

**COMMONWEALTH OF PENNSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**VALERIE BURT,  
Complainant**

**v.**

**ROSS MAINTENANCE COMPANY,  
Respondent**

**DOCKET NO. E-69660-D**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**

## FINDINGS OF FACT \*

1. The Complainant, Valerie Burt, is an individual residing in Pittsburgh, Pennsylvania. (NT 14.)
2. The Respondent, Ross Maintenance Company, is a Pennsylvania corporation now located at 1620 Homestead Road, Verona, Pennsylvania. (CE 2.)
3. The Complainant was hired by Respondent on or about August 8, 1993. (NT 14; CE 1.)
4. The Complainant's job duties consisted mainly of general cleaning. (NT 19, 20.)
5. As a general cleaner, the Complainant's duties included vacuuming, dusting, mopping floors, and cleaning bathrooms. (NT 19.)
6. The Complainant worked at several job sites including Integra Bank branches, Bowser Pontiac, Birmingham Towers, and Carnegie Mellon University. (NT 20.)
7. Complainant's immediate supervisor was Mark Napoleoni. (NT 164.)
8. Mr. Napoleoni was employed by the Respondent as the operations manager. (NT 164.)

---

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

CE	Complainant's Exhibit
NT	Notes of Testimony

9. A friend of the Complainant, Kenneth Sunseri, contacted Mr. Napoleoni about a job for Complainant. (NT 14-15.)

10. Mr. Napoleoni interviewed and hired the Complainant. (NT 15-18.)

11. When the Complainant requested the location of her first job, Mr. Napoleoni told her that she would ride with him for the first two weeks. (NT 18-19.)

12. After the initial two weeks, Mr. Napoleoni told Complainant that he still wanted her to travel with him in order to learn the various building sites. (NT 19.)

13. When Complainant expressed a desire to use her own vehicle, Mr. Napoleoni said he wanted her to continue riding with him so he could train her for a supervisory position. (NT 20-21.)

14. Once, while riding with the Complainant, Mr. Napoleoni turned to her while shifting gears, and asked her to ". . . shift my stick." (NT 22.)

15. The Complainant rejected his request. (NT 22.)

16. Mr. Napoleoni also asked the Complainant to attend a biker's convention with him. (NT 22, 24.)

17. The Complainant repeatedly told Mr. Napoleoni that work and personal relationships didn't mix. (NT 22.)

18. Mr. Napoleoni asked the Complainant why she didn't wear tight jeans instead of sweat pants. (NT 24.)

19. The Complainant indicated that she was more comfortable wearing sweat pants. (NT 24.)



20. On August 18, 1993, ostensibly while showing the Complainant how to use a cleaning machine, Mr. Napoleoni came up behind her and ground his hips against the Complainant. (NT 25.)

21. Richard Osselborn, another Respondent employee at the time, observed the hip grinding incident. (NT 84-85.)

22. On the same evening when Complainant told Mr. Napoleoni that she was unable to go to another work site, he replied, "You're going to go get laid." (NT 26, 89.)

23. Subsequent to this incident, in order to minimize contact with him, Complainant requested from Napoleoni that she be assigned to a permanent job site. (NT 26-27.)

24. When Mr. Napoleoni failed to assign her to a permanent site, the Complainant asked Mary Ann Pediconi if she knew of any permanent sites. (NT 27.)

25. At this time, the Complainant believed that Ms. Pediconi was a receptionist for Respondent. (NT 27.)

26. On October 28, 1993, Mr. Napoleoni assigned the Complainant to the job site located at 210 Grant Street. (NT 27.)

27. The previous cleaners at that job location had been terminated for theft and poor performance. (NT 27.)

28. Soon after the Complainant began working at 210 Grant Street, one of the tenants wrote a letter to the Respondents stating that the cleaning services had improved. (CE 2.)

29. Mr. Napoleoni had told Complainant that, if she could not come to work, he needed a two-hour notice to find a replacement. (NT 32.)

30. On December 2, 1993, the Complainant had an accident while changing a fluorescent light bulb at 210 Grant Street. (NT 34.)

