

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONNA FORTUNER,
Complainant

v.

GENERAL DYNAMICS LAND
SYSTEMS DIVISION,
Respondent

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Docket No. E-38985-D

STIPULATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONNA M. FORTUNER, :
Complainant :
v. : Docket No. E-38985-D
GENERAL DYNAMICS LAND SYSTEMS :
DIVISION, :
Respondent :

STIPULATIONS

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

1. Complainant herein is Donna Fortuner, an adult white female.
2. Respondent, herein, is General Dynamics Land Systems Division.
3. Respondent is located at 175 East Street, Eynon, PA and has offices in Warren, Michigan.
4. Respondent is an employer within the meaning of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, as amended, 43 P.S. §955(a).
5. Respondent is subject to the jurisdiction of the Pennsylvania Human Relations Commission ("Commission") under relevant provisions of the Pa. Human Relations Act ("Act").
6. On December 16, 1986, Complainant made, signed, and timely filed a written, verified complaint with the

Commission, docketed at E-38985-D, alleging that Respondent discriminated against her on the basis of her sex when it discharged her from employment on August 8, 1986, in violation of Section 5(a) of the Act.

7. On or about January 29, 1987, the Harrisburg Regional Office Commission staff served a copy of the Complaint on Respondent in a manner which satisfies the requisites of 1 Pa. Code §33.32.

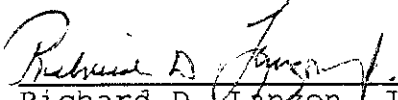
8. Respondent subsequently filed an answer to the complaint.


9. On or about March 10, 1989, the Harrisburg Regional Office Commission staff notified the parties that after investigation probable cause, to credit the allegations of Complainant's complaint had been found.

10. To date, conciliation efforts have failed.

11. The Commission approved this matter for public hearing and so notified the parties.

12. All prerequisites for a public hearing have been satisfied.


Richard D. Lanzon, Jr.
Attorney for Respondent


Colie B. Chappelle, Jr.
Attorney for Commission
in Support of Complaint

FINDINGS OF FACT*

1. General Dynamics is a defense contractor. (N.T. 447, 486)
2. General Dynamics' Pennsylvania facility generally consists of one large open building in which a variety of machinery manufactures tank parts. (N.T. 31, 44, 222)
3. General Dynamics' facility work areas are broken down into designated departments. (N.T. 44; C.E. 3)
4. During the relevant time frame, General Dynamics ran a 5 day per week, three shift operation: Monday - Friday; 1st shift - 7:00 am - 3:00 pm; 2nd shift - either 3:00 pm - 11:00 pm or 3:30 pm - midnight; 3rd shift - 11:00 pm - 7:00 am. (N.T. 29,30)
5. Newly hired employees are on probation for 90 days, during which time an employee is evaluated both formally and informally, (N.T. 19, 258, 271, 382; C.E. 9, R.E. 4)

*The foregoing "Stipulations" 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
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

6. General Dynamics hourly employees were members of the United Automobile, Aerospace & Agricultural Implement Workers of America, ("UAW"). (C.E. 9)
7. A 1985 collective bargaining agreement between General Dynamics and the UAW, clarified certain rights of probationary employees. (N.T. 121, 669-672; C.E. 9, R.E. 3)
8. As a defense contractor, General Dynamics was required by the Office of Federal Contract Compliance to have an affirmative action program. (N.T. 447)
9. Consistent with its affirmative action program, General Dynamics set hiring goals and actively recruited female and minority employees. (N.T. 448, 450, 470; R.E. 7)
10. Although possessing less prior machinist experience than General Dynamics normally required, and having been rated less than acceptable in several areas, on June 30, 1986, General Dynamics hired Fortuner as a machinist consistent with its affirmative action efforts. (N.T. 457; R.E. 10)
11. Fortuner's first assignment was to department 3104, second shift, where she was trained on and subsequently operated band saws and milling machines. (N.T. 97-98, 193, 194, 257-258)
12. Fortuner's supervisor in department 3104 was Nicholas DeRoma (hereinafter "DeRoma").
13. DeRoma's supervisor was 2nd shift general foreman, Richard Doty, (hereinafter "Doty"). (N.T. 14, 98, 372)
14. Doty often just stood nearby and watched both hourly employees and supervisors. (N.T. 15, 22, 31-32, 99, 101-102, 205, 269, 288-289, 382-383, 392)

