

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARY LYNNE HEALY,
Complainant

v.

NATIONAL AMERICAN CORPORATION,
Respondent

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DOCKET NO. E-26581

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. Mary Lynne Healy, (hereinafter either "Healy" or "Complainant"), is an adult female presently residing in Brandon, Florida. (N.T. 17)
2. National American Corporation, (hereinafter either "NACO" or "Respondent"), is a recreational land development company headquartered in Mississippi, which had a recreational land development in Dubois, Pennsylvania. (N.T. 18, 179, 311, 312)
3. In May 1980, Healy was hired as a salesperson at NACO's Dubois, Pennsylvania resort known as Treasure Lake. (N.T. 18)
4. As a sales representative at NACO's Treasurer Lake development, Healy sold either timeshares or campsite lots. (N.T. 18, 64, 75)
5. NACO invited "guests" to Treasure Lake who, once there, were given a sales presentation, then driven by a sales representative on a 5-10 mile tour of the facility, then returned to NACO's offices where the assigned sales representative attempted to finalize a sale. (N.T. 18)
6. This process took approximately 3-3½ hours per perspective buyer and sales representatives generally did 3 presentations per day.
7. Healy did not begin to see customers until June 1, 1980 because although hired in March 1980, she first took time to obtain her real estate license. (N.T. 19)

* 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. NACO operated on a fiscal year basis, which in 1980, ran from March-March, and although Healy did not begin selling until June 1, 1980, by the end of that fiscal year, she was ranked number 3 salesperson out of a 35-40 person sales force. (N.T. 20, 21)

9. Healy consistently excelled as a sales representative. In fiscal year 1981-82, she was the number 1 sales person. (N.T. 23). In fiscal year 1982-83, she was ranked as the number 2 sales person. (N.T. 24)

10. In recognition of outstanding sales performance, Healy received plaques, gifts, trips, and monetary bonuses. (N.T. 22, 24, 26)

11. NACO had a monthly top salesperson award, which Healy managed to win only once. This indicates Healy's consistency, as by year's end, Healy managed to rank first or second. (N.T. 27) Healy indicated that she had been told that consistency was an important factor regarding promotion to a management position. (N.T. 28)

12. NACO's sales representatives generally worked on a commission basis: 10% of sales generated. (N.T. 43, 53, 158)

13. One method of measuring sales performance was to calculate the percentage of customers sold versus the number of customers seen by a sales representative. (N.T. 21; C.E. 1)

14. NACO set goals for such closing percentages and originally asked sales persons to maintain at least a 10% closing rate. (N.T. 22, 227)

15. At time passed, the 10% closure rate requirement was relaxed to 7 to 8%, and later, further relaxed to as low as 5 to 6%. (N.T. 22, 227)

16. A NACO sales representative's day generally began at 8:30 a.m. and ended when a sales manager said go home. (N.T. 30)

17. In 1980, at Treasure Lake, NACO's sales force consisted of William Randolph, the project director, (hereinafter, "Randolph"); James Walker, the sales manager; James Pierre, the assistant sales manager; and approximately 30-35 salespersons. (N.T. 312, 313, 316)

18. When James Pierre resigned, Randolph replaced Pierre with Richard Upshaw, (hereinafter, "Upshaw"). (N.T. 313)
19. Each morning, NACO sales staff attended mandatory sales meetings. (N.T. 30)
20. Sales managers conducted these sales meetings during which new sales ideas and techniques were reviewed, staff motivation was attempted, and staff was also instructed regarding how to keep a consistent sales performance. (N.T. 31)
21. Superior sales representatives had their own offices while many salespersons shared office space. (N.T. 31)
22. After approximately 5 months on the job, Healy was given her own office. (N.T. 31)
23. Healy's immediate success led to NACO's assignment of newly hired employes to go around with Healy. (N.T. 36)
24. Having an assigned observer trainee present while Healy made her sales presentation had an adverse affect on Healy's sales. (N.T. 37)
25. As early as June 1980, and without compensation, Healy began attending after work weekly social gatherings arranged by NACO as a marketing tool for potential buyers. (N.T. 28)
26. NACO operated by inviting prospective buyers to Treasure Lake who normally met one-on-one with a salesperson. However, periodically, NACO invited more potential buyers than the sales force could handle. (N.T. 39)
27. When this happened, Upshaw would assign Healy and a few others to do group presentations. (N.T. 40, 41)
28. In 1981, Upshaw also assigned Healy the extra duty of after hours sales training for newly hired employes. (N.T. 42,43)
29. Healy's training sessions covered such concerns as appearance, attitude, self motivation, overcoming stress, sales techniques and closing techniques. (N.T. 44)

30. Upshaw asked several male sales representatives to assist with new employe training, however, several refused without repercussion. (N.T. 45, 46, 47)

31. Healy's sales presentation was also selected for video taping as a training tool at Treasure Lake and other NACO resorts around the country. (N.T. 48)

32. NACO also conducted a week long annual training called "spring training", at which Healy did a lot sale presentation and another segment entitled "How to make your sales presentation sparkle with enthusiasm." (N.T. 51, 52)

33. Also, when Healy learned Dennis Gustafson, (hereinafter, "Gustafson"), a colleague, had been approached by Upshaw to increase his closing percentage or be terminated, Healy informally trained Gustafson after hours 2-3 times per week, for 2-3 hours per session, for 2-3 weeks. (N.T. 55-56)