31. The Complainant got powder in her eye, and the eye became infected. (NT 35.)

32. The next day, the Complainant went to her doctor who diagnosed conjunctivitis. (NT 55.)

33. Her doctor also told her that she would not be able to drive. (NT 35.)

34. The Complainant called Mr. Napoleoni within the two-hour limit and told him that she could not drive and needed a ride to work. (NT 55.)

35. The Complainant further informed him that she had a ride home, but she was still willing to clean the building if she could get a ride. (NT 35-36.)

36. Mr. Napoleoni did not offer any assistance and cleaned the building at 210 Grant Street by himself. (NT 35.)

37. On December 7, 1993, when the Complainant went to work, another employee, Trevor, was at the 210 Grant Street job site. (NT 36.)

38. The Complainant immediately attempted to reach Mr. Napoleoni by phone and pager. (NT 36.)

39. After an hour, Mr. Napoleoni called the Complainant and told her that she would be training Trevor. (NT 36, 40.)

40. The Complainant was somewhat confused, since she had been performing her duties at this location, by herself, for approximately seven weeks. (NT 36.)

41. Mr. Napoleoni told the Complainant that she was incompetent and could not do the job. (NT 36.)

42. Mr. Napoleoni had never previously indicated any problem with the Complainant's performance.

43. On the contrary, Mr. Napoleoni had said the Complainant was the best trained employee, and in fact had appointed her as supervisor for a week. (NT 184, 196.)

44. One week after the December 7th incident, the Complainant went to work and another employee, Tim, was at the job site. (NT 41.)

45. When the Complainant was unable to page Mr. Napoleoni, she contacted Respondent's office and was told to contact Mr. Napoleoni. (NT 42.)

46. When she finally spoke with Mr. Napoleoni, he told her to train Tim to do her job. (NT 42.)

47. When the Complainant contacted Mr. Napoleoni the next day, he told her he was pulling her off the 210 Grant Street job site. (NT 43.)

48. At that point, the Complainant complained about discrepancies in her paychecks and asked Mr. Napoleoni if she was being fired. (NT 44.)

49. Mr. Napoleoni replied, "Yes." (NT 44.)

50. The only person at Respondent's company that the Complainant ever approached with a problem was Mr. Napoleoni. (NT 44.)



51. Mr. Napoleoni testified himself that he was the person employees went to when they had a problem. (NT 198.)

52. After her termination, the Complainant was employed as a cosmetics salesperson, and also did landscaping, lawn care and farm work. (NT 45-46.)

53. The Complainant also cleaned homes and did some painting. (NT 45-46.)

54. The Complainant needed to work certain hours because she had to care for her son, who is autistic. (NT 46.)

55. From 1994 to 1996, the Complainant earned under \$6,900 annually and did not file income tax returns, as permitted by the IRS. (NT 47-48.)

## CONCLUSIONS OF LAW

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

2. Valerie Burt ("Complainant") is a female individual residing in Pittsburgh, Pennsylvania, within the meaning of the Pennsylvania Human Relations Act ("PHRA").

3. The Respondent is an employer within the meaning of the PHRA.

4. All procedural prerequisites to a public hearing have been met in this case.

5. The Complainant established a *prima facie* case of hostile work environment sexual harassment by proving that:

- a) she is a member of a protected class;
- b) she was subject to unwelcome conduct of a sexual nature;
- c) the conduct affected a term or condition of employment; and
- d) the employer is liable for the act of harm.

6. The Respondent articulated a legitimate, non-discriminatory reason for its action.

7. The Complainant also established a *prima facie* case of *quid pro quo* discrimination in relation to her discharge on the basis of her sex, female, by proving that:

- a) she is a member of a protected class;
- b) she was subjected to unwelcome advances of a sexual nature;



c) she suffered an adverse employment action; and

d) the employer is liable for the act of harm.

8. The Complainant has established by a preponderance of the evidence that Respondent unlawfully discriminated against her because of her sex.

9. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the Commission may impose damages, and the Commission has the discretion to award damages in a manner it deems appropriate.

