COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RALPH JOHNSON AND THEODORE R. DIXON, JR., Complainants	:	
v.	:	DOCKET NOS. E-56916 E-56914
THE HOUSING AUTHORITY OF THE CITY OF MCKEESPORT, Respondent	:	

STIPULATIONS OF FACT

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RALPH JOHNSON, and
THEODORE R. DIXON, JR.,
Complainant,

v.

HOUSING AUTHORITY OF THE CITY OF MCKEESPORT,
Respondent.

Docket No.E-56916

STIPULATIONS OF FACT

1. Complainant, Ralph Johnson, filed a timely complaint of discrimination against Respondent, Housing Authority of the City of McKeesport ("Housing Authority") on October 23, 1991 at Docket No. E-56914.

2. Complainant, Theodore R. Dixon, Jr., filed a timely complaint of discrimination against Respondent, City of McKeesport Housing Authority, on October 30, 1991 at Docket No. E-56916.

3. Respondent filed a verified answer to each Complaint within 30 days of service of each complaint.

4. Commission investigation resulted in a finding of probable cause to credit the allegations of Johnson and Dixon.

5. Conciliation efforts were unsuccessful as to both complaints.

6. Public Hearing was approved by the Commission on Johnson's Complaint on April 24, 1995.

7. Public Hearing was approved by the Commission on Dixon's Complaint on June 27, 1994.

8. Complainants are African-Americans and each is a member of a protected class.

9. In the event that the Commission finds on behalf of either or both Complainants, counsel for the Commission and counsel for Respondent agree to calculate monetary damages by multiplying the average hours of weeks worked by Complainant Johnson by the hourly pay rate(s) for the period from his termination until the date of the Commission's final order and by multiplying the

average of hours of weeks worked by Complainant Dixon by the hourly pay rate(s) for the period from his suspension until February 10, 1994. Both calculations shall be subject to 6% per annum as provided by law. Both calculations shall be set forth in a joint submission within 20 days after the hearing as to liability.

The undersigned agree that the aforesaid Stipulations of Fact are true and correct to the best of the knowledge, information and belief of each.

Walter Baczkowski, Esq. Date
Attorney for Respondent

5/15/95

Lorraine S. Caplan Date
Assistant Chief Counsel

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMPLAINANT(S):	)	
	)	
RALPH JOHNSON AND	)	
THEODORE DIXON	)	
	)	
v.	)	**Docket No. E-56916**
	)	
RESPONDENT(S):	)	
	)	
CITY OF MCKEESPORT HOUSING	)	
AUTHORITY (POLICE)	)	
	)	

STIPULATION OF MONETARY DAMAGES

Complainant Johnson's damages are calculated as 4.2 average hours worked per week multiplied by 194 weeks (July 1991-March 31, 1995) multiplied by $15.00 per hour to the amount of $12,222.00.

Beginning on April 1, 1995, the Respondent's pay rate increased to $17.00 per hour. The hearing examiner can calculate Complainant Johnson's damages from the first of April to the date of the award, if any, by multiplying the number of weeks that have passed from April 1, to the date of the award by 4.2 hours and multiplying that figure by $17.00 per hour.

Complainant Dixon's damages are calculated as 4.4 average hours worked per week multiplied by 135 weeks (July 1991-February 10, 1994) multiplied by $15.00 per hour to the amount of $8,910.00.

Respondent does not waive the right to argue the limitation of damages as a result of the letter dated February 11, 1992, by signing the above stipulation.

Walter F. Baczkowski,
Counsel for Respondent

Lorraine S. Caplan,
Assistant Chief Counsel

FINDINGS OF FACT *

1. The Respondent is a public authority which provides low income housing for the City of McKeesport. (SF 1.)

2. The Respondent began a housing patrol operation in 1989. (NT 147.)

3. In June of 1990, the Respondent hired Charles E. Coughlin, a former narcotics investigator with the City of McKeesport, to supervise the housing patrol.

4. Mr. Coughlin was originally hired as Superintendent of Police, but his title was later changed to Director of Security. (NT 102-103.)

5. The only qualification for employment as a housing patrol officer was that the applicant be an officer in good standing with the City of McKeesport police. (NT 12.)

6. Complainant Ralph Johnson ("Johnson") was accepted for employment as a housing patrol officer in 1989. (NT 71.)

7. Complainant Theodore Dixon, Jr., ("Dixon") was accepted for employment as a housing patrol officer in 1989. (NT 12.)

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

CE	Complainants' Exhibit
RE	Respondent's Exhibit
NT	Notes of Testimony
SF	Stipulations of Fact

8. Mr. Coughlin scheduled shift assignments for housing patrol officers and posted the schedules on a weekly basis. (NT 13-14.)