34. After Healy's private instruction, Gustafson's performance improved. (N.T. 57)

35. Healy had occasionally expressed her desire to be considered for promotion and had been voluntarily doing extra duties because she had been asked to do them, and Upshaw had told Healy that by doing such things, she would greatly improve her chances to become management, and finally Healy did extra duties because she enjoyed it. (N.T. 39,43,65,66,67,190)

36. NACO never developed a formal promotion process. (N.T. 62)

37. By the fall of 1982, NACO's Treasure Lake hierarchy included Randolph, project director; Upshaw, sales manager; and Larry Scalf, assistant sales manager. (N.T. 63)

38. In the spring of 1983, Southmark Corporation purchased the company which owned the Dubois facility, and after purchasing it, created a new entity called Cayman Landing. (N.T. 64, 313, 314)

39. The forming of Cayman Landing created the need for another sales manager and an assistant. (N.T. 64) The main responsibilities of a manager are to teach, train, motivate, guide, and hire and fire. (N.T. 62). The duties of an assistant sales manager included conducting morning sales meetings, scheduling, paperwork, supervision of sales representations, and assisting with closings. (N.T. 270) Healy had been experienced in all these areas. (N.T. 33-35, 38-53, 191)

40. In March 1983, Frank Taylor, (hereinafter "Taylor"), was promoted to the position of Cayman Landing sales manager, and John Hoffman, (hereinafter "Hoffman"), was promoted to the newly created assistant sales manager position. (N.T. 76, 80)

41. Hoffman and Healy became NACO employes at about the same time, and Healy had more experience at NACO than Taylor. (N.T. 78)

42. Prior to the announcement of the promotions, Healy had been experiencing symptoms of stress, headaches, back problems related to a slipped disc, and laryngitis. (N.T. 88)

43. After the promotion announcements, Healy's physical and emotional condition got worse. (N.T. 89)

44. Approximately 5 days after Hoffman and Taylor's promotions, they were demoted back to their original sales representative positions and Julius Springborn, (hereinafter "Springborn"), was made Cayman Landing's sales manager, and Michael DePew, was promoted to the assistant sales manager position. (N.T. 92, 314)

45. Healy had more experience with NACO than both Springborn and Michael DePew. (N.T. 23)

46. In May 1983, Scalf was terminated and the following day, Gustafson was promoted to the position as Upshaw's assistant sales manager. (N.T. 99)

47. Healy also had much more seniority with NACO than Gustafson. (N.T. 23,45)

48. Healy had neither been interviewed for any of the five promotions between March and May 1983, nor had any manager ever discussed these management position openings with her. (N.T. 101)

49. After again not being selected for either the 2 openings in April or the one opening in May, Healy's health worsened. (N.T. 102)

50. In May, 1983, Healy approached Upshaw and requested a 2 week leave of absence, which leave of absence was granted. (N.T. 104)

51. Approximately 5 days after the leave began, Upshaw called Healy and instructed Healy to return or be fired. (N.T. 107)

52. Healy returned the day after Memorial Day, 1983. (N.T. 107)

53. Healy's June, 1983, sales performance had been one of her most productive months as a NACO employe. (N.T. 108, 113, 114)

54. In June, 1983, Upshaw was transferred and Ted Tinker, (hereinafter "Tinker"), was brought in as the new sales manager. (N.T. 108, 328)

55. The five other promotions previously mentioned above were given to in-house sales representatives. (N.T. 40,41,46,50,67,75)

56. On July 9, 1983, Healy called off sick with laryngitis. (N.T. 114, 115)

57. The following day, Tinker called Healy into his office regarding being out sick, and while with Tinker, Tinker would not look at Healy's doctor's excuse which she offered to show him. (N.T. 115, 116)

58. At that time, Tinker instructed Healy not to let it happen again. (N.T. 116)

59. Towards the end of July, 1983, Healy was having another good sales volume month. (N.T. 117)

60. On the morning of July 28, 1983, Healy's back was bothering her, and Healy made several attempts to call Tinker. (N.T. 118, 241)

61. Healy finally reached Tinker by phone at approximately 10:30 a.m. (N.T. 119, 241)

62. It was a rule that an employe who was sick had to call by 8:30 a.m. (N.T. 118)

63. The following day, July 29, 1983, Healy went to work, and following the morning sales meeting, Healy was called to Tinker's office where she was told that NACO was displeased with her absences and occasional tardiness. (N.T. 121, 122)

64. Healy suggested Tinker call her chiropractor, however, Tinker was not interested. (N.T. 123, 124) Healy also asked for leave of absence to get her health in order but her request was rejected. (N.T. 123)

65. Tinker requested Healy to resign, however, Healy refused, accordingly, Tinker terminated Healy. (N.T. 57, 123, 124)

66. Healy testified that only one other person, Billy DePew had ever been fired for other than lack of sales, and he was rehired. (N.T. 125, 127, 290)

67. Randolph testified that many employes were terminated for either tardiness or poor attendance. (N.T. 323, 369)

68. Between June 1980 and July 1983, NACO's sales force remained fairly constant with between 35-40 salespersons on staff, although approximately 500 salespersons left or were terminated over the period. (N.T. 218)