15. On one evening, within her first thirty days, while working on a milling machine in department 3104, Fortuner's machine experienced three consecutive breakdowns. (N.T. 204-205)
16. Upon the first breakdown, Fortuner had asked Doty if she should do something else, but Doty told Fortuner to go get coffee while the machine was being repaired. (N.T. 204)
17. The second breakdown took approximately 1½ hours to repair. (N.T. 204)
18. It was common for machinery at the General Dynamics plant to experience breakdowns and malfunctions. (N.T. 18, 86, 88, 320, 390)
19. A wide variety of causes existed for machine breakdowns which ranged from strictly machine malfunctions to various degrees of operator error. (N.T. 33, 113, 142, 152, 274, 361, 363)
20. Whether or not an employee was disciplined for a machine breakdown depended on the severity of damage, the reason for it, and the responsible employees' work record. (N.T. 142, 152)
21. Fortuner was not disciplined for the three consecutive breakdowns of her milling machine in department 3104. (N.T. 204-205)
22. At the conclusion of Fortuner's first thirty days, DeRoma prepared an evaluation of Fortuner which rated her good in ability, conduct, performance, and attendance. (N.T. 258, 276; R.E. 4)
23. Individual machine tasks are laid out in documents called operation sheets which describe the functions of a machine, the tools to be used, and what to do while a machine is running. (N.T. 55, 62-63, 260; R.E. 1)

24. The operation sheet for the milling machine Fortuner ran in department 3104 required an operator to deburr parts while the machine was running. (N.T. 21, 149, 260; R.E. 1)
25. The deburring process entailed an operator using hand tool grinders to remove burrs from a rough cut part. (N.T. 30, 612)
26. While deburring, operators had to turn their back on running milling machines. (N.T. 23, 76, 278)
27. Vision and hearing were also hindered while deburring because operators had to wear protective face shields and the grinder used to debur made considerable noise. (N.T. 67)
28. Some machinists had expressed concern regarding the requirement to debur while a machine was operating. (N.T. 24, 88, 279)
29. The UAW had no problem with the deburring requirement and never received a complaint regarding deburring while a machine was running. (N.T. 148-149)
30. Approximately August 4, 1986, which was after Fortuner's 30 day evaluation and while Fortuner was still operating a milling machine in department 3104, DeRoma approached Fortuner because Fortuner was not deburring while the machine was operating. (N.T. 195, 200, 259, 291)
31. DeRoma asked Fortuner if she had been instructed to deburr and Fortuner indicated she had. (N.T. 259)
32. When DeRoma then asked Fortuner why she was not deburring, Fortuner responded, "you give it to me in writing or I'm not going to do it." (N.T. 259)
33. After DeRoma showed Fortuner the machine's operation sheet and provided her with a detailed explanation of the process, Fortuner began to perform the deburring process. (N.T. 260, 280)

34. Considering Fortuner's initial response unusual and serious, DeRoma reported the incident to Doty and noted the incident in his log book. (N.T. 261-262, 284, 373)
35. For a variety of personnel and production needs, it was common practice at General Dynamics to switch employees from machine to machine and from department to department. (N.T. 272, 315, 525)
36. On or about August 5, 1986, Fortuner was transferred from department 3104 to department 3106, second shift. (N.T. 195, 396)
37. The change of departments also meant that Fortuner's immediate supervisor changed. (N. T. 228, 297, 325, 373, 387, 525, 568)
38. One of Fortuner's new supervisors, Michael Mraz, (hereinafter "Mraz"), assigned Fortuner to a Cincinnati Hydrotel, (hereinafter "Hydrotel") (N.T. 298)
39. Department 3106 second shift machinist, John Motts, (hereinafter "Motts:") had requested a transfer to day shift and Fortuner was scheduled to replace Motts on the 2nd shift. (N.T. 427)
40. Mraz assigned Motts to train Fortuner on the Hydrotel. (N.T. 298, 326, 427)
41. Initially, Motts instructed Fortuner to watch him, make notes, and deburr parts. (N.T. 197)
42. The night shift foreman, Louis Young, (hereinafter "Young"), also briefly supervised Fortuner as, although on 3rd shift, he was working 7:00 pm to 7:00 am. (N.T. 325)
43. On Fortuner's second evening on the Hydrotel with Motts, Young observed Fortuner standing and watching Motts for a complete operation: (8-10 minutes). (N.T. 327, 351)