## OPINION

In the instant case, Valerie Burt ("Complainant") filed a verified complaint with the Pennsylvania Human Relations Commission ("PHRC") on or about May 10, 1994, against Ross Maintenance Company ("Respondent") at Docket No. E-69660-D. The Complainant alleges that she was sexually harassed by Respondent's employee and ultimately discharged because of her sex. The Complainant further alleges that the Respondent's actions violated Section 5 of the Pennsylvania Human Relations Act ("PHRA").

PHRC staff, after completing its investigation, notified Respondent that probable cause existed to credit the allegations in the complaint. After entry of the finding of probable cause, PHRC staff attempted to resolve the matter in dispute between the parties through conference, conciliation and persuasion but were unable to do so. PHRC staff then notified the Complainant and Respondent that the Commission had approved the convening of a public hearing.

The public hearing in this matter was held on October 20, 1997 before Phillip A. Ayers, Permanent Hearing Examiner. John E. Quinn, Esquire, appeared on behalf of the Respondent. Lisa J. Mungin, PHRC Assistant Chief Counsel, appeared on behalf of the State's interest in the complaint. Both parties filed post-hearing briefs.

In reviewing a case of this nature, we must utilize the analytical mode of evidence assessment set forth in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). In that case, the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp.

v. Green 411 U.S. 792 (1973). The 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 burden, in order to prevail the 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 evidence 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).

Following its instructions on the effect of a *prima facie* showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter.

The Court stated that:

*As 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."*

The Complainant is free to represent any 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 the 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, supra at 319.

We now move to the burden of proof analysis in the instant case. There are two fundamental concepts in developing a burden of proof analysis. Firstly, the analytical model is adaptable (not restricted to the McDonnell-Douglas model) and therefore must fit the particular circumstances of the case. Secondly, to meet the burden of establishing a *prima facie* case of discrimination based on sexual harassment and a hostile work environment, the Complainant must show that:

- a) she is a member of a protected class;
- b) she was subject to unwelcome conduct of a sexual nature;
- c) the conduct affected a term or condition of employment; and
- d) the employer bears responsibility for the act of harm.

Clearly the Complainant is a female and therefore a member of a protected class. The Complainant also credibly testified to unwelcome conduct of a sexual nature. Such conduct included "rubbing up against" the Complainant, asking for dates by Mr. Napoleoni, and other conversations of a sexual nature. (NT 23.) The Complainant also testified as to her indication to Mr. Napoleoni that such conduct, both verbal and physical, was not welcome. Her testimony at the public hearing not only showed that the Complainant found such behavior unwelcome, but also that she attempted to discourage it. When the suggestion was made by Mr. Napoleoni that she dress in a more enticing manner (i.e. wear tighter clothing), the Complainant

indicated that she did not participate in such behavior. She further told Mr. Napoleoni that work and personal relationships did not mix. Upon review of the testimony at the public hearing, the Complainant has met the second element of the *prima facie* case.

Next we move to the question, did the behavior of Mr. Napoleoni affect a term or condition of Complainant's employment? In the instant case, the behavior had a clear impact on the Complainant's job in that she was often in the middle of this negative behavior. The Complainant was subjected to a number of sexual advances and, clearly, was touched in an offensive manner. Barrett v. Omaha National Bank, 584 F.Supp. 22 (1983). The individual responsible for the behavior was her supervisor, who decided where she worked, how she worked, and ultimately how much money she made. Certainly one of the Complainant's allegations was that, every time she rebuffed an advance by Mr. Napoleoni there would be a problem with her check. Once again, upon review of the record, the Complainant has met the third element of a *prima facie* case.

Lastly, the record reveals that the employer (Respondent) bears responsibility for Mr. Napoleoni's behavior. In this matter, Mr. Napoleoni was the supervisor who clearly appeared to have full authority over all employees. Most employees were unaware of anyone else in the management structure. Any questions regarding problems in the scheduling or division of work was always directed to Mr. Napoleoni, i.e., "Talk to Mark." Mr. Napoleoni, as far as the employees who testified, had the authority to change schedules, assign jobs, hire and fire. (NT 72-73.) Even



Respondent's own witness testified that employment-related decisions were made in conjunction with Mr. Napoleoni. Therefore the employer does bear responsibility for Mr. Napoleoni's actions.