69. When Cayman Landing opened, NACO began with approximately 110-115 total and ended up with approximately 30-35 per office. (N.T. 317)

70. When NACO hired, 15-20 were hired with hopes that perhaps 2 would ultimately work out. (N.T. 224)

71. Following Healy's termination she requested and was granted a meeting with Randolph. (N.T. 126, 252)

72. On August 2, 1983, Healy met with Randolph, Tinker and Gustafson. (N.T. 125, 127, 128, 252; R.E 3)

73. Healy offered to show her doctor's excuses for her absences, however, Randolph refused to look at them. (N.T. 128, 129, 130, 253, 369)

74. Following Healy's termination, she attempted to find substitute employment by sending applications and resumes. (N.T. 165, 166)

75. Healy was able to conduct several seminars for Dubois businesses, but otherwise Healy was unable to find comparable employment until October 1984, when NACO rehired her as a sales trainer. (N.T. 58, 144, 167, 174)

76. By October 1984, Randolph had retired. (N.T. 311)

77. Healy was a trainer from October 1984 to March 1985, when Healy was made an assistant sales manager. (N.T. 144, 174) In the Spring of 1985, Healy was given an award for her performance as a trainer. (N.T. 61)

78. After approximately 1 month in the assistant sales manager position, the new project director asked Healy to transfer to a Virginia facility where male managers had become the focus of a sexual harassment charge. (N.T. 148)

79. Healy transferred to Virginia where, under her leadership, her team consistently out performed two other sales teams. (N.T. 149, 150)

80. In September 1986, Healy was again terminated. (N.T. 152, 174)

81. The pending sexual harassment suit had been settled in the fall of 1986. (N.T. 153; R.E. 4)

82. No reason was given to Healy for her September 1986 termination. (N.T. 156)

83. Following the September 1986 termination, Healy sought substantially equivalent employment. (N.T. 165, 166)

84. Between November 1986 and July 1987, Healy worked with a personnel agency and made approximately \$200.00 in commissions. (N.T. 169)

85. In July 1987, Healy began working as a loan consultant for Savings of America and was still with them at the time of the Public Hearing. (N.T. 170)

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.

3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").

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

5. The Respondent failed to show sufficient prejudice resulting from the lapse of time between the filing of this matter in September 1983, and the Public Hearing held in May 1989.

6. The Complainant established a prima facie case of a sex-based failure to promote by showing that:

- a. She is a female;
- b. Who was qualified for available positions; and
- c. Despite her qualifications, she was not selected for promotion; and
- d. The promotions were given to male co-workers, 4 out of 5 of whom had less experience than the Complainant, and all of whom had sales performances below the Complainant's.

7. The Complainant established a prima facie case of sex-based discriminatory conditions of employment by showing that:

- a. She is a female;
- b. Who requested a leave of absence which was cut short; and

c. Men Salespersons did not have their leave of absences cut short.

8. The Complainant established a prima facie case of a sex-based discharge by showing that:

- a. She is a female;
- b. Who was performing her job satisfactorily; and
- c. Despite this she was discharged; and
- d. She had been treated differently from male salespersons.

9. The Respondent successfully articulated reasons who the Complainant was not promoted; was forced to return early from a leave of absence; and was terminated.

10. The Complainant successfully proved by a preponderance of the evidence that the Respondent's articulated reasons for the failure to promote, and termination were unworthy of credence and pretextual.

11. The Complainant has met her ultimate burden of persuasion that the Respondent's actions violated Section 5(a) of the PHRA.

12. Once a finding of discrimination has been made, the PHRC may order the Respondent to cease and desist from the discriminatory practice and grant back pay for wages and other benefits lost by the Complainant.

13. The PHRC is permitted to award interest on back pay awards at the rate of 6% per annum.

14. The Complainant is entitled to reinstatement in the next available full-time sales representative position, and instatement into the next available assistant sales manager position.

O P I N I O N

This case arises on a complaint filed by Mary Lynn Healy, ("Healy"), against National American Corporation ("NACO"), with the Pennsylvania Human Relations Commission ("PHRC"). In her complaint filed on or about September 14, 1983, Healy alleged that NACO failed to promote her, failed to give her a leave of absence, and ultimately discharged her because she is a woman. These 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. ("PHRA").

PHRC staff investigated the allegations and at the investigation's conclusion, informed NACO that probable cause existed to credit Healy'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 NACO that it had approved a Public Hearing.

The Public Hearing was held on May 8 and 9, 1989, in Pittsburgh, PA, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Vincent Ciccone. Charles R. Volk, Esquire, appeared on behalf of NACO. 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 October 3, 1989, and the brief for NACO was received on September 26, 1989.

At the outset of the Public Hearing NACO renewed a previously denied Motion to Dismiss. NACO based its motion on the doctrine of laches. In an Interlocutory Order dated September 23, 1988, the Hearing Examiner denied NACO's laches argument under principles outlined in Beaver Cemetery v. PHRC, 107 Pa. Cmwlth. 190, 528 A.2d 282 (1987). At the Public Hearing, NACO

was afforded every opportunity to put into the record any evidence of prejudice to NACO caused by the 5 year delay between the filing of the complaint and the pre-hearing conference in this case.

