

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

ANNA LYNCH-PRATT, Complainant

v.

THE FISH MARKET RESTAURANT, Respondent

DOCKET NO. E-40955

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**COMMONWEALTH OF PENNSYLVANIA
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v.

THE FISH MARKET RESTAURANT, Respondent

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STIPULATIONS OF FACT

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

1. The Complainant herein is Anna Lynch-Pratt, an adult female.
2. The Respondent herein is McKlan, Inc. a Pennsylvania corporation doing business as the Fish Market Restaurant located at 118-124 South 18th Street, Philadelphia, PA 19103.
3. The Respondent, at all times relevant to the instant case, has employed four or more individuals in the Commonwealth.
4. On July 13, 1987, the Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Commission docket number E-40955.
5. On August 26, 1987, the Complainant filed an amended notarized complaint with the Commission also at docket Number E-40955.
6. On September 28, 1987, Respondent submitted to the Commission an Answer and New Matter to Complainant's amended complaint.
7. In February 1988, the Commission notified the Respondent that probable cause existed to credit the allegations from the complaint, as amended.
8. Subsequent to the finding of probable cause the Commission and Respondent attempted to eliminate the allegedly unlawful practice through conference, conciliation and persuasion, but were unable to do so.
9. In correspondence dated July 13, 1988, the Commission notified the Respondent that a public Hearing had been approved in this matter.
10. The Complainant was hired by the Respondent in November 1986 as a salad/cold bar person and prep person.
11. In March 1987, Complainant informed her supervisor that she was pregnant with a due date of October 20, 1987.
12. In late March or early April 1987, the Complainant was assigned to a portion of Respondent's restaurant known as the Oak Bar for salad/sandwich preparation duties.
13. On May 13, 1987 or May 14, 1987, Complainant's supervisor informed her that her last day at work would be May 15, 1987.
14. The Complainant last worked for Respondent on May 15, 1987.

15. At the time Complainant last worked for Respondent, the Complainant worked an average of 38.22 hours per week and was paid a rate of \$6.00 per hour.

Pamela Darville
Pamela Darville

Counsel for the Commission

June 6, 1989
Date:

Keith N. Leonard
Keith N. Leonard

Counsel for Respondent

June 23, 1989
Date:

Charles W. Boohar
Charles W. Boohar

Counsel for Complainant 3

June 30, 1989
Date:

FINDINGS OF FACT

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 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
S.F. Stipulation of Fact

1. On November 4, 1986, Anna Lynch-Pratt, (hereinafter either "Complainant" or "Pratt"), began working at the Fish Market Restaurant, (hereinafter "The Fish Market"). (N.T. 41, 42; S.F. 10)
2. Pratt was initially hired to prepare individual salads. (N.T. 42)
3. After approximately 1 month, Pratt was assigned additional "prep" duties, which included making soups, salad dressings, and other large quantity items. (N.T. 44, 45)
4. Between December 1986, and March 1987, Pratt performed salad person duties four days per week and prep person duties one day a week. (N.T. 50)
5. In February 1987, The Fish Market opened an express luncheon service in a portion of the restaurant know as the Oak Bar. (N.T. 50, 117)
6. At first, four to five kitchen employes rotated working the Oak Bar lunch service. (N.T. 50, 118)
7. In March 1987, Pratt asked her supervisor, Peter Howell, (hereinafter "Howell"), to be assigned to work the Oak Bar full time. (N.T. 50)
8. Howell did assign Pratt full time to the Oak Bar. (N.T. 50, 112)
9. At all times, Pratt had performed her duties efficiently and competently. (N.T. 127; 186; C.E. 7, p. 10)

