance department. (N.T. 212, 454)

86. Unless a newly hired employee had a substantial amount of directly related experience, new employees were paid at the Class B intermediate rate during an initial 6 month familiarization period. (N.T. 211, 454, 659)

87. Because Crone lacked a sufficient amount of directly related experience, BMY initially classified Crone as Class B for pay purposes. (N.T. 208-209, 309, 312)

88. In the five year period prior to Crone's hire, there had been 12 males hired, transferred or promoted by BMY into either electrical or electronic positions. (N.T. 218; R.E. 41, 48)

89. Six of these 12 males began at the Class B wage rate. (N.T. 218; R.E. 41, 48)

90. All those hired, transferred or promoted who began at the Class A wage rate had more experience than Crone. (N.T. 218; R.E. 41, 48)

CRONE'S TERMINATION

91. Under a CBA provision, a BMY probationary employee could be discharged "as exclusively determined by the Company." (C.E. 41)

92. There were continued problems with Crone's work throughout her employment at BMY. (N.T. 419, 422)

93. In early December, 1986, Hivner spoke with Eveler who had no objection to Crone being offered an additional 30 days probation in order to provide Crone with an additional opportunity to demonstrate she could both learn and do the job. (N.T. 431, 432, 438, 543)

94. Specifically, male electricians had been offered similar probationary extensions. The practice of extending a probation was generally not uncommon. (N.T. 437, 570, 599; C.E. 41)

95. On or about December 10, 1986, at two separate meetings with Hivner, Hivner's immediate supervisor, Bill Miller, (hereinafter "Miller"), and union representatives, Bowersox and Terry McBride (hereinafter "McBride"), Crone was told that BMY wanted to extend her probationary period because Crone lacked skills in construction work. (N.T. 164, 165, 434, 540, 542-543, 568, 585)

96. At one of these meetings, Crone was really upset to learn BMY wanted to extend her probation and responded with profanity, some of which was directed at Kohanski. (N.T. 168, 353, 434, 436, 543-544)

97. At one point, McBride took Crone out of the meeting to try to calm her down and to advise her that she should think about the offer of extended probation. (N.T. 168, 434, 544, 546)

98. Crone reentered the meeting and conveyed to Hivner and Miller that she wanted to think about the offer until the next day. (N.T. 168, 545)
99. Crone was advised that she could take a day and think the offer over. (N.T. 169)
100. After the first meeting, Crone went to speak to Kohanski. (N.T. 438-439; 743, 771)
101. Kohanski indicated that Crone barged into his office and Kohanski characterized Crone's demeanor as "very bad, profane, obnoxious, confrontative mode." (N.T. 743, 765)
102. In effect, Crone told Kohanski that she should be in electronics and not working in electrical repair, and that Kohanski could take his extension offer and do "you know what" with it. (N.T. 743)
103. Kohanski responded to Crone by advising her she had been hired in an electrical position and was expected to fulfill those duties. (N.T. 744)
104. The meeting ended when Crone abruptly stormed out. (N.T. 744)
105. Kohanski then called BMY's Manager of Industrial Relations, Robert Brawner (hereinafter "Brawner") and shared with him what had occurred and asked his advice. (N.T. 744-745)
106. Brawner recommended Crone's immediate termination. (N.T. 745)
107. Approximately 10 minutes before Crone was advised of her termination, Crone had approached Hivner and advised him she would accept the extension of probation and that she had made a big mistake the night before when she had spoken with Kohanski. (N.T. 438-439, 609, 622-623).
108. Shortly after this discussion, Hivner was called to BMY's Personnel Department and advised to tell Crone she was being terminated. (N.T. 170, 441, 662-663)
109. Crone was terminated for the reason: "Unsatisfactory probationary period." (N.T. 663-664, 743, 745-748)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the PHRC have fully complied with the procedural prerequisites to a public hearing in this case.
3. Phyllis Crone is an individual within the meaning of the Pennsylvania Human Relations Act. ("PHRA").
4. BMY is an employer within the meaning of the PHRA.
5. Crone has the burden of establishing a prima facie case for each of three allegations of sex-based discrimination raised in her complaint.
6. Crone failed to establish a prima facie case that she was not initially hired into an electronics position.
7. Crone has established a prima facie case of disparate wages by showing:
 - (a) BMY paid unequal wages to employees of opposite sexes;
 - and
 - (b) the jobs in question were equal.
8. BMY articulated a legitimate nondiscriminatory reason why Crone was being paid less than male electricians at the point in time when Crone worked for BMY.
9. Crone failed to establish that BMY's reasons were a pretext for discrimination.
10. Assuming arguendo that Crone established a prima facie case of sex-based termination, BMY articulated legitimate non-discriminatory reasons for Crone's discharge.
11. Crone failed to establish that BMY's articulated reasons for her discharge were pretextual.