NACO's post-hearing brief primarily argues prejudice in the form of witness unavailability. One witness Gustafson, has died, and NACO indicates Tinker's whereabouts, are unknown. Both witnesses were said to have been involved in Healy's discharge. However, the record reveals that NACO had presented nothing beyond their general assertion that they suffered prejudice from the absence of these two witnesses. No details of how this circumstance may have prejudiced NACO were given. Additionally, no description of NACO's unsuccessful efforts to locate Tinker was even attempted.

Even if the equitable doctrine of laches would ultimately be found to apply to administrative hearings, NACO has not made a sufficient record to show prejudice. For this reason and the reasons previously outlined in the Hearing Examiner's September 23, 1988 Interlocutory Order, the doctrine of laches shall not be applied in this case.

Turning to Healy's substantive allegations, we recognize that the nature of her claims present allegations of disparate treatment, and although Healy's allegations focus on three distinct aspects of her employment, (promotions, conditions, and termination) the analytical mode of evidence assessment is 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 that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 256 (1981).

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 shall be used to ultimately resolve the liability phase 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, Healy must, of course, first establish a prima facie case by a preponderance of the evidence. Since Healy's complaint alleges three separate acts of harm, (promotion, conditions, 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 Healy. 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 allegations raised in the instant case.

To establish a prima facie case of a failure to promote Healy must establish:

1. That she is a member of a protected class;
2. That she was qualified for the available position;
3. That despite her qualifications, she was rejected; and
4. That the available positions were filled by individuals with either less or comparable qualifications who were not members of the protected class.

See i.e., 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 Healy's conditions of employment allegation, she must establish:

1. That she is a member of a protected class;
2. That she requested a leave of absence which request was denied; and
3. That male salespersons were granted leave of absences.

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

1. That she is a member of protected class;
2. That she had been performing her job satisfactorily;
3. That she was discharged; and
4. That she had been treated differently from other male salespersons. See PA State Police v. PHRC, 116 Pa. Cmwlth. 89, 542 A.2d 595 at 600, 601 (1988) vacated and remanded on other grounds.

The Respondent's brief argues that Healy failed to make out a prima facie case regarding not being promoted by submitting that Healy failed to demonstrate she was qualified for a management position. Other than this single assertion, the Respondent's brief does not submit that Healy failed in any other way to make out a prima facie case on either the promotion allegation or the conditions of employment or discharge allegations.

Dividing Healy's allegations into separate examinations we find that under the requisite showing to establish a prima facie case of failure to promote, clearly, Healy satisfies the first criterion: She is a female. Just as clear was the satisfaction of the third and fourth elements: She was

denied five promotions which were given instead to male co-workers, four out of five of whom began working for NACO after Healy and all of whom had sales performances below Healy's exemplary sales record. Furthermore, Healy testified that of the five men promoted, she participated in the initial training of Taylor and Gustafson, and later personally retrained Gustafson 2-3 hours per day, 2-3 times per week, for 2-3 weeks.

Regarding the prima facie promotion issue, this leaves the question of whether Healy was qualified for a management position. There are two components of the qualification element: The qualifications demanded by the position in question, and the qualifications possessed by a Complainant. Of course, normally, the first component must be established to give meaning to the second component.

Healy, in effect, indicated that to her knowledge, the main responsibilities of a manager or assistant manager are to teach, train, motivate, guide, and hire and fire. The only witness for NACO, Project Director, William Randolph, indicated that 90% of the sales management program was attitude and the remainder of the qualifications were enthusiasm, stability, and consistently working a 6 day work week. Except for the 6 day week requirement, the required elements listed by Randolph are not capable of being measured objectively.

Several federal courts have held that Complainants should not be required, as a part of a prima facie showing, to establish that they possess subjective qualifications, but that Respondents should be required to articulate either the need for or the lack of such qualifications in its rebuttal of a prima facie showing. See, Jayasinghe v. Bethlehem Steel Corp., 760 F.2d 459, 33 FEP 441 (9th Cir. 1983), cert. denied, 105 S. Ct. 380 (1984); and Burrus v. United Tel. Co., 683 F.2d 339, 29 FEP 663 (10th Cir.), cert. denied, 459 U. S. 1071 (1982). These courts indicate that to do

otherwise would collapse the three step analysis into a single initial step at which all issues would be resolved. This would defeat the purpose underlying the McDonnell Douglas process. Lynn v. Regents of the University of Calif., 656 F.2d 1337, 28 FEP 410 (9th Cir. 1981).

We agree with this analysis. Although we recognize that subjective criteria can play a legitimate role in a Respondent's actions, it is also apparent that subjective factors provide an open opportunity for unlawful discrimination. See Thorton v. Coffey, 618 F.2d 686, 22 FEP 709 (10th Cir. 1980). There must be room for a Complainant to challenge the use of subjective criteria by permitting evidence of pretext.

Here, the objective information available finds that on average, Healy was the best salesperson NACO had for the period June, 1980 through March, 1983. Additionally, Healy's qualifications for the job can be seen from the fact that after her termination, she was later recalled and eventually placed in a management position where she was quite successful. Two of the men promoted over Healy in March 1983 only remained on the job as managers for five days until they were demoted back to their salespersons positions.

Considered as a whole, the evidence of record reveals that Healy had in fact established a prima facie case of discrimination in NACO's failure to promote her.