44. Young approached Motts and Fortuner and, in effect, told Fortuner that in order to learn she was supposed to be running all operations of the machine not just watching and that Motts was only there to advise and correct her. (N.T. 197, 327, 344)
45. As Young turned to walk away, he overheard Fortuner make a racially derogatory comment: Young is black. (N.T. 328)
46. Young turned to Fortuner and said "I beg your pardon", however, Fortuner did not respond further. (N.T. 328)
47. Although Young was offended and considered the incident serious, he did not pursue the matter directly. (N.T. 356)
48. Instead, Young simply noted the incident in his log book and immediately reported the matter to Doty. (N.T. 328, 341, 356, 373)
49. Although other employees had been disciplined for making racial slurs, Doty did not discipline Fortuner. (N.T. 376, 565)
50. The Hydrotel on which Fortuner was trained was reputed as being one of the more reliable machines in department 3106 and was also considered a consistent performer. (N.T. 304, 363, 432, 593)
51. When she began work on August 7, 1986, Fortuner prepared to solely operate the Hydrotel. (N.T. 196, 200, 395)
52. Fortuner indicated she read her instructions, checked the parts, started the Hydrotel, and turned her back to deburr. (N.T. 201)
53. A co-worker, Doris Staples, noted fire coming from the Hydrotel and yelled for Motts who immediately ran over and shut off the Hydrotel. (N.T. 75, 83-84, 201, 430, 604, 642)
54. The Hydrotel had sustained major damage. (N.T. 147-148, 309, 339, 398, 632, 650)

55. Motts instructed Fortuner to get the foreman who first inquired of Fortuner what happened. (N.T. 202)
56. Fortuner indicated she did not know what happened and she was sent back to department 3104 for the remainder of the shift. (N.T. 202)
57. The damage to the Hydrotel consisted mainly of damage to the machine's cutter which was totally destroyed. (N.T. 112, 300, 583)
58. Hydrotel cutters normally never need to be replaced and, absent damage, are good for a lifetime. (N.T. 144-145)
59. Quality Control Inspector, Nancy Selesky, testified that upon viewing the damage to the Hydrotel that she had never seen damage that bad. (N.T. 657)
60. Mraz too could not recall damage like that before. (N.T. 303)
61. Doty instructed Young and another foreman to investigate the damage. (N.T. 377)
62. Since major repairs were necessary, the Hydrotel was out of operation approximately 3 days to 1 week. (N.T. 314, 339, 398, 551-552, 591, 657)
63. Consistently, both experienced machinists and supervisors indicated operator error was the cause of the damage. (N.T. 315, 317, 331, 378, 604, 609, 644)
64. Fortuner had set the Hydrotel up improperly. (N.T. 644)
65. A switch on the Hydrotel was turned incorrectly causing the cutter to rapidly rotate in reverse resulting in an extensive and costly smash. (N.T. 155, 303, 330, 379, 590, 644)
66. When Fortuner arrived at work on August 8, 1986, Doty handed Fortuner a termination notice and, in effect, advised her that she was "not adaptable to this type of work." (N.T. 203)

67. At the time of her discharge, Fortuner was still a probationary employee. (N.T. 382)
68. Prior to discharging Fortuner, Doty discussed his intentions with his supervisor, and the 1st shift general foreman. (N.T. 380, 399)
69. Both agreed with Doty's decision to terminate Fortuner. (N.T. 380, 399).
70. Doty also discussed the matter with Human Resource Specialist, Calvin Smith, who also felt the decision to terminate Fortuner was proper. (N.T. 380, 400, 467-468, 487, 504, 508)
71. Although other employees had been disciplined for damaging machinery, it appeared Fortuner was the first to be terminated following equipment damage. (N.T. 18, 113, 140, 142)
72. Male employees have been discharged with an indication that they were "not adaptable to type of work." (N.T. 476-479; R.E. 17-22)
73. On September 2, 1986, General Dynamics replaced Fortuner by hiring a woman machinist, Carolyn Marion (hereinafter "Marion"). N.T. 471, 473)
74. Marion was the only person General Dynamics has hired since Fortuner's termination. (N.T. 474, 558)
75. Following her discharge, Fortuner complained to the union through the 2nd shift Chief Steward, Joseph Pilkonis, (hereinafter "Pilkonis"). (N.T. 103, 210)
76. On September 19, 1986, Pilkonis attempted to present Fortuner's grievance, however General Dynamics management refused to accept it. (N.T. 115, 116)