9. Mr. Coughlin allowed officers to trade shift assignments without consulting with him. (RE 25-26.)

10. When two officers would trade assignments, Mr. Coughlin could not determine which officer was at fault if one of them did not appear. (RE 30-31.)

11. Officers who wished to call off for duty were expected to call Coughlin at home or through his pager, or to call the City of McKeesport Police Department. (RE 21, 23.)

12. The Respondent had no written policy governing discipline or termination of housing patrol officers. (NT 168.)

13. Complainant Dixon was suspended from the duty roster in 1991 for his alleged failure to call off on February 5, 1991. (NT 123.)

14. Mr. Coughlin did not inform Complainant Dixon in writing or orally that the suspension was for a failure to call off. (NT 19.)

15. Complainant Dixon was not scheduled for duty on February 5, 1991. (CE A.)

16. Complainant Dixon was suspended on July 8, 1991 for failing to call off. (CE B.)

17. Complainant Dixon always called off or traded assignments when he could not work his scheduled assignments. (NT 20-21.)

18. Complainant Dixon was terminated from the housing patrol on August 23, 1991. (CE B.)

19. Respondent's roster indicates that Complainant Johnson did not call off on at least two occasions when he was not scheduled to work. (CE A.)

20. Complainant Johnson always traded assignments or called off when he was unable to work his shift assignment. (NT 73-74.)

21. Until his date of termination, Complainant Johnson was never informed in writing or orally that he had failed to call off for work at any time. (NT 75.)

22. Complainant Johnson was suspended and terminated on July 8, 1991. (CE E.)

23. James Lundie, a white officer, failed to call off for duty on at least two occasions. (CE G.)

24. Lundie was never disciplined for his failure to call off on November 8, 1990, a date he was scheduled to work. (CE A, G.)

25. After his November 8 failure to call off, Lundie was never removed from the duty roster. (CE A, G.)

26. Thomas Pipp, a white officer, failed to call off for duty on August 4, 1991, a date he was scheduled to work. (CE A, G.)

27. Respondent's records did not indicate that Mr. Pipp was ever disciplined. (CE A, G.)

28. Officer Lundie failed to call off for duty on July 5, 1991, a day for which he was scheduled. (CE A, G.)

29. On July 8, 1991, Lundie was reprimanded for his failure to call off. (CE K.)

30. On December 4, 1991, the complaints of Dixon and Johnson were served on the Respondent. (CE D, F.)

31. On December 16, 1991, Lundie was terminated by the Respondent. (CE M, N.)

32. Officer Lundie was reinstated when he accepted Respondent's offer of reinstatement in early 1992. (NT 171.)

33. By letter dated February 11, 1992, both Complainants were offered reinstatement. (CE O.)

34. Complainants Johnson and Dixon did not accept Respondent's offer of reinstatement. (CE O.)

CONCLUSIONS OF LAW

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

2. The parties have complied with all procedural prerequisites to a public hearing.

3. The Complainants are individuals within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. The Complainants bear the burden of establishing a *prima facie* case of race discrimination.

5. The Complainants have met their burden of establishing a *prima facie* case by showing that:

a) they are members of a protected class;

b) they were qualified to perform their job duties;

c) they were terminated from their positions; and

d) the Respondent did not terminate similarly situated employees not in the Complainants' protected class.

6. Once the Complainants establish a *prima facie* case, the burden of production shifted to the Respondent to produce evidence of legitimate, nondiscriminatory reasons for its action.

7. The Respondent has met its burden of articulating a legitimate nondiscriminatory reason for its action in terminating the Complainants.

8. The Complainants have met their ultimate burden of persuasion by showing that the Respondent's proffered explanation is unworthy of credence.

9. When PHRC finds a violation of the PHRA, it has authority to order a remedy which will effectuate the purposes of the Act.

OPINION

These matters arise out of two complaints filed by Ralph Johnson and Theodore R. Dixon, Jr. (hereinafter "Complainant Johnson" and/or "Complainant Dixon"), against the Housing Authority of the City of McKeesport (hereinafter "Respondent"), Docket Nos. E-56916 and E-56914. The Complainants allege that they were suspended and then terminated from their positions on the housing patrol of Respondent Housing Authority because of their race, African-American, and in doing so, the Respondent violated Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA").

After an investigation by Pennsylvania Human Relations Commission (hereinafter "PHRC") staff, the Respondents were notified that probable cause had been established with regard to the allegations of discrimination based on race. Conciliation efforts proved unsuccessful. A request for public hearing was approved by the Commission on June 27, 1994 on Complainant Dixon's complaint. A request for public hearing on Complainant Johnson's complaint was approved on April 24, 1995.

The public hearing in these consolidated matters was convened on May 15 and 16, 1995, in Pittsburgh, Pennsylvania. Phillip A. Ayers, Permanent Hearing Examiner, presided over the public hearing. Lorraine S. Caplan, PHRC Assistant Chief Counsel, appeared on behalf of the complaints. Walter F. Baczkowski, Esquire, appeared on behalf of the Respondent. Subsequent to the public hearing, both Respondent Counsel and Commission Counsel submitted post-hearing briefs.