Turning to Healy's conditions of employment allegation, once again, Healy is successful in establishing a prima facie case. Healy has shown that she is a female who made a request for a leave of absence which request was originally granted, however, after Healy began the leave of absence, the leave was abruptly cancelled and she was ordered to return to work or be fired. Healy also testified that numerous men were given leave of absences and that to her knowledge none had ever been called back after the leave had

been granted. Such evidence sufficiently shifts to the Respondent the burden to produce evidence to show that Healy's leave was cancelled for a legitimate nondiscriminatory reason.

Turning to Healy's discharge allegation, once again, Healy is successful in establishing a prima facie case. She is, of course, a woman, who had been performing her job satisfactorily. In fact, Healy's sales figures for June 1983 were the best she had ever recorded. Healy's July 1983, sales volume was also an excellent showing but she was never-the-less terminated on July 28, 1983. Finally, regarding being treated differently, Healy offered evidence that she had been recently denied five promotions and recalled from a leave of absence in May 1983. More importantly, Healy also testified that although there was massive turnover in NACO's sales force, only one other person had ever been terminated for a reason other than lack of sales.

Accordingly, Healy was successful in establishing the requisite prima facie case in each of her three allegations. Thus the production burden shifts to NACO.

The 4th Circuit Court in Uviedo v. Steves Sash & Door Co., 35 FEP 906 at 909 (5th Cir. 1984) outlined quite well the general meaning of the Respondent's burden of production. The Uviedo court said:

The burden on the defendant in rebutting a plaintiff's prima facie case is not a heavy one. "All the employer need do is to raise a genuine issue of fact as to whether it discriminated against the plaintiff." Redditt v. Mississippi Extended Care Centers, Inc. 718 F.2d 1381, 1385, 33 FEP 286 (5th Cir. 1983). The defendant accomplishes this by introducing into evidence "a clear and reasonably specific legally

sufficient explanation" for its action. Id. See Burdine,
450 U. S. at 254-55, 101 S. Ct. at 1094-95.

Regarding the promotion issue, NACO's primary position is that Healy's attitude was bad. Randolph readily concurs that Healy's sales performance was excellent, but Randolph testified that attitude is 90% of the management program and Healy's attitude was bad. Randolph further testified that the then sales manager, Upshaw, made the recommendation regarding who to promote and Randolph simply reviewed Upshaw's recommendation and invariably went along with Upshaw's choices. Additionally, Randolph indicated that Upshaw had told him that Healy was not being recommended for promotion to management because of her work habits, bad attitude, and her unwillingness to work a 6 day work week.

With respect to Healy's conditions of employment claim, although NACO did not directly articulate its response to Healy's claim, Randolph submitted that any NACO employe who worked for any length of time received time off. Randolph contended that both men and women were afforded time off for emergency situations and that, in effect, Healy had been treated no different than anyone else. Regarding calling Healy back, Upshaw had given Healy two weeks leave, however, Upshaw called Healy back for an upcoming holiday: Memorial Day. Healy herself testified that some of NACO's busiest sales days were holidays.

Turning to Healy's termination, NACO submits that Healy's termination resulted from the application of Randolph's strict tardiness and attendance policy: either three absences - termination, or three times being late - termination. Randolph's testimony inferred that Healy missed work on several occasions and was terminated accordingly.

Thus, on each of Healy's three separate allegations, NACO has successfully articulated nondiscriminatory reasons for its actions. By doing so, the burden shifts back to Healy to establish by a preponderance of the evidence that the reasons NACO offered for its actions were either pretextual or not worthy of belief. On the promotion and discharge issues, we believe Healy has met this burden. However, on the conditions of employment issue, Healy's evidence falls short of the requisite preponderance standard.

Before focusing directly on the promotion and termination allegations, the issue of credibility arises due to instances of conflicting testimony. Many of the findings of fact previously listed reflect the Hearing Examiner's view of the credibility of the two conflicting witnesses. In assessing credibility, consideration was given to each witness' motive and state of mind, strength of memory, and demeanor and manner while testifying. In addition, consideration has been given to the extent to which, if at all, any aspect of a witnesses testimony is either supported or contradicted by other evidence.

Regarding demeanor, and manner of testifying, Healy spoke frankly and with candor, while Randolph was at times hesitant, evasive and even directly inconsistent. For example, Randolph testified that numerous individuals were terminated for poor attendance and when pressed to name several, Randolph first confirms that Billy DePew was so terminated. Then Randolph mentioned that Dick Swink had been terminated for poor attendance before Healy. When Randolph was then shown records which indicate Swink was not terminated until after Healy, Randolph changed his story. Additionally, evidence reveals that Swink was a borderline sales performer, as Swink only had a 7% closing average, while Randolph had at first maintained that he was a better performer than Healy.

Another instance of inconsistency was how many women salespersons were employed by NACO's Dubois facility. Randolph maintained that it was normal that between one-third to one-half of the sales force were women. Conflicting evidence revealed that perhaps the highest level had possibly approached one-third but never ever close to one-half and generally far below one-third.

Regarding being evasive, Randolph quite clearly attempted to evade questions regarding how Healy's many positive contributions to NACO's operation in any way showed that Healy had a bad attitude. When pressed on cross examination, Randolph eventually articulated that because Healy was against a 6 day work week, she had a bad attitude. Later Randolph testified that 99% of the sales force disliked working 6 day weeks and that the 6 day work schedule was reduced to 5 days when a sufficient adverse reaction was perceived to be coming from the work force.