77. In effect, the collective bargaining agreement provided that the union shall not represent probationary employees in discharge cases except when there was alleged discrimination. (N.T. 124-125; C.E. 9)

78. Article 3 Section 2 of the collective bargaining agreement specifically required a grieved employee who wanted to allege discrimination to present a written claim which "contain[s] a full statement of the facts giving rise to the claim and the reasons why the employee believes [s]he has been discriminated against..." (C.E. 9)

79. The way Fortuner's grievance had been drafted, it did not entitle Fortuner to union representation. (N.T. 669, 678-679)

80. On September 26, 1986, an abuse of grievance procedure petition was presented to General Dynamics. (N.T. 116)

81. General Dynamics' answer to the abuse of grievance procedure petition dated October 31, 1986, indicated the matter had been investigated and that Fortuner's grievance was rejected consistent with that provision of the collective bargaining agreement which prohibits the union from representing a probationary employee who has been discharged. (N.T. 116; R.E. 2)

82. The abuse of grievance procedure petition was then dropped by the Union. (N.T. 672)

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 Commission have fully complied with the procedural prerequisites to a Public Hearing in this case.
3. General Dynamics is an "employer" within the meaning of the PHRA.
4. Fortuner is an "individual" within the meaning of the PHRA.
5. General Dynamics articulated legitimate reasons for terminating Fortuner.
6. Fortuner failed to establish by a preponderance of the evidence that the reasons offered by General Dynamics for its actions were pretextual.
7. Fortuner failed to present credible direct evidence of a discriminatory animus.

OPINION

This case arises on a complaint filed by Donna Fortuner, (hereinafter "Fortuner"), against General Dynamics Land Systems Division (hereinafter "General Dynamics"), with the Pennsylvania Human Relations Commission ("PHRC"). In her complaint filed on or about December 16, 1986, Fortuner alleged that General Dynamics terminated her because of her sex, female. Fortuner's complaint alleges a violation 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. ("PHRA").

PHRC staff investigated the allegation and found probable cause to credit Fortuner's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion but such efforts proved unsuccessful. Subsequently, the PHRC notified General Dynamics that it had approved a Public Hearing.

The Public Hearing was held on October 11, and 12, 1990, and November 7, 1990, in Scranton, Pa., before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Colie B. Chappelle, Jr., Esquire. Richard D. Lanzon, Jr., Esquire, appeared on behalf of General Dynamics. 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 February 8, 1991, and the brief for General Dynamics was received on February 6, 1991.

Generally, two analytical approaches can govern a disparate treatment allegation. See Holmes v. Bevilacqua, 794 F.2d 142 (4th Cir. 1986). The first model is most often used and involves cases in which Complainants rely on a judicially created inference to support their claim of discrimination. Normally, under this model, a Complainant must first make a prima facie showing. Once established, a Respondent is afforded an opportunity to articulate 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. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The second model involves cases in which Complainants argue there is direct evidence of discrimination. See Blalock v. Metal Traders, Inc., 775 F.2d 703, 39 FEP 140 (6th Cir. 1985); Lujan v. Franklin County Board of Education, 766 F.2d 917, 929 n. 16, 38 FEP 9 (6th Cir. 1985); Miles v. M.N.C. Corp., 750 F.2d 867, 875, 37 FEP 8 (11th Cir. 1985). These cases progress without the aid of rebuttable presumptions because a Complainant's prima facie case consists of evidence of overt discrimination. The burden of persuasion (not merely production) then shifts to the Respondent to prove either that (1) the Respondent had legitimate reasons for its action; or (2) its overt discrimination can be justified as a bona fide occupational

qualification. See generally Smallwood v. United Airlines 728 F.2d 614, 34 FEP Cases 217 (4th Cir. 1984). When the direct evidence model is used, the prima facie route becomes unnecessary. See Cline v. Roadway Express, 29 FEP 1365 (4th Cir. 1982).