10. During a May 13, 1989 management meeting a decision was made to terminate lunch services at the Oak Bar as this service had neither met management expectations or proved profitable. (N.T. 133, 202)
11. On May 13, 1987, Howell advised Pratt that as of May 15, 1987, she was to be laid off. (N.T. 62, 134)
12. After being informed of the imminent layoff, Pratt asked to be kept working in any capacity. (N.T. 62, 134-135, 153, 168)
13. Between April 1986 through April 1987, Pratt had successfully completed a chef training course at a Restaurant School in Philadelphia. (N.T. 40) I
14. Pratt graduated from the Restaurant School with honors. (N.T. 40)
15. Prior to coming to work at The Fish Market, Pratt had approximately 9 years of varied experience in the food service area. (N.T. 39, 40)
16. On May 10, 1987, a Respondent help wanted ad appeared in The Philadelphia Inquirer. (N.T. 66, C.E. 2)
17. The May 10, 1987 want ad was seeking a pastry/salad cook. (C.E. 2)
18. On May 31, 1987, the Respondent again advertised for a pastry/salad cook. (N.T. 67, C.E. 3)
19. On June 10, 1987, the Respondent hired a male apprentice cook who began working in the same capacity as Pratt had worked prior to being assigned to the Oak Bar. (N.T. 42, 179; C.E. 6)
20. On June 19, 1987, the Respondent hired another male who also began working at Pratt's former job. (N.T. 182; C.E. 6)
21. The Respondent hired 43 persons between Pratt's layoff and October 14, 1987. (C.E. 6)
22. Approximately March 1987, Pratt informed Howell that she was pregnant. (N.T. 59, 189)
23. Pratt gave birth on October 17, 1987 (N.T. 58)
24. Pratt's physician, Dr. Anthony Miticia, testified that he found no reason why Pratt could not have continued working at The Fish Market up to the date of Pratt's delivery. (N.T. 19, 31)
25. McKlan, Inc., (hereinafter either "McKlan" or "Respondent"), operated The Fish Market. (S.F. 2)
26. During the years 1985, 1986, and 1987, The Fish Market was losing money. (N.T. 196). In 1986, the loss amounted to \$202,000.00 and for the first quarter of 1987, the loss was \$36,000.00. (N.T. 196)
27. In March 1987, a management decision was made to cut back both food and labor costs. (N.T. 199)
28. In January 1987, the weekly payroll was approximately \$10,000.0, which by June 1987, had been reduced to \$7,400.00. (N.T. 200)
29. During the same time period, there had also been across-the-board personnel reductions as the number of employes was reduced from 65 to 50. (N.T. 200) In the fall of 1986 there had been 17 kitchen employes, and with Pratt's discharge, there were only 13 remaining. (N.T. 115)
30. Despite reduction efforts, The Fish Market closed on December 17, 1988. (S.F. at N.T. 37)
31. Following Pratt's layoff, Pratt testified that she did not look for alternate employment until April 11, 1988. (N.T. 78, 79)

32. When Pratt did seek employment, she was immediately successful in finding alternate employment. (N.T. 79)
33. Pratt earned \$8,896.69 in interim earnings between April 11, 1988 and December 17, 1988. (S.F. at N.T. 37)
34. At the time of her layoff, Pratt worked an average of 38.22 hours per week at a rate of \$6.00 per hour. (N.T. 53; S.F. 15)
35. Had Pratt been working at The Fish Market the 35 ½ week period between April 11, 1988, and December 17, 1988, she would have earned approximately \$8,050.86. (S.F. 15)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this case.
3. Respondent is an "employer" within the meaning of the PHRA
4. Complainant is an "individual" within the meaning of the PHRA
5. Complainant here has met her burden of establishing a prima facie case.
6. The Respondent has articulated legitimate reasons for terminating the Complainant.
7. The Complainant successfully established by a preponderance of the evidence that the Respondent's articulated reasons for terminating her were pretextual.
8. A Complainant who has been shown to have failed to take reasonable steps to find alternate employment can be denied backpay for the period of such unreasonable conduct.
9. Interim earnings are deductible from lost wages occasioned by discrimination.

OPINION

This case arises on a complaint filed on or about July 13, 1987, by Anna Lynch-Pratt, (hereinafter either "Pratt" or "Complainant") against The Fish Market Restaurant (hereinafter "The Fish Market"), with the Pennsylvania Human Relations Commission ("PHRC"). In her complaint, the Complainant alleged that the Respondent discharged her because of her sex, female, and pregnancy, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et. seq. ("PHRA"). On or about August 25, 1987, the Complainant amended her complaint.

PHRC staff conducted an investigation and found probable cause to credit the Complainant's allegations. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion, however, such efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on July 13 and 14, 1989 in Philadelphia, Pennsylvania before Carl H. Summerson, Hearing Examiner. The case on behalf of the Complainant was presented by Charles W. Boohar, Esquire. John L. Jenkins, Esquire, appeared on behalf of the Respondent. Pamela Darville, Esquire, appeared on behalf of the PHRC's interest in the complaint.

Following the Public Hearing, the parties were afforded an opportunity to submit briefs. The Respondent's and Complainant's briefs were received in September 1989. A subsequent reply brief for the Respondent was received on October 30, 1989.

Section 5(a) of the PHRA provides in pertinent part: "It shall be an unlawful discriminatory practice...[f]or an employer because of the...sex...of any individual to...discharge from employment such individual, or to otherwise discriminate against such individual with respect to...conditions or privileges of employment..."