Another area of inconsistency in Randolph's testimony deals with how he said he reacted to Upshaw granting Healy a leave of absence in March, 1983. Randolph testified that he went along with it, however, Randolph earlier suggested Upshaw created considerable problems by allowing salespersons time off. In fact, in June, 1981, Randolph terminated Upshaw because Upshaw was giving salespersons time off. Randolph later testified that in June 1983, Upshaw was ready to be terminated again for his "bad habits" with salespersons. On the one hand, Randolph is ready to fire Upshaw, while, on the other hand, Randolph says he went along with giving Healy time off. At another point in Randolph's testimony, Randolph denies telling Upshaw to order Healy back but says, if Upshaw had not, Randolph would have done so. Clearly, Healy was made to return after only five days of a two week leave of absence. Randolph would have us believe Upshaw simply changed his mind even though Randolph had no problem with Upshaw giving Healy

time off. Frankly, it is far more credible that Upshaw called Healy and cancelled her leave because Randolph was very displeased that Upshaw was again giving a salesperson time off.

Another specific instance of inconsistency also deals with Randolph's assertion that Healy displayed a bad attitude. Randolph knew that Healy was being used to train new employes after hours, and Randolph says she was good with people at night. However, Randolph asserts that Healy was bad with the sales force during the day.

The uncontroverted evidence suggests that salespersons had little contact with each other during the day. Instead, salespersons were busy with customers. Healy suggested there was often no time to have lunch except on the run. In general, it just is not credible that Randolph would have an employe who is, as he suggests, hampered by a bad attitude, doing several forms of training. Especially, when the training includes areas such as enthusiasm and motivation. Instead, the more credible conclusion regarding Healy's attitude is that she was a devoted, dedicated company woman who was doing everything she could to make the company successful and better her standing so as to improve her chance of being selected for a management position. Randolph maintained a reluctance to recognize the obvious. NACO had gone through 500 people in approximately 3 years, and standing near the top, if not at the top, of this large group was Healy.

Regarding Healy's denial of promotion allegations, the evidence considered as a whole reveals that the Respondent's articulated reasons for failure to promote Healy are unworthy of credence. Burdine Supra, at 256 (1981). Healy's evidence persuasively reveals that Healy's attitude was quite good, contrary to NACO's assertion that her attitude was bad. As indicated the only thing NACO, in effect, points to in their attempt to support that Healy's attitude was bad is that Healy disliked working a 6 day

work week. Randolph testified that to his knowledge 99% of the sales force were against the 6 day work week schedule. Conversely, Healy's evidence clearly depicts an employe with a healthy attitude. For instance, Healy's supervisor recognized her as an asset and gave her time off, despite Upshaw ultimately being fired for it in 1981.

Perhaps the largest contradiction in NACO's position is the simple fact that Healy was the one selected by NACO to train newly hired and current sales personnel. Healy's sales presentation was even videotaped as a training aide at NACO's Dubois facility and other NACO facilities around the country.

Strikingly, although Healy fully cooperated with every request that she do extra work, others were not always as cooperative. Healy's testimony remained uncontroverted that at least one man who was later promoted, Springborne, had on occasion refused to assist with training responsibilities.

Except for Hoffman, who began at the same time as Healy, Healy was senior to the other 4 men promoted between March and May 1983. Additionally, Healy actually helped directly train Taylor and Gustafson. Also, Healy's efforts regarding training permeated the full spectrum of NACO training measures throughout her employment, while those ultimately promoted may have been involved with training, but certainly not to the degree of Healy's involvement.

Regarding grooming for management, interested employes appear to have been left mainly to speculate on what management was looking for. Healy had informed management of her desire for promotion and aggressively did all she could to gain deserved recognition. Instead, NACO promoted others.

It is noteworthy that Hoffman and Taylor, the first two to be promoted before Healy, survived only 5 days as managers. When Healy was

later rehired and eventually made a manager, she not only lasted longer than 5 days, but was a leader in NACO's Virginia resort.

Several other factors presented by the evidence also have some bearing on why 5 men were promoted before Healy. Healy testified without contradiction that Randolph told sexual jokes daily. Added to this factor is the general observation that NACO's sales force was predominantly men and no women were on the sales management team. Without further background information, however, such a statistical showing has minimal weight regarding NACO's motives.

The overwhelming consideration here is simply that Healy out-worked, out-sold, and out-trained the entire male dominated work force. The only real evidence submitted regarding Healy having a bad attitude was information which Randolph conceded was a problem for 99% of the sales force. Further Healy's complaints had not been more frequent or vehement than anyone else. Accordingly, Healy successfully meets her ultimate burden of persuasion with regard to NACO's failure to promote her.

Turning to Healy's termination, NACO relies on the position that Healy was both absent and tardy too frequently. Once again the evidence considered as a whole leads to the inescapable conclusion that NACO's articulated reasons for Healy's termination are not worthy of credence.

Of approximately 500 employes over a 3 year period, Healy was perhaps the best salesperson NACO had. Incredibly, in June and July 1983, Healy was having record sales. Nevertheless, Healy was terminated.