In reviewing Complainants' allegations, we recognize the nature of their claims presents allegations of disparate treatment based on race discrimination. The analytical mode of evidence assessment in a matter such as this is clearly set forth in several cases. In Allegheny Housing Rehabilitation Corp. v PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas v. Green, 411 U.S. 792 (1973). The Pennsylvania Supreme Court's guidance indicates that a 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 the complainant must demonstrate by a preponderance of the evidence that the complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct 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).

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

> As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the

> plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes."

A complainant 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 the evidence does preponderate to prove discrimination. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing, *supra* at 319.

In this court-designed burden allocation, the Complainants must first establish a *prima facie* case. Here, the proof pattern is adapted to fit the factual variance presented by the instant case. As always, the *prima facie* showing should not be an onerous burden.

In the instant cases, *prima facie* cases of race discrimination were established by showing that:

1) they are members of a protected class;

2) they were qualified to perform their job duties;

3) they were terminated from their positions; and

4) the Respondent did not terminate similarly situated employees not in the above protected class.

In the instant cases, both Complainant Johnson and Complainant Dixon are African-Americans and therefore members of the protected class. Also, it is undisputed that both complainants were qualified to perform their job duties as

officers with Respondent. The record further shows that both complainants were suspended and terminated during the Summer of 1991. Lastly, the record before the Commission reflects that, while both African-American complainants were terminated, a white officer (Officer Lundie) received only a reprimand for the same offense. Accordingly, the Complainants in the instant cases have established *prima facie* cases of race discrimination.

As aforementioned, once a *prima facie* case of race discrimination has been established, the burden then shifts to the respondent to "simply. . . produce evidence of a legitimate, non-discriminatory reason. . . for [its action]." If the respondent meets this burden, the complainants, in order to prevail, must demonstrate by a preponderance of the evidence that the complainant was a victim of intentional discrimination. In the instant case, the Respondent asserts that the Complainants were terminated because they violated Respondent's policy regarding absenteeism. Accordingly, the Respondent has set forth a "legitimate, non-discriminatory reason for its action."

With the Respondent having met its burden, the Complainants must show, by a preponderance of the evidence, that they were victims of intentional discrimination. They may succeed by direct persuasion that a discriminatory reason was a likely motivation, or indirectly by showing that the proffered explanation is unworthy of credence.

In order to properly decide these cases, we must review pertinent aspects of the factual record. Firstly, respondent witness Charles Coughlin supervised the housing patrol program to fight drug-related crime in the City of McKeesport's three

housing communities. Mr. Coughlin was a former narcotics investigator with the McKeesport City Police. As supervisor Mr. Coughlin was in charge of hiring police officers for the housing patrol.

At the time of the instant complaints, the Respondent did not have any written policies or procedures regarding discipline and termination. Mr. Coughlin also testified that his own procedure was to speak to an officer who had failed to call off, and if the proffered explanation was inadequate and he had missed three times, the officer would be suspended. Mr. Coughlin admitted that he was never sure when officers called off or when different officers would trade assignments. Consequently Mr. Coughlin, according to his own testimony, could not tell who was at fault when someone did not appear for a work assignment.

A review of the record indicates that Mr. Coughlin's explanation for suspending and terminating Complainants is not worthy of credence. Mr. Coughlin asserts that he was never clear as to who failed to call off, but he disciplined both of the Complainants anyway. In regard to both Complainants, Mr. Coughlin promptly cited them for this alleged failure to call off. Coughlin never asked Complainants if they had an excuse. Had he done so, they could have told him then that they either were not scheduled or had switched. Instead, Coughlin simply imposes harsh discipline. It is as if he wanted to find fault with Complainants and was not interested in whether they had actually done anything or not. The Respondent's own records indicate that while the Complainants were suspended and terminated, a white officer (Lundie) was reprimanded for a similar offense. Also, Officer Lundie was continued on the duty roster, while Respondent's own records

indicate that Complainant Dixon was taken off the duty roster for thirty days as a disciplinary measure. This difference in treatment is certainly clear in light of the fact that Lundie failed to call off on days that he was scheduled to work. The record before the Commission also indicates that another white officer, Thomas Pipp, failed to call off when he was scheduled to work, and was never disciplined. Both Complainants were cited for days that they were not scheduled to work.

The record reflects a clear difference in treatment between Complainants and the white officer. Mr. Coughlin's own version of his "disciplinary procedure" clearly resulted in disparate treatment. It is interesting to note that twelve days after the Complainants filed their complaints, the Respondent terminated Officer Lundie. This action by the Respondent appears to be an attempt to undo the damage incurred by the disparate treatment of the Complainants.