It is well established law in Pennsylvania that discrimination based on pregnancy constitutes sex discrimination proscribed by Section 5(a) of the PHRA. Dallastown Area School District v. PHRC., 74 Pa. Cmwlth Ct. 400, 460 A.2d 878, at 880 (1983), citing Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973).

In this case, the order and allocation of proof shall follow the oft repeated general pattern first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and clarified by the Pa. Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). 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). Although McDonnell Douglas Corp. v. Green was a refusal to hire case, Allegheny Housing Rehabilitation Corp., Supra. recognized that the order and allocation of proof principles set forth therein are also applicable to discharge cases. In a discharge case, the principal modification of McDonnell Douglas pertains to the prima facie showing. In Allegheny Housing Rehabilitation Corp., the Pa. Supreme Court dealt with a discharge question, however, the Court did not set forth the requisite elements of a prima facie showing in a discharge case. Instead, the Court simply reviewed the elements which had been used by the PHRC and by the Commonwealth Court and suggested that those formulations "might be considered flawed."

Generally, there is rarely a problem articulating the first 3 elements of a prima facie case. These include: (1) that the complainant was a member of a protected class; (2) that the complainant was qualified to perform the duties of the position from which the complainant was discharged, and (3) that the complainant had been discharged. The difficulty usually arises in the establishment of the 4th element.

Before stating the requisite 4th element in this case, several general principles should be kept in mind. First, the burden of establishing a prima facie case should not be onerous. Second, the purpose of the prima facie case is to give rise to an inference of unlawful discrimination.

In discharge cases, we should recognize that the evidence necessary to create an inference that there is a connection between a Complainant's protected status and the discharge will vary depending on the circumstances of the discharge in question. Here, the surrounding

circumstances present a question of whether a general economic cut back and/or lack of work resulted in Pratt's discharge. Accordingly, in this case, the 4th element which the Complainant must show to establish a prima facie case is either that she was discharged under circumstance which give rise to an inference of discrimination, see i.e. Burdine v. Texas Department of Community Affairs, 450 U.S. 248 (1981), or that the Respondent sought people with Pratt's qualifications to fill her former job after her discharge. See i.e. Osborne v. Cleland, 22 FEP 1292, 620 F.2d 195 (8th Cir. 1980).

In this case, Pratt was able to successfully establish a prima facie case by showing that she is of course a female who was pregnant; that she was qualified to work in the Respondent's restaurant, not only in the kitchen, but in almost any capacity; that she had been discharged; and that shortly after her discharge, the Respondent hired two men who were immediately assigned to work in exactly the same capacity as Pratt had worked prior to being assigned full time to the Oak Bar.

Since Pratt was able to set forth the requisite prima facie showing, the burden of production shifts to the Respondent to articulate a legitimate, non-discriminatory reason for its action. The Respondent was successful in this regard by offering testimony that there was a pressing financial problem facing The Fish Market which necessitated cut backs in labor costs. Since the fall of 1986, The Fish Market had reduced the number of kitchen employees from 17 to 14 and Pratt's discharge was simply further reducing the number of kitchen employees to 13. Furthermore, the Respondent submits that a management decision to close the Oak Bar service left Pratt with no where to go. The Respondent argued that The Fish Market had no available positions for Pratt after closure of the Oak Bar.

Additionally, the Respondent attempted to articulate that Pratt's performance was an additional consideration in the decision to terminate her. Finally, an issue was raised with regard to Pratt accepting work at The Fish Market in a capacity other than the kitchen. Howell testified that, in his opinion, Pratt was not serious when she asked to be kept even if that meant working as a hostess or a dishwasher.

The essence of this case, like so many others, is in the burden this placed on Pratt to establish that the articulated reasons offered by the Respondent for its actions are pretextual. Here, Pratt has established by a preponderance of the evidence that each reason articulated by the Respondent was pretextual.

It is hard to imagine that the Respondent relied on the premise that no jobs were available to which Pratt could be assigned. Clearly, the very day Pratt was terminated, there was an opening in the pastry department. The Respondent offered evidence that a decision was made to obtain pastries from an outside source, however, this decision was clearly made after May 15, 1989. On May 15, 1989 Pratt could have easily been assigned to the then available pastry making opening.

Furthermore, despite the Respondent's asserted aggressive cut back in personnel, approximately one month after discharging Pratt, the Respondent hired two men whose first assignments were to perform exactly the duties Pratt had performed before she was assigned to the Oak Bar. There is no reason Pratt could not have been assigned to one of those two openings. In fact, between Pratt's discharge and the delivery of her baby