While it is true, Healy began to miss work in March 1983, it is important to look at the full picture. Before March 1983, Healy testified that she had near perfect attendance. Healy also testified that between January 1983 and July 1983, Healy did not miss much more work than any other sales representative. In March, 1983, Healy perhaps already under

considerable stress from performing extra voluntary duties in addition to an already grueling regular schedule, felt humiliated by being denied one of two well-deserved promotions. Healy's stress, of course, increased and grew even stronger after each of the 3 additional subsequent promotion denials.

Despite verifiable medical problems, NACO made absolutely no allowance for Healy's medical problems. In fact, as strong evidence of the pretextual nature of NACO's articulated reason for Healy's discharge, NACO management personnel refused to even review Healy's doctor's excuses. Such a refusal helps support Healy's argument that NACO's reasons are a pretext for unlawful sex discrimination. See i.e. deLesdstine v. Ft. Wayne State Hospital, 29 FEP 193 (7th Cir. 1982). In Healy's case, NACO seemed unprepared to make any allowance for her medical condition.

Also of persuasive impact is the fact that prior to Healy's termination she was given no warning that absences would result in termination.

Finally, Healy's testimony indicates that, although NACO terminated many employees, only one other salesperson had ever been terminated for a reason other than a poor sales performance. In that instance, the fired employe was soon returned to his position.

Again, Healy's evidence considered as a whole, leads to the conclusion that the rationale articulated by NACO for terminating Healy was pretextual. Thus, having determined that NACO's failure to promote and subsequent discharge of Healy were motivated by sex-based discrimination, we consider appropriate remedies.

Section 9 of the PHRA provides that hiring, with or without backpay, may be ordered after a finding of discrimination. The general function of backpay relief is to put the victim of discrimination in the

position he/she would have attained absent the discrimination. Abermarle Paper Company v. Moody, 422 U. S. 405, 418-423 (1975); PHRC v. Transit Casualty Insurance Company, 478 Pa. 430, 387 A.2d 58 (1978). Further, the Pa. Supreme Court has declared that the PHRC has broad discretion when fashioning an award. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985).

First, it is clear that a general cease and desist order is appropriate. Additionally, the facts of this case present the issue of whether either reinstatement as a sales representative or instatement as a sales manager is an appropriate remedy. As a general rule, when a Complainant accepts an interim offer of reinstatement or employment with the Respondent, the back pay period may terminate, provided the position accepted is fully comparable to what the Complainant would have held absent the Respondent's discriminatory actions. The same principle can apply equally to the issue of reinstatement.

Here NACO rehired Healy in October 1984 as a sales trainer. In March 1985, Healy was made an assistant sales manager and after approximately 1 month as an assistant sales manager in Dubois, Healy was asked to transfer to a Virginia facility. Healy did transfer and worked for NACO as an assistant sales manager until she was terminated in September 1986.

Clearly, Healy's subsequent acceptance of a position with NACO was in accord with a desire to mitigate her damages. It appears Healy acted reasonably throughout her second employment with NACO and through no fault shown she was again terminated. On the contrary, evidence presented suggests two improper factors may well have contributed to Healy's second termination.

First, Healy indicates she was asked to go to Virginia because it would perhaps be better for NACO to have a woman manager in Virginia since NACO was facing a sexual harassment suit there. Coincidental with the case settling, Healy was terminated. Second, Healy testified that she had been

told that the corporate sales manager, Jim Phillips, had been speaking with a NACO regional sales manager, Bernie Farrell, about shaking up the managers at the Virginia facility. Healy further indicated she had been told that when Farrell asked Phillips who he was going to fire, Phillips responded, "Mary Lynne Healy for one." Further, when Farrell asked Phillips why Healy, Phillips remarked, "no one is going to hold a damn court case over my head."

Although these two factors are damaging, the simple fact is that no evidence was presented that Healy had in any way caused the loss of her position in September 1986. Accordingly, Healy's termination should not be considered as a failure to use reasonable diligence in mitigating back pay damages. Thus, the back pay period should resume in September 1986 following Healy's second termination, and the interim rehiring of Healy should not affect the reinstatement, instatement question. Accordingly, an instatement order remains an appropriate remedy along with back pay.

Having determined that Healy should be awarded back pay, the next focus must be ascertaining the proper amount. Of course, the means used to determine the appropriate back pay award are discretionary, however, in the exercise of this discretion we are mindful of certain general principles. First, the general purpose of the award is to make Healy whole by attempting to make the award the amount, which, but for the discrimination, Healy would have earned.

Consideration of awards of back pay are normally divided into three separate parts: the time period to be covered by the award; amounts to include to calculate the "gross" damages which could be awarded; and amounts which should be deducted from the gross amount.

Here, the proper back pay period begins on or about March 28, 1983. The date Healy was first discriminatorily denied a promotion. In previous

PHRC cases, the PHRC has terminated the running of back pay liability on the date of the public hearing. Following this general precedent, back pay liability in this case would cease in May 1989. Also, we have already noted that although a portion of the effects of NACO's discrimination were set aside for a time period, the full effects resumed upon Healy's second termination.

Back pay periods can also be terminated if a Complainant at any point becomes less than reasonably diligent in attempting to find alternate employment. Here, the evidence supports that Healy continually made reasonably diligent efforts to find substitute employment.