With the Complainant establishing her *prima facie* case, the burden of production then shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its actions. The Respondent asserts that the Complainant performed poorly in her position. By virtue of this articulation, the Respondent has fulfilled its burden of production.

Once the Respondent has met its burden, the Complainant, in order to prevail, must demonstrate by a preponderance of the evidence that she is a victim of intentional discrimination. The Complainant may succeed in this ultimate burden by showing that Respondent's proffered explanation is unworthy of credence. Burdine, *supra*. The Complainant can accomplish this by showing pretext on the part of the Respondent.

Based upon the record before the Commission, the reason set forth by the Respondent is pretextual. We begin with the fact that the Respondent contradicts its own answer in this matter. As Commission Counsel notes, the Respondent first asserts, in its answer to the complaint, that the Complainant was not discharged and that work was available for her, but later, in the same answer, asserts that the employment relationship with the Complainant was severed due to poor performance.



Secondly, the Respondent's witnesses, including Mr. Napoleoni, simply were not credible. The assertion that the Complainant was a poor performer was not substantiated by any documents. As a matter of fact, the only documents presented by the Respondent indicated an improvement in the services at the work site located at 210 Grant Street. The Respondent stated in its answer that there were numerous complaints on a daily basis regarding the Complainant. However, Respondent's witnesses could not provide any documentation or any details of these complaints.

The most damaging point in Respondent's lack of credibility regarding Complainant as a "poor performer" is the fact that Mr. Napoleoni testified that the Complainant was his best trained employee. (NT 184.) Furthermore, Mr. Napoleoni ordered the Complainant to train her replacement. Mr. Napoleoni also testified that he had assigned the Complainant to fill in a supervisory position. Obviously, no supervisor would have a poor performer train new employees. Such a philosophy is simply not good business. The only logical conclusion is that Respondent's argument that the Complainant is a poor performer is not credible.

Next, the Respondent's other witnesses, Ms. Bruce and Ms. Pediconi, were as vague and unconvincing as Mr. Napoleoni. Neither witness could detail the alleged problems with the Complainant at 210 Grant Street. Furthermore, neither witness had much contact with the Complainant. The Complainant and her witness, Mr. Osselborn, only had contact with Mr. Napoleoni. Interestingly, both the Complainant and Mr. Osselborn thought that Ms. Bruce was an employee of Tempworks. William Maneese, Commission investigator, testified that he spoke with

Nancy Bruce on and off for three years and had never known that she was employed by Respondent. Ms. Bruce, at the public hearing, for the first time, testified that she was in a supervisory position at Ross Maintenance Company.

In addition, the evidence in this matter indicates that the Complainant has made a *prima facie* case for sex discrimination in regard to her discharge. The Complainant has shown:

- a) she is a member of a protected class;
- b) she was subjected to unwelcome advances of a sexual nature;
- c) she suffered an adverse employment action; and
- d) the employer is liable for the act of harm.

As aforementioned, the Complainant is a member of a protected class, and the evidence shows that she was in fact subjected to unwelcome advances of a sexual nature from Mr. Napoleoni . Furthermore, the Complainant suffered the ultimate adverse employment action; she was terminated from her position. Even before she was terminated, she suffered adverse employment actions, i.e., her work hours were reduced and she encountered problems with her paychecks. The last element of the *prima facie* case is also clear, in that the employer bears responsibility for the actions of Mr. Napoleoni. Even the Respondent's witness testified that Mr. Napoleoni provided input on all employment decisions. Mr. Napoleoni had the authority to hire, set up and change schedules, assign job sites, and to discharge employees. In this case, Mr. Napoleoni used the authority furnished to him by his employer to sexually



harass the Complainant. Miller v. Bank of America, 600 F.2d 211, 213, 20 FEP Cases 462 (9th Cir. 1979).

Since the Complainant has met her burden of establishing a *prima facie* case in regard to the discharge, the Respondent must meet its burden of articulating a legitimate, non-discriminatory reason for its action. The Respondent meets this burden by asserting that the Complainant was discharged because of her performance.