OPINION

This case arises on a complaint filed on or about February 23, 1987, by Phyllis F. Crone (hereinafter "Crone") against BMY, a Division of Harsco, (hereinafter "BMY"), with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). On or about October 22, 1987, Crone filed an amended complaint. Crone's original complaint alleged that she was terminated because of her sex, female. In her amended complaint, Crone added two additional sex-based allegations: denial of equal pay and an initial assignment as a maintenance man-electrical when Crone had wanted the position of maintenance electronic repairman. Each of these three sex-based allegations allege violations of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

PHRC staff investigated the allegations and at the investigation's conclusion, informed BMY that probable cause existed to credit Crone's allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion but such efforts proved unsuccessful. Subsequently, the PHRC notified BMY that it had approved a Public Hearing.

The Public Hearing was held on September 16, 17, and 20, 1991, in York, PA., before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Colie Chappelle. J. Robert Kirk, Esquire, appeared on behalf of BMY. Following

the Public Hearing, the parties were afforded an opportunity to submit briefs. The post-hearing brief on behalf of the complaint was received on December 5, 1991, and the brief for BMY was received on December 3, 1991.

Regarding Crone's substantive allegations, we recognize that the nature of her claims present allegations of disparate treatment, and although Crone's allegations focus on three distinct aspects of her employment, (initial job assignment, pay, and termination) the analytical mode of evidence assessment is generally the same for each separate allegation raised. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the PA Supreme Court clarified the order and allocation of burdens first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The PA Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then 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 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).

The PA Supreme Court also indicated that if a Complainant "produces sufficient evidence that, if believed and otherwise unexplained,

indicates that more likely than not discrimination has occurred, the [Respondent] must be heard in response." If the Respondent fails to respond the presumption of discrimination created by the prima facie showing stands determinative of the factual issue and the Complainant must prevail. However, when a Respondent offers a non-discriminatory explanation for its actions, the presumption of discrimination drops off. Allegheny Housing Authority, Supra.

Following its instruction on the effect of a prima facie showing, and a successful rebuttal thereof, the PA Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The Court stated that:

[A]s in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes." Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing Authority, Supra at 319.

In this court designed tripartate burden allocation, Crone must, of course, first establish a prima facie case by a preponderance of the evidence. Since Crone's complaint alleges three separate acts of harm, (initial job assignment, pay, and termination), she must establish a prima facie case for each allegation. Since McDonnell Douglas, Supra, was a race-based refusal to hire case, the literal phrasing of the prima facie burden articulated in McDonnell Douglas does not precisely fit any of the three acts of harm alleged by Crone. Additionally, Allegheny Housing Authority, Supra, although a discharge case, fails to specifically list the factors necessary to establish a prima facie showing of a discriminatory discharge. Accordingly, the McDonnell Douglas proof pattern must be adapted to fit the factual variances presented by the three separate allegations raised in the instant case.

To establish a prima facie case of a failure to initially hire Crone into the craft position of maintenance electronic repairman, Crone must establish:

1. That she is a member of a protected class;
2. That she was qualified for a position which was available;
3. That despite her qualifications, she was not assigned the electronics position; and
4. That an available position was filled by an individual with either less or comparable qualifications who was not a member of the protected class.