Thus, we turn to the question of what was the "gross" amount of Healy's loss. In March, 1983, two positions were denied to Healy: sales manager; and assistant sales manager. The next two positions, 5 days later, were the filling of the same two manager positions from which Hoffman and Taylor had both been demoted. Finally, the fifth incident of promotion was to an assistant sales manager position.

Generally, a Complainant's post-hearing brief argues for the remedial measure they seek. In this instance, the post-hearing brief simply notes that wide a variety of remedial measures can be taken.

Since there is some difference between a sales manager's wages and an assistant's, we must first decide which position to use as the basis for the calculation of lost wages. Here, the assistant sales manager's position is selected since no strong argument has been presented that the basis should have been that of a sales manager.

Testimony indicates that an assistant sales manager had a base annual salary of \$30,000 and an override of one-half of 1 percent of NACO's total sales volume. Additionally, assistant sales managers were provided with a car.

Interestingly, Healy's fiscal year 1981-82 wages were approximately \$56,000, and her 1982-83 fiscal year earnings were \$45,000. This, of course, appears to be more than she would be making as an assistant sales manager. Furthermore, precise calculations are difficult given the lack of precise damage information presented. As a general principle, absolute exactitude is not required and we are left to approximate the amounts earnable. Any method used here is simply a process of an educated conjecture.

Since Healy's sales performance was exceptional between the failure to promote in March 1983, and her discharge on July 28, 1983, it appears likely that Healy would have continued to make more money as a sales representative than she would have made as an assistant sales manager.

Accordingly, we begin to calculate Healy's lost wage damages in August 1983 after her termination. Of course, it is a simple process to calculate Healy's lost wages regarding the \$30,000 annual base salary of an assistant sales manager. However, the record contains minimal information regarding the one-half of 1 percent override.

Healy did testify that when she was rehired and became an assistant sales manager, her total salary was approximately \$48,000 per year: salary plus the override. Accordingly, this \$48,000 yearly figure shall be used throughout as the yearly salary Healy would have made had she not been discriminatorily denied promotion and then terminated. On average, a \$48,000 per year salary represents approximately \$4,000 per month.

Accordingly, the following calculations are made:

August 1983 - October 1984

14 months @ \$4,000 per month - \$56,000.00

October 1984 - March 1985 (Healy had been rehired as a trainer for \$2,000 per month)

6 months @ \$2,000 per month - \$12,000.00

April 1985 - September 1986 (Healy was paid as an assistant sales manager) -0-

September 1986 - May 1989

33 months @ \$4,000 per month -\$132,000.00

Total wages lost \$200,000.00

At this point another fundamental principle must be applied. Interim earnings operate to reduce the back pay otherwise allowable. Transit Casualty, Supra.

The testimony presented reveals the following deductions are appropriate:

August 1983 - October 1984	\$	300.00
September 1986 - July 1987	\$	200.00
July 1987 - December 1987	\$	18,000.00
January 1988 - December 1988	\$	38,000.00
January 1989 - May 1989	\$	<u>14,000.00</u>
Total interim wages	\$	70,500.00

Accordingly, Healy is entitled to a lump sum payment of \$129,500.00. Additionally, simple interest of 6% annually should be awarded. Williamsburg Community School District v. PHRC, 99 Pa. Cmwlth Ct. 206, 512 A.2d 1339 (1986); and Goetz v. Norristown Area School District, 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1974).

Relief is, therefore, ordered as specified in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARY LYNNE HEALY,
Complainant

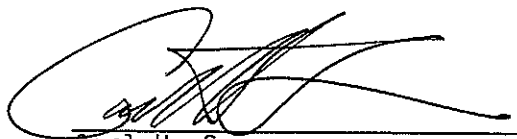
v.

NATIONAL AMERICAN CORPORATION,
Respondent

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: DOCKET NO. E-26581
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RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that accordingly, the Complainant has proven discrimination in violation of §5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached 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
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARY LYNNE HEALY, :
Complainant :
 :
v. : DOCKET NO. E-26581
 :
NATIONAL AMERICAN CORPORATION, :
Respondent :

FINAL ORDER

AND NOW, this 26th day of April , 1990, 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 Finding of Facts, 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 the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S


1. That the Complainant is entitled to reinstatement to the next available sales representative position and subsequent instatement to the next available assistant sales manager position.
2. That the Respondent shall cease and desist from sex-based discrimination with regard to promotions and terminations.
3. That within 30 days of the effective date of this order, the Respondent shall pay to the Complainant the lump sum of \$129,500.00, which amount represents the wages lost by the Complainant between August 1983 and the Public Hearing of this case;

4. That the Respondent shall pay interest of 6% per annum calculated from August 1983, up to the last day of the Public Hearing of this case;

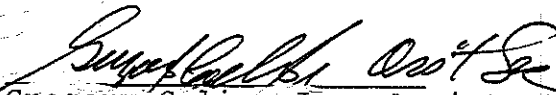
5. That the Respondent shall pay additional interest of 6% per annum calculated from the effective date of this Order until payment is made; and

6. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Vincent Ciccone, Esquire in the PHRC Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION


Dr. Robert Johnson Smith, Chairperson

ATTEST:


Gregory Celia, Jr., Assistant Secretary