Looking at the McDonnell Douglas model, we find that in this case, this matter was fully tried on its merits. When this occurs, it is appropriate to move to the ultimate issue of whether Fortuner has met her ultimate burden of persuasion that General Dynamics' discharge of her was discriminatory within the meaning of the PHRA. See U.S. Postal Service Board of Governors v. Aikens, 31 FEP 609 (U.S. Supreme Court 1983) ("Aikens").

In this case, General Dynamics responded to Fortuner's allegation by offering evidence of three reasons for Fortuner's termination. Aikens indicates that once a Respondent does this, the McDonnell-Burdine presumption arising from a prima facie showing drops from the case, and the factual inquiry proceeds to a new level of specificity. Aikens further states that the prima facie case method established in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. Aikens, citing Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

"Where the [Respondent] has done everything that would be required of [it] if the [Complainant] had properly made out a prima facie case, whether the [Complainant] really did so is no longer relevant. The [trier

of fact] has before it all the evidence it needs to decide whether 'the [Respondent] intentionally discriminated against the [Complainant].'" Aikens at 611. In short, we simply must decide which party's explanation of General Dynamics' motivation to believe.

From the aspect of the direct evidence route, Fortuner offered testimony that Doty told her that General Dynamics was "no place for a woman anyway." Fortuner testified that the milling machine she was working on malfunctioned three times in one evening. After the second breakdown Fortuner submits that Doty made the above comment to her.

Doty specifically denied making the comment (N.T. 385). His denial directly contradicts Fortuner's testimony, thus necessitating a determination of credibility.

On the issue of credibility, Fortuner bears the burden of establishing by a preponderance of the evidence that Doty made the statement which arguably reflects a sex-based animus. Considering the record as a whole, Fortuner failed to meet the preponderance standard in this regard.

First, the interesting nature of the testimony Fortuner offered on this matter tends to reduce her credibility. (N.T. 203-205) Basically, Fortuner was asked about her contacts with Doty prior to her August 8, 1986 termination. When Fortuner was asked if she ever spoke to Doty or if Doty ever spoke to her, Fortuner initially responded, "Not really." (N.T. 203) Then Fortuner related an instance when Doty told her she should be deburring while her machine was running.

Again Fortuner was asked about having words with Doty and Fortuner again related that Doty just asked her why she was not deburring while her machine was running. In an apparent effort to explain why she was not deburring, Fortuner began to relay that she told Doty about the prior evening when her machine broke down three times in a row. As Fortuner continued to relate the story, Doty suddenly became an integral part of the evening of the three breakdowns as well. After an extended description of the events of the evening of the three malfunctions of her machine, Fortuner still had said nothing about Doty's comment about women in the workplace.

Instead, Fortuner had to be asked directly, "was there ever any comments made about your sex?" In response Fortuner appeared quite confused. Her answer is indicative of her confusion:

"That wasn't on that particular job I don't believe. I think that was -- maybe it was when I started there. Yeah, that's the one where the machine was breaking. And he had said -- when it first happened he said, what happened? I said, I don't know. I was deburring this part and I forget when I turned it off and it just started smoking. And the second time that it happened he had made a comment that this is no place for a woman anyway, like it was my fault the machine was doing this."

Fortuner's answer suggests Doty's comment was made when she started. However, several questions later, Fortuner testified that the incident occurred while she was working on the milling machine. Elsewhere

in the record, it is clear that Fortuner started on the band saws and worked the milling machines only for a short time before her transfer to department 3106. This testimony, taken as a whole, lacked credibility.

Another factor which adds to the conclusion that Fortuner's version was less credible than Doty's was Fortuner's failure to rebutt an aspect of the testimony by General Dynamics' Human Resource Specialist, Calvin Smith. Smith offered testimony that prior to Fortuner's hire, Smith had checked companies at which Fortuner indicated on her application that she had worked. Smith discovered that Fortuner had never worked at one place Fortuner's application listed as being a prior job. (N.T. 460) No such glaring discrepancy can be found in the record regarding Doty.

As support for the assertion that Doty held no animus towards women in the workplace, Doty submitted that both his wife and mother worked for many years in factories. (N.T. 385) Furthermore, Doty was straightforward in this declaration that he had no problem with women working in a factory.

Given these factors the edge on the issue of credibility goes to General Dynamics with regard to whether Doty ever made the statement that General Dynamics was "no place for a woman anyway."