PHRC v. Johnstown Redevelopment Authority, Pa. , 588 A.2d 497 (1991);
See also, Stancil v. Clayton, 30 FEP 730 (DCDC 1978); and Garner v. Boorstin, 690 F.2d 1034, 29 FEP 1765 at 1767 n. 4 (D.C. Cir. 1982)

Regarding Crone's disparate pay allegation, she must establish:

1. That the Respondent pays unequal wages to employees of opposite sexes working within the same establishment; and
2. That the jobs in question involve equal work, which means work that is equal in skill, effort, and responsibility and that is performed under similar working conditions.

Sabo v. Superior Valve Co., Docket No. E-33055 (Pa. Human Relations Commission, November 30, 1989), citing Brennan v. Corning Glass Works, 417 U.S. 188 (1974).

Finally, to establish a prima facie case of sex-based discharge, Crone must show:

1. That she is a member of a protected class;
2. That she has been performing her job satisfactorily;
3. That she was discharged; and
4. That she had been treated differently from comparably situated male employees.

See PA State Police v. PHRC, 116 Pa. Cmwlth. 89, 542 A.2d 595 at 600, 601 (1988) vacated and remained on other grounds.

Regarding Crone's first allegation that when she was hired by BMY, BMY placed her in the position of maintenance man-electrical instead of maintenance man-electronic repairman, Crone encounters several difficulties with her burden of first establishing a prima facie case. Clearly, Crone meets the first element and portions of the third and fourth elements of her required prima facie showing. Being a woman, Crone is, of course, a member of a protected class. It is equally clear that Crone was not assigned an

electronics repair position, and that on October 27, 1986, a male, Dennis Davis, began working as an electronic repairman. The remainder of the requisite prima facie showing is not clear at all.

First, there is a sizeable question whether a position was even available. In reality, the evidence in this case mentions two electronic repair openings. During the week of October 20, 1986, BMY posted an electronic repair position. This was during Crone's first week of employment. Crone unsuccessfully bid on this opening and when asked directly, Crone specifically indicated that she had no intention of making a claim in connection with her unsuccessful bid for that opening.

The only opening Crone questions is the position given to Dennis Davis, (hereinafter "Davis"). Precise chronological details of the filling of this opening were not fully explored or developed through the evidence presented in this case. However, the record does reveal several things. First, Davis was initially interviewed by BMY in November 1985.

On Davis' application, Davis indicated the type of work he had desired was "Electronic Tech." After interviewing Davis, BMY's Electrical/Electronic Repair Supervisor, Barry Hivner, (hereinafter "Hivner"), entered the following written comment on Davis' application:

Mr. Davis has experience on CNC and a good understanding of [GAK] CNC, he also has good background experience in the electric field, and would be a prime candidate for the [electrician] job coming up.

When testifying at the Public Hearing, BMY's personnel administrator, Bruce Eveler, (hereinafter "Eveler"), offered that Davis had been hired in November 1985 as an electronic repairman, subject to Davis passing a pre-employment physical. However, Davis' physical disclosed an abdominal hernia which prevented his employment.

Clearly, there is some degree of inconsistency between Hivner's written comment and Eveler's recollection of BMY's November, 1985 contact with Davis. Hivner indicated Davis would be a prime candidate for the electrician job coming up and Eveler says Davis was offered an electronic repair job contingent upon Davis passing a physical.

There is no dispute with respect to the general events which transpired after Davis' physical revealed a hernia. The record indicates an agreement was reached between BMY and Davis: If Davis would undergo surgery for repair of the hernia, BMY would offer Davis a job. In effect, BMY was offering Davis an accommodation for his hernia.

Davis' hernia was repaired on or about March 1986, and on March 6, 1986, this information was noted on Davis' original application. On a date uncertain, BMY offered Davis an electronic repairman position, which offer Davis accepted on or about October 20, 1986.

Crone's first contact with BMY was through a phone call Crone initiated. Crone called looking for work in the electrical/electronic field. Crone initially spoke with Eveler, and after this conversation, Crone forwarded her resume and information regarding a certificate of completion of an apprenticeship program. Subsequently, Eveler called Crone and asked Crone to come in to fill out an application.