The evidence before the Commission indicates that the Respondent's proffered explanation is pretextual and not worthy of credence, and therefore, the Complainants have shown that they were victims of intentional discrimination.

Accordingly, having found that the Respondent, in suspending and terminating the Complainants, violated Section 5(a) of the PHRA, we move to the issue of damages. Once there is a finding of unlawful discrimination, a remedy shall be fashioned to grant Complainants "make whole relief" and to deter future discrimination. PHRC v. Alto Reste Park Cemetery Ass'n., 453 Pa. 124, 306 A.2d 881 (1973). Also, the Pennsylvania Human Relations Commission has broad discretion when it fashions an award to a complainant. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985). Firstly, both Complainants shall be reinstated into their

positions as housing patrol officers. Next, we move to the issue of monetary damages.

In the instant cases, the parties have stipulated as to certain damages. This stipulation as to monetary damages is part of the record before the Commission. However, the Respondent specifically has argued that the time period for damages should be limited to February 11, 1992. That date is approximately 31 weeks after the Complainants were suspended from the housing patrol. As a matter of clarification, February 11, 1992 is the date that the Respondent offered reinstatement to the Complainants. The relevant case in this area is Ford Motor Co. v. EEOC, 458 U.S. 219 (1982). Commission counsel asserts that the above referenced case stands for the proposition that "only an unconditional offer would limit Respondent's liability." Counsel further asserts that Respondent's offer was made pursuant to conciliation and an anticipated release of all liability.

Firstly, we must look at the Ford Motor Co. case and its holding. The general rule from the Ford Motor Co. case is that an employer charged with discrimination can toll the accrual of backpay by unconditionally offering the job previously denied. Thus, absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of backpay liability. Another case that impacts on this issue is EEOC v. Serrano Medical Associates (47 EPD 38, 318) where an employer's liability for backpay was tolled by an offer of reinstatement, despite the fact that the offer did not include backpay.

In the instant case, we must look at the letter dated February 11, 1992 (Complainants' Exhibit O) and determine whether the offer of reinstatement is

conditioned. The offer of reinstatement did not include backpay. A review of said document does not indicate that the offer was conditioned upon the Complainants waiving any action. As a general rule, the Complainants should only be awarded those damages that would put them in the same position they would have been if they had not been terminated. Accordingly, having found that the February 11, 1992 letter is an unconditional offer, the Complainants' damages should cease as of February 11, 1992. In this matter the parties have submitted a stipulation which provides some assistance in calculating damages. The parties stipulated that Complainant Johnson worked an average of 4.2 hours per week, and Complainant Dixon worked an average of 4.4 hours per week. Both Complainants were paid during the relevant time period at the rate of $15 per hour. The time period between Complainants' termination and the letter of February 11, 1992 is thirty-one (31) weeks. The calculations of damages for the Complainants are as follows:

Complainant Johnson: 31 Weeks @ 4.2 hrs. per = 130.2 hrs. x $15 = $1,953.

Complainant Dixon: 31 Weeks @ 4.4 hrs. per = 136.4 hrs. x $15 = $2,046.

Having found that the Complainants have met their ultimate burden of proving discrimination by a preponderance of the evidence, and having found the appropriate figure of damages, an appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RALPH JOHNSON AND THEODORE R. DIXON, JR., Complainants	:	
v.	:	DOCKET NOS. E-56916 E-56914
THE HOUSING AUTHORITY OF THE CITY OF MCKEESPORT, Respondent	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, it is the Permanent Hearing Examiner's recommendation that the Complainants have proven unlawful discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Stipulation of Monetary Damages, Conclusions of Law, Opinion, and Order be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By: Phillip A. Ayers

Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RALPH JOHNSON AND THEODORE R. DIXON, JR., Complainants	:	
v.	:	DOCKET NOS. E-56916 E-56914
THE HOUSING AUTHORITY OF THE CITY OF MCKEESPORT, Respondent	:	

FINAL ORDER

AND NOW, this 27th day of February, 1996, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Stipulation of Monetary Damages, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Permanent Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

1. Respondent shall cease and desist from discriminating against Complainants because of their race.

2. Respondent shall pay Complainant Johnson the lump sum of $1,953 and Complainant Dixon the lump sum of $2,046 within thirty days of the effective date of this Order.

3. Respondent shall reinstate both Complainants into the positions of officers for the Housing Authority.

4. Respondent shall pay additional interest of six percent (6%) *per annum*, calculated from the effective date of this Order until payment is made.

5. Within thirty days of the effective date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to Lorraine S. Caplan, Esquire, at the Commission's Pittsburgh Regional Office, 11th Floor State Office Building, 300 Liberty Avenue, Pittsburgh, PA 15222.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Robert Johnson Smith
Chairperson

Attest:

_____
Raquel O. de Yiengst
Assistant Secretary