

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAI Y. KPAKIWA,
Complainant

v.

MAGEE WOMEN'S HOSPITAL,
Respondent

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DOCKET NO. E-27277

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAI Y. KPAKIWA, :
 :
 Complainant :
 :
 v : Docket No. E-27277
 :
 MAGEE-WOMEN'S HOSPITAL, :
 :
 Respondent :

JOINT STIPULATIONS OF FACT

1. A complaint Docket No. E-27277 was filed with the PHRC on December 6, 1983.
2. The Respondent was served with the complaint on December 13, 1983.
3. The Complainant is an adult individual who resided in Pennsylvania at the time of the complaint.
4. At the time of the complaint the Respondent employed more than four employees.
5. A fact finding conference was held in 1984.
6. Probable cause was approved by the Legal Department in 1985.
7. Conciliation efforts were not successful.

8. The case was placed on the public hearing docket by the Commission in 1988.
9. A prehearing conference was held in March, 1989.
10. All of the procedural requirements for a Public Hearing were met.

Diane Blancett-Maddock 11/4/92
Diane Blancett-Maddock
Counsel for Commission

Martin J. Saunders 11/4/82
Martin J. Saunders
Counsel for Respondent

Byrd R. Brown
Byrd R. Brown
Counsel for Complainant 11/4/92

FINDINGS OF FACT *

1. The Complainant in this matter is named Kai Y. Kpakiwa (hereinafter "Complainant") and at the time of Public Hearing, resided at 2856 Davidson Drive, Nahunta, Georgia, 30058. (N.T. 9)

2. The Complainant began employment with Magee Women's Hospital (hereinafter "Respondent") in 1974 as a housekeeper. (N.T. 10)

3. The Complainant was employed as a housekeeper from 1974 until 1976. (N.T. 10)

4. In 1976, the Complainant was promoted to the position of Lead Worker and shift supervisor. (N.T. 11)

5. The two individuals that the Complainant reported to were Mr. Marino and Mr. Niccolai. (N.T. 12)

6. Mr. Marino was the Director of Housekeeping and Mr. Niccolai was Assistant Director of Housekeeping. (N.T. 13)

7. When the Complainant became a lead worker, his immediate supervisor was Connie Washington, a Black female. (N.T. 69)

8. Mr. Marino made the decision to promote the Complainant from housekeeping to the lead worker and shift supervisor position. (N.T. 71)

9. The Complainant was the evening supervisor in the Environmental Services Department of Magee Women's Hospital. (N.T. 80)

* The foregoing "Stipulations of Fact" 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 fact 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 - February 20, 1992 Transcript
R.E.	Respondent's Exhibit
N.T. II	Notes of Testimony - November 4, 1992 Transcript

10. As evening supervisor, it was the Complainant's responsibility to ensure that the offices and storerooms for the environmental services were locked. (N.T. 80)

11. The Complainant had received several written warnings for deficiencies in performance even before he became supervisor. (N.T. 86)

12. The first written warning was given to the Complainant on June 14, 1979 by Mr. Marino. (N.T. 87)

13. With this written warning, the Complainant was counselled about derelictions in his supervisory duties as a lead worker. (N.T. 87)

14. The Complainant did not file any grievance with the hospital or any type of complaint to any organization over this written warning. (N.T. 87)

15. The Complainant received another written warning concerning his failure to properly supervise employees. (N.T. 88, R.E. B)

16. The Complainant did not file any grievance with the hospital or any other organization over this written warning. (N.T. 88-89)

17. On May 21, 1980, Mr. Niccolai personally counselled the Complainant concerning his failure to properly secure keys, by leaving keys on desks at night and leaving the cage to the door unsecured. (N.T. 89)

18. The counselling also included leaving the research master key and the day key unsecured and leaving personnel health unit unlocked. (N.T. 89)

19. Feeling that Complainant did not fully understand his duties, on June 1, 1981, both Mr. Marino and Mr. Niccolai sat down with the Complainant to go over the job description of the lead worker. (N.T. 92)

20. At the time of this conversation, the Complainant had been employed as a lead worker for over five years. (N.T. 93)

21. On March 9, 1983, the Complainant was given a work assignment which consisted of the facilitating of the breaking down, and then setting back up and rearranging of the board room. (N.T. 104, E.E. G)

22. The Complainant was disciplined on March 21, 1983 because of his failure to ensure that the board room had been arranged properly. (N.T. 107)

23. The Complainant did not file any grievance with the hospital or any type of organization over this disciplinary measure. (N.T. 107)

24. The Complainant in April of 1983 on another occasion received disciplinary action for not sending an employee to the emergency room for treatment after the employee was injured. (N.T. 119, R.E. J & L)