Crone's application is dated September 30, 1986, and Crone testified that she completed the application approximately a week to two weeks after she had made the first call. Accordingly, Crone's first contact with BMY was approximately mid September. Davis accepted the offer of the electronic position October 20, 1986, approximately one month later.

From this information an inference can be drawn that an electronics repair position may well have been available when Crone made an application for employment with BMY on September 30, 1986.

The next question which must be answered is whether Crone can show by a preponderance of the evidence that she was qualified for the position of electronic repair. On this issue, Crone's and Eveler's testimonies are strikingly different. Both Crone and Eveler agree that Crone had inquired about a position in the electronics field, however, the similarities in the testimony end here. Eveler testified that he instructed Crone he thought she was not qualified for the electronic repair position. Crone's testimony, while quite different, was inconsistent. First Crone testified she was told there was both an opening for electrical repair and electronics repair. A very short while later, Crone suggested Eveler told her an electrical repair job was open and in a few weeks one would be coming open in the electronics area. This glaring inconsistency damages Crone's credibility on this point.

Crone went on to testify that Eveler told her her background looked good in electronics. This too is inconsistent with a basic qualification requirement for the electronic repair position. BMY specifically required a minimum of 49 months of training and experience in electronic repair and related work. The papers Crone submitted indicated she only had approximately 15 months of an electronics component while undergoing her prior apprenticeship program.

The evidence considered as a whole leads to the conclusion that Eveler's version of what Crone was told is more accurate and that in fact, Crone did not possess the minimum qualifications for the electronics position.

This is not Crone's only difficulty with establishing the requisite prima facie showing regarding this aspect of her allegations. Under the fourth element, Crone must show that a male who was either less qualified or comparably qualified was given the electronic repair position.

On this issue, there is virtually no question that Davis' experience and background better qualified him for the opening. Davis' experience consisted of 14 years of hands-on experience as a maintenance electrician and electronic repair. Additionally, Davis' work had been on the identical type equipment that BMY had.

Another interesting factor is that Crone and Davis were not the only individuals seeking the electronic repair job eventually awarded to Davis. Three men from the maintenance electrical department at BMY had bid on the position. One of these three had been in BMY's maintenance electrical department for nearly 9 years.

Accordingly, Crone is unable to establish the fourth element of the requisite prima facie showing as well. Of course, to make out a prima facie case, all elements must be established by a preponderance of the evidence. Here, Crone falls short on two out of four of the requisite elements.

Turning to Crone's second allegation that she was denied equal pay, once again Crone has not successfully proven this allegation. Even though arguably a prima facie case can be shown, when a close review is made, Crone's case falls apart.

Clearly, at the time of Crone's employment, BMY paid co-worker male electricians more than Crone was being paid and the jobs were equal. However, BMY's activated reason behind this apparent disparity clearly explains the wage structures at BMY.

Wages are first controlled by a position's grading as established by the CBA. An electrician position under the CBA is generally a labor grade 16. However, BMY and the Union operated under a supplemental agreement which provided for three classes of wage rates which depended upon legitimate nondiscriminatory factors:

Class A - A "standard rate" equal to the plant standard hourly wage scale rate for the respective job class of the job.

Class B - An "intermediate rate" at a level two job classes below the standard rate.

Class C - A "starting rate" at a level four job classes below the standard rate.

When Crone began at BMY, she was paid at the Class B rate, two grades below all other electricians. Looking at this from the perspective of a snap shot, this appears unequal. However, the appropriate assessment is not that of a snap shot but instead a motion picture.

The evidence as a whole shows that Crone's initial assignment to the Class B wage rate was entirely consistent with BMY's treatment of males previously hired, transferred, or promoted into both electrician and electronic positions. Between 1980 and 1988, twenty-two men came into electrical craft positions at BMY. Of those men, eight began at Class B, and two even began at Class C, an even lower wage classification. Of the men who began at Class A, the experience levels far exceeded Crone's experience. In fact, of the men who also began at Class B, there is evidence that none had as little experience as Crone.