The brief on behalf of the complaint additionally makes a fleeting reference to the notation made on Fortuner's separation notice: "Not adapted to type of work." This reason was commonly used on the separation notices of not only Fortuner but on males being terminated as well. (R.E. 18, 20, 22) Confronted with this situation, no appreciable inference of sex based animus can be drawn from the language of Fortuner's separation.

Accordingly, Fortuner failed to meet the burden of proof under a direct evidence analysis.

This leaves the remaining question of whether General Dynamics' articulated reasons for Fortuner's termination are pretextual. General Dynamics argues that Fortuner was discharged for two incidents of insubordination and one incident of operator error which caused major damage to an expensive piece of equipment.

Primarily, General Dynamics submits that the machine damage was the major reason for Fortuner's termination, while the two instances of insubordination only slightly contributed to Fortuner's dismissal. The first incident General Dynamics points to as insubordination occurred between Fortuner and her Foreman, DeRoma. The brief on behalf of the complaint attempts to trivialize the encounter, however, the incident in question appears to have been more than "DeRoma simply telling, reminding, or assuring Complainant that a certain procedure must be followed." Fortuner described the encounter with DeRoma as "we had some confrontation, me and Mr. DeRoma." (N.T. 203)

DeRoma later testified that he approached Fortuner to inquire if she had been instructed to deburr while her machine was running. Fortuner indicated she had. DeRoma then indicated he asked Fortuner why she was not deburring then and she responded, "You give it to me in writing or I'm not going to do it." DeRoma considered the matter serious enough to report the incident to Doty and enter the matter in his log book. DeRoma further indicated he had never had a problem like this. Later, Doty too indicated the incident was serious.

On this issue, the brief on behalf of the complaint appears to be seeking a determination that it would be incorrect to assess Fortuner's reaction to DeRoma as a serious incident. Instead of whether DeRoma and Doty's assessment was correct, the proper inquiry here is whether the assessment asserted was genuinely held. In the final analysis, it is up to Fortuner to establish that sex was the dispositive factor in her termination. On the question of whether DeRoma and Doty genuinely held the opinion that Fortuner's reaction was insubordinate, Fortuner offered little to reduce the credible testimony of both DeRoma and Doty. The Public Hearing of this case did not attempt to exercise industrial relations oversight, instead, the object of the inquiry was whether a discriminatory motive played a role in Fortuner's discharge.

Perhaps the largest discrepancy in this case can be found in the credibility issue surrounding Young's testimony that Fortuner directed an offensive racial slur to him. In the brief on behalf of the complaint, the general argument is made that Young should not be believed. The brief alludes to the "Complainant's denial" as a factor in support of the position that Young's testimony was untrustworthy. However, although Fortuner took the witness stand as a rebuttal witness, Fortuner never denied she made the racial slur about which Young had testified. Instead, Fortuner appears to rely on supposition and innuendo in her pursuit of a finding that Young's testimony was not worthy of belief. Clearly, Fortuner had every opportunity to directly rebut Young's accusation, however, Fortuner stood silent on the issue. Accordingly, once again, Fortuner's evidence falls considerably

short of her burden to establish pretext by a preponderance of the evidence. At a minimum, it is expected that a litigant would firmly deny an accusation of the sort made by Young. Strickingly, Fortuner did not.

The last and main reason for Fortuner's termination was firmly established to have been serious major damage to the Hydrotel Fortuner improperly operated. Considered as a whole, the evidence leads to the inescapable conclusion that operator error put the Hydrotel out of service between 3 to 5 days.

Again, Fortuner's attempt to show pretext in the form of unequal treatment falls far short of her evidentiary burden. Fortuner's evidence alluded to others, both probationary and full time, who were involved in equipment damage and were either not discharged or given far less discipline than a termination.

Chief Union Steward Pilkonis related that the degree of discipline depends on the severity of damage and the reason for it. During the Public Hearing, numerous references were made to Dave Tulley, another probationary employee, who supposedly was involved with damage to a machine during his probationary period. However, it was never made clear exactly what had transpired.

What was clear was that there was a distinction made by General Dynamics between a machine malfunctioning and operator error causing major damage. Clearly, Fortuner had an occasion to be working at a milling machine which broke down three times in a row. The break down was said to be an electrical problem.