As aforementioned, once a respondent meets its burden, the complainant may succeed in its ultimate burden of persuasion by either direct evidence that a discriminatory reason more likely motivated the respondent or, indirectly, by showing that a respondent's proffered explanation is unworthy of credence. Burdine, supra. In this matter the evidence is clear that Respondent's explanation is not credible. As stated before, Mr. Napoleoni testified that the Complainant was his best trained employee. The Complainant was the individual used to train other employees. The Complainant had been assigned to supervise other employees. Therefore, it is clear that the Complainant has shown, by a preponderance of the evidence, that she is a victim of intentional discrimination in her discharge from employment.

The entire record in this case shows that the Respondent's articulated reason is pretextual. Having found that the Complainant has met her ultimate burden in this matter, we now move to the issue of remedy.

In dealing with remedy, the Commission by virtue of Section 9 of the PHRA has a great deal of discretion in awarding a remedy. There are two purposes in



awarding any remedy under the PHRA. The first purpose is that the unlawful discriminatory practice is effectively eradicated. The impact is ensured by the issuance of a cease and desist order, preventing the Respondent from engaging in further unlawful discriminatory practices. The second purpose is to restore the injured party to her pre-injury status and make her whole. Williamsburg Community School District v. Pennsylvania Human Relations Commission, 99 Pa. Cmwlth. 206, 512 A.2d 1339 (1986). The Complainant was employed as a cosmetics salesperson, landscaper, and worked in various other jobs which paid minimum wage. The Complainant also indicated that her choice of hours was somewhat restricted because she had to care for her autistic son.

In the instant case, the Complainant should be awarded back pay for the period from December 14, 1993 (date of termination) to October 20, 1997 (date of public hearing). The Complainant earned \$5 per hour and worked seven hours a night, five days a week. At the 210 Grant Street location she earned \$175 per week. Her income at 210 Grant Street would have been as follows:

1993	(3 weeks remaining) 3 x \$175.00	\$ 525.00
1994	52 x \$175.00	9,100.00
1995	52 x \$175.00	9,100.00
1996	52 x \$175.00	9,100.00
1997	(42 weeks to public hearing) 42 x \$175.00	<u>7,350.00</u>
<b>Total Lost Income</b>		<b>\$35,175.00</b>

The income that the Complainant in fact earned must be estimated because she made under \$6,900 annually and, consequently, did not file federal income tax forms.

The Complainant testified that her income was:

1994	\$ 4,500.00
1995	6,000.00
1996	2,750.00
1997 (\$6,000 per year, prorated ten months)	<u>5,000.00</u>
<b>Total Earned Income</b>	<b>\$18,250.00</b>

<b>INCOME LOST</b>	<b>\$35,175.00</b>
<b>LESS, INCOME EARNED</b>	<b><u>18,250.00</u></b>
<b>DAMAGES</b>	<b>\$16,925.00</b>

Therefore, the Complainant's back-pay award in this matter is **\$16,925.**

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VALERIE BURT,  
Complainant

v.

ROSS MAINTENANCE COMPANY,  
Respondent

DOCKET NO. E-69660-D

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 the instant case. 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: \_\_\_\_\_

  
Phillip A. Ayers  
Permanent Hearing Examiner



COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

VALERIE BURT,  
Complainant

v.

ROSS MAINTENANCE COMPANY,  
Respondent

DOCKET NO. E-69660-D

**FINAL ORDER**

AND NOW, this Twenty-seventh day of October, 1998, 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 as its own findings in this matter, and incorporates same into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

**ORDERS**

1. That the Respondent shall cease and desist from failing to provide a workplace free from sexual harassment.
2. That the Respondent shall cease and desist from terminating employees because of sex.

3. That the Complainant be awarded back pay in the amount of \$16,925, plus six percent interest per annum.

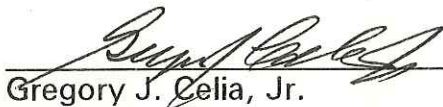
4. That the Respondent shall report the means by which it will comply with all components of the order, in writing, to Lisa J. Mungin, Assistant Chief Counsel, PHRC Pittsburgh Regional Office, 1100 State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222-1210, within thirty days of the date of this order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**



By: Robert Johnson Smith  
Chairperson

Attest:



Gregory J. Celia, Jr.  
Secretary