Crone presented no evidence in support of her ultimate burden to show BMY's evidence was either untrustworthy or pretextual. Instead, the evidence was clear that Crone's Class B wage assignment was merely to be assigned for a 6 month initial familiarization period and like men before her, to be raised to Class A after the familiarization period was successfully completed. For this reason, Crone failed to prove by a preponderance of the evidence that she was denied equal wages based on her sex.

We next turn to Crone's remaining allegation: a sex-based termination. First, we look to whether Crone has successfully established the requisite elements of a prima facie case. Once again, Crone has no difficulty establishing elements 1 and 3, and great difficulty with elements 2 and 4.

Clearly, Crone is a member of a protected class and was terminated. The questions here are whether she was performing the job satisfactorily and whether she was treated differently.

Frankly, Crone's evidence makes little to no effort to rebut a variety of work performance problems articulated by witnesses for BMY. Similarly, Crone's evidence made only a limited effort to compare herself with a similarly situated male who was treated differently.

Here an initial argument can be made that since there was an effort to extend Crone's probationary period, she was performing at least well enough to be considered potentially capable of successfully completing a probationary period. Also, Crone did present evidence of a male in an electronic position who significantly damaged an expensive piece of equipment and was only demoted not terminated.

Assuming arguendo that a prima facie case has been established, we look to BMY's articulated reasons for Crone's termination. Again, there was un rebutted evidence of documented performance problems with Crone. Crone herself admitted she did not like and was just not interested in electrical construction assignments she had been given.

Furthermore, Crone's performance problems eventually resulted in a decision to offer her a 30 day extension of her probation. Crone's reaction to the offer began as extremely negative and eventually led to a withdrawal of the offer and her termination. The evidence finds Crone barging into Kohanski's office, (Crone's third level supervisor), complaining about her assignments and telling Kohanski he could do "you know what" with the offer to extend her probation.

Conflicts in the testimony regarding Crone's limited version of her conversation with Kohanski and the testimony offered by Kohanski are resolved in favor of Kohanski's version. Crone's testimony acknowledged an exchange with Kohanski, however there was very little description of the content of the interchange. Further, at a prior deposition, Crone either denied having a conversation with Kohanski or had indicated she could not recall whether she had had a conversation with Kohanski. Finally, Hivner testified without contradiction that Crone had come to him the day after the incident with Kohanski and indicated that she had made a big mistake the previous day.

There has been no effort to show pretext in the action taken by Kohanski. After Crone's confrontation of Kohanski, Kohanski activated a withdrawal of the offer of an extension of Crone's probation, and instead activated Crone's termination.

Regarding other employees with performance problems, the only comparison attempted was a comparison to a man in an electronic position who has successfully completed probation and who had accidentally damaged a computer. This employee was reclassified from electronic repair to electrical repair; effectively a demotion.

Several differences make this individual an inappropriate comparison. First and foremost, he was not on probation like Crone. Second, there was no evidence of either repeated unwillingness or inability to do his job. And finally, this employee had not barged into the superintendent of maintenance's office, told him what he can do with an offer, and stormed out.

One can speculate that had Crone not barged into Kohanski's office, but instead taken the advice of her supervisor and a union advisor to extend her probation, Crone may still be a BMY employee. Instead, the evidence considered as a whole indicates that BMY articulated a legitimate reason for Crone's termination, which reason has not been shown to be a pretext for sex-based discrimination.

Accordingly, an appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS F. CRONE,
Complainant

v.

BMY, A DIVISION OF HARSCO,
Respondent

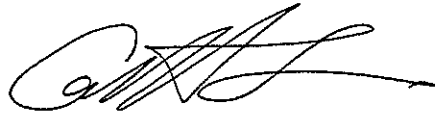
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Docket No. E-39596

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 failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached 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.

By:



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS F. CRONE,
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Respondent

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Docket No. E-39596

FINAL ORDER


AND NOW, this 21st day of May, 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 Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said 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

that the complaint in this case be, and the same hereby is dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:


Robert Johnson Smith
Chairperson

ATTEST:


Gregory J. Zelia, Jr., Secretary