What happened to Fortuner on this instance is telling. Upon the first breakdown, Fortuner asked Doty if she should go work elsewhere while her machine was being repaired. Doty told Fortuner to go have coffee until the repairs are finished: No trace of discipline.

On the other hand, when Fortuner caused damage said by others to be the worst ever seen at General Dynamics, Fortuner is terminated. Additionally, it must be remembered that Fortuner was still a probationary employee when she caused the major damage to the Hydrotel machine.

Several remaining factors deserve some comment regarding the issue of pretext. First, Fortuner's evidence attempted to portray Doty as constantly harassing her by standing and watching her. The record as a whole does depict Doty as watching Fortuner, but at the same time, the record is replete with a recognition that Doty watched everyone including foremen under his supervision.

Second, Fortuner presented the testimony of Donna Valtos, who testified that she had been the victim of sexual harassment at General Dynamics. Valtos' testimonial allegations of sexual harassment primarily focused on incidents in 1976, 10 years before Fortuner was even hired. Valtos related that when she began working in 1976, her supervisor conditioned her job assignments on whether Valtos would go out with him. Since 1976, Valtos suggested that various forms of retaliatory action have been visited upon her. The closest Valtos' testimony came to being directly connected to the present case was her allegation that Gene Fedura periodically called Valtos sexually offensive names. Fedura was Doty's

supervisor and one of the individuals with whom Doty had discussed Fortuner's imminent discharge. Another direct connection to the present case was Valtos' testimonial allegations against Doty. Valtos related incidents of alleged retaliatory action and another incident where Doty told Valtos that he would prefer Valtos not talk to the men because they might get excited and not do their job correctly.

As distressing as Valtos' allegations were, another female who had worked for General Dynamics testified that she had never felt victimized by sexual harassment. Also, Fortuner's testimony contained no hint of sexual harassment allegations. Furthermore, the impact of Valtos' troubling testimony was further reduced by Calvin Smith's portrait regarding General Dynamics' affirmative action measures.

The third additional factor regarding pretext was General Dynamics' rejection of all attempts to file a union grievance after Fortuner's termination. While Fortuner eventually filed a discrimination claim with the PHRC, when filing a union grievance, she was obliged to make it clear that her grievance was based on a discrimination allegation. Under the collective bargaining agreement in effect at the relevant time period, failure to so specify was a legitimate ground for rejection of Fortuner's grievance. The collective bargaining agreement declared that in a discharge case, the union could only represent a probationary employee grievant if the claim being made was clearly based on a discrimination allegation.

In this case, Fortuner relied upon supposition regarding what her grievance said. Witnesses for General Dynamics stated the grievance was

rejected because it failed to comply with the provision requiring a probationary employee's grievance to be based on discrimination. Once again, Fortuner retains the burden of proof and again she fell short.

The final factor on the issue of pretext effectively closes the door on Fortuner's attempt to establish that the reasons offered by General Dynamics for her discharge were pretext. Since Fortuner's discharge, General Dynamics made only one new hire. Approximately 1 month after Fortuner was terminated, the person hired was Carolyn Marion. Although not ironclad, the subsequent hiring of a female machinist to replace Fortuner is extremely helpful to General Dynamics' position that it was justified in Fortuner's termination.

Having ultimately failed to demonstrate that General Dynamics' articulated reasons for her discharge were merely a pretext for discrimination, Fortuner has not proven her case by a preponderance of the evidence. An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DONNA FORTUNER,
Complainant

v.

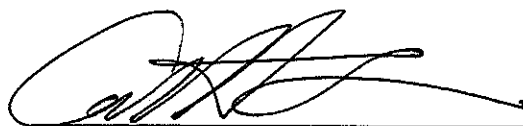
GENERAL DYNAMICS LAND
SYSTEMS DIVISION,
Respondent

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Docket No. E-38985-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 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 Stipulations, 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.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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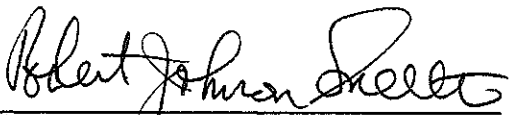
FINAL ORDER

AND NOW, this 4th day of April 1991, 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

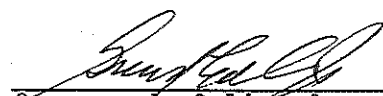
O R D E R S

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. Celia, Jr., Secretary