25. The Complainant did not report the employee's injury until management already knew of it from the employee. (R.E. J)

26. In the Complainant's daily report from June 28, 1983, the Complainant had the assignment to clean the Gulf Building basement. (N.T. 123)

27. The Complainant's report also states that he had completed "everything in the Gulf Building basement." (N.T. 124)

28. The Complainant was given his fifth written warning on June 29, 1983, because the Complainant failed to complete the assignment at the Gulf Building. (N.T. 125)

29. The Complainant was called into Mr. Marino's office with Mr. Niccolai to discuss the problems with the assignment to clean the Gulf Building. (N.T. 126, 129)

30. The written warning was handed to the Complainant and he refused to sign the document. (N.T. 129)

31. However, the Complainant did not file a grievance or any type of complaint in reference to the written warning. (N.T. 129)

32. This warning was the Complainant's fifth overall written warning. (N.T. 129)

33. The disciplinary/termination policy at Respondent's workplace was that an employee could be terminated after three written warnings. (N.T. 129)

34. The Complainant was not terminated after three written warnings. (N.T. 130, 131)

35. The Complainant's five written warnings were before the Complainant applied for the position of assistant director of environmental services. (N.T. 131)

36. On August 18, 1983, the Complainant was counselled by Mr. Marion and given yet another written warning concerning the manner in which he counselled and supervised employees. (N.T. 133)

37. Two other employees (Marlene Reise and Barbara Craven) had complained about the Complainant's failure to recommend them for a raise. (N.T. 133)

38. Both of these employees are Black females. (N.T. 133)

39. The complaint of the employees was that the Complainant instituted the disciplinary action of not recommending a raise without any prior indication of dissatisfaction with their performance. (N.T. 133)

40. The Complainant signed this written warning and acknowledged that Mr. Marino had discussed the Complainant's actions in regard to the two employees (Craven and Reise). (N.T. 133)

41. The Complainant never filed a grievance or a discrimination charge in regard to this written warning. (N.T. 134)

42. The Complainant was offered the opportunity to return to this position as lead worker on June 2, 1983, but he refused the offer. (N.T. II 460)

43. In addition to previously issued warnings, the Complainant continued to receive counselling in regard to deficiencies in his job performance. (R.E. I, I(1), N, P, Q, R, S, V)

44. The reason for continued counselling included the loss of drapes removed for cleaning (R.E. I(1)), and a complaint by a Dr. Holtzman that Complainant had failed to clean two pediatric areas. (R.E. I(1)).

45. The Complainant was also notified by inference of the on-going dissatisfaction with this performance by the fact that he had three raises withheld from him. (R.E. DD, FF, GG)

46. At no time did the Complainant use the Respondent's grievance procedure to question any disciplinary action, whether it was counselling or the denial of a raise. (N.T. 87, 89, 103, 129)

47. In July of 1983, Mr. Niccolai was promoted to the position of Director of the Safety and Security Department, leaving the position of Assistant Director vacant. (N.T. II 449)

48. Both Jeffrey Busko and the Complainant applied for the vacant position. (N.T. II 368)

49. Mr. Marino selected Jeffrey Busko for the position. (N.T. II 368)

50. The Complainant was not chosen because Mr. Busko was better qualified and because of the Complainant's poor performance record. (N.T. II 369)

51. In December of 1983, an employee (Kirk Adler) was not paid for over a month because the Complainant did not record his hours on the bi-weekly attendance sheets. (R.E. 44-45)

52. After investigating, Mr. Busko brought the latest incident to the attention of Mr. Ayers who was not in the position Mr. Marino formerly held. (N.T. II 458-459)

53. In February of 1983, Mr. Harry Ayers inter alia assumed responsibility for the environmental services department. (N.T. II 454)

54. When Mr. Ayers received notice in December of 1982 that he would be assuming this responsibility, he began to review the personnel files of the employees, including the Complainant's. (N.T. II 454)

55. Mr. Ayers was aware of the disciplinary actions taken against the Complainant over the years. (N.T. II 458)

56. After the Kirk Adler incident, Jeffrey Busko recommended that the Complainant be terminated, based on the Complainant's continued failure to properly exercise supervisory responsibility and his overall performance record. (N.T. II 459)

57. Mr. Ayers did not agree with Mr. Busko's recommendation, but decided to offer the Complainant a demotion. (N.T. II 459-460)

58. Mr. Ayers did personally meet with the Complainant and offered him a demotion. (N.T. II 460)

59. The Complainant immediately refused the demotion, and Mr. Ayers indicated to Complainant that he should think about it and call the office the next day. (N.T. II 460)

60. The Complainant did not communicate with the Respondent the next day. (N.T. II 460)

61. The Respondent then subsequently issued a termination letter to the Complainant when they did not hear from him. (N.T. II 460)

CONCLUSIONS OF LAW

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

2. The parties have fully complied with the procedural pre-requisites to a public hearing in this case.

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

4. Magee Women's Hospital (hereinafter "Respondent") is an employer within the meaning of the PHRA.

5. The Complainant has met his initial burden of establishing a prima facie case of failure to promote by proving that:

- a) he belongs to a protected class;
- b) he applied for and he was qualified for a position for which Respondent was seeking applicants;
- c) that he was denied the promotion; and
- d) that the promotion was awarded to an applicant with either equal or less qualifications than Complainant and who is a different race, color and national origin than Complainant.

6. The Complainant has met his initial burden of establishing a prima facie case of discharge by showing:

- a) he is a member of a protected class;
- b) he was performing the duties of the position;
- c) he was terminated from the position; and
- d) Respondent replaced him with someone of equal or less qualifications than the Complainant not of the same race, color and national origin.

7. The Respondent articulated legitimate non-discriminatory reasons for its refusal to promote the Complainant and for terminating the Complainant.

8. The Complainant bears the burden of showing that the proffered reasons of the Respondent are pretextual and/or unworthy of credence.

9. The Complainant has not met his burden of showing that the proffered reasons of the Respondent are pretextual and/or unworthy of credence.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAI Y. KPAKIWA,
Complainant

v.

MAGEE WOMEN'S HOSPITAL,
Respondent

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DOCKET NO. E-27277

OPINION

This case arises on a complaint filed on or about December 6, 1983, by Kai Kpakiwa (hereinafter "Complainant") against Magee Women's Hospital (hereinafter "Respondent") with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). The Complainant alleged that he was not selected for promotion to the position of Assistant Director because of his race, color, national origin. The Complainant also alleges that he was terminated because of his race African, Color, Black and/or national origin, Sierra Leonean. These allegations state violations of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA")

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

The Public Hearing was held on February 20, 1992, February 21, 1992 and November 4, 1992, in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Phillip A. Ayers. The case on behalf of the complaint was presented by PHRC staff attorney Diane Blancett-Maddock; Byrd R. Brown, Esquire appeared on behalf of Complainant; the Respondent was represented by Martin J. Saunder, Esquire. Upon receipt of the transcript the parties were afforded an opportunity to submit briefs. The Complainant filed his post hearing brief on January 15, 1993 and the Respondent filed its post hearing brief on January 13, 1993.

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). The Complainant must carry the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "prima facie case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the prima facie case creates the presumption that the employer unlawfully discriminated against the employee. Id. at 254. The prima facie case serves to eliminate the most common non-discriminatory reasons for the employer's actions. Id. It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In McDonnell Douglas, the U. S. Supreme Court held that a plaintiff may prove a prima facie case of discrimination in a failure-to-hire case, by demonstrating:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the prima facie case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U. S. at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEP 1018 (6th Cir. 1987).

Here we adapt the McDonnell Douglas test because this case involves an alleged promotional denial and termination. To establish a prima facie case of a promotion denial, the Complainant must show:

1. that he is a member of a protected class;
2. that he applied for and he was qualified for a position for which Respondent was seeking applicants;
3. that despite his qualifications, Complainant was denied the promotion; and

4. that the promotion was awarded to an applicant with either equal or less qualifications than Complainant and who is a different race, color, national origin than Complainant's.

The prima facie showing in regard to the termination is as follows:

1. he is a member of the protected classes;
2. he was performing the duties of the position;
3. he was terminated from the position; and
4. the Respondent replaced him with someone of equal or less qualifications who is not of the same race, color, national origin.

Once Complainant establishes a prima facie case, the burden shifts to Respondent to "articulate some legitimate, non-discriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. Respondent must rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," Id. at 258, and "legally sufficient to justify a judgment" for Respondent. Id. at 255. However, Respondent does not have the burden of "proving the absence of discriminatory motive." Bd. of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If Respondent carries this burden of production, the Complainant must then satisfy a burden of persuasion and show that the legitimate reasons offered by Respondent were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden now merges with the burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of proof rests with the Complainant.

In the instant case, the Complainant successfully meets his prima facie showings in both a failure to promote situation and a termination. In regard to the promotion, under the Pennsylvania Human Relations Act, all races, colors and national origins are protected, and obviously, the Complainant has a race, color, and national origin. Also, the Complainant applied for and was qualified for the position in this case. Since the position was awarded to someone else, the Complainant was effectively denied the position. In regard to the fourth element, the individual chosen was of equal or less qualifications than Complainant and he was not of the same race, color, national origin.

In regard to the prima facie showing of the termination issue, the Complainant is clearly a member of the protected classes. He was performing the duties of the position in question, and he was in fact terminated from the position. Lastly, the Complainant was replaced by someone of equal or less qualifications who is not of the same race, color and national origin. The Complainant has set forth a prima facie showing in regard to the termination.

Having set forth the prima facie showings, the burden of production shifts to the Respondent to articulate a legitimate non-discriminatory reason for its actions in not promoting the Complainant and terminating him. The Respondent presented, at the Public Hearing, voluminous documentation and testimony articulating the reasons for both of its actions. The information presented by the Respondent included all different types of disciplinary action, counselling memos, anecdotal notes, performance evaluations, and credible testimony. Essentially, the Respondent's articulated reason was that the Complainant's bad performance was the reason he was not promoted and ultimately terminated.

Now that the Respondent has met its burden of articulating legitimate non-discriminatory reasons for its actions, the Complainant must persuade the Commission that a discriminatory reason more likely motivated the Respondent's actions, or indirectly show that the proffered explanation is unworthy of credence. In the instance case, the Complainant simply cannot do so. In this case, the Complainant not only cannot show that the proffered reasons are unworthy of credence, but the Complainant's credibility is brought into question. This point is important because the Complainant at all times has the burden of persuading the Commission that the Respondent discriminated against him because of his race, color and national origin. At the Public Hearing, the Complainant testified that he had never been terminated from any position. However, the Respondent presented five subsequent employers of the Complainant who testified they had fired the Complainant because of incompetence.

Moving forward with several of the Complainant's specific allegations, it is clear that his credibility has been seriously undermined. The Complainant alleges that Mr. Marino publicly humiliated him because of his speech. The incident allegedly occurred in 1981. However, the Complainant did not mention it until in September of 1983, after receiving five written warnings and having several raises withheld. The Complainant did not offer any evidence of this alleged incident. He did not produce any witnesses when it allegedly occurred, or at Public Hearing.

Furthermore, the Complainant's allegations that he was counselled in a discriminatory manner, disciplined and denied raises are without merits. The Respondent presented numerous credible witnesses who testified to the performance problems of the Complainant. These problems are a matter of record presented at the Public Hearing. The Complainant, at Public Hearing,

feigned lack of memory or while acknowledging the counselling and discipline or evaluation, disputed certain underlying facts. But, continually at the Public Hearing, the Respondent presented documents and testimony that contradicted the Complainant's version of events. Also, the vast majority of these reports were signed by the Complainant. Also, as Respondent's counsel notes in his brief, "the inability of a supervisor to remember his own counselling and discipline simply is additional incredible testimony and further adds to Complainant's lack of credibility." Clearly the Complainant's credibility is so lacking that any factual dispute should be resolved against the Complainant.

The Respondent in this matter also produced evidence that the personnel actions (i.e. counselling, discipline and denial of raises) taken against Complainant were the standard procedure used by the Respondent. The Respondent presented evidence that two White supervisors were terminated for unsatisfactory performance. Furthermore, these individuals, before termination, received written warnings, counsellings and were denied raises. The Complainant in this matter received many more counselling and/or disciplinary actions than did these individuals.

In addition, another point is that the Complainant was replaced by someone who is in one of the protected classes, and was offered a non-management position with Respondent. This is not the act of a Respondent who is seeking to rid itself of an employee because of his race, color or national origin. Interestingly, if the Respondent had strictly followed its own policy, then the Complainant would have been terminated after three warnings, instead of six written warnings.

Finally, a review of the record in this matter reveals that the Complainant, clearly a poor performer in this job, before being fired, was given numerous warnings and offered a demotion which he refused. The Respondent has clearly articulated numerous legitimate non-discriminatory reasons for its actions and the Complainant has failed to show that those articulated reasons were a pretext for not promoting and ultimately terminating Complainant because of his race, color or national origin.

Having found thusly, an appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAI Y. KPAKIWA,
Complainant

v.

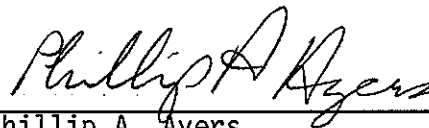
MAGEE WOMEN'S HOSPITAL,
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DOCKET NO. E-27277

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 of Fact, 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.



Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

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KAI Y. KPAKIWA,
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v.

MAGEE WOMEN'S HOSPITAL,
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DOCKET NO. E-27277

FINAL ORDER

AND NOW, this 8th day of June, 1993, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates 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

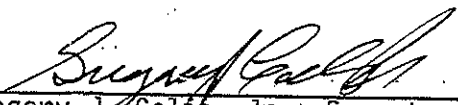
that the complaint in this case be, and the same hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 

Robert Johnson Smith, Chairperson

ATTEST:


Gregory J. Cella, Jr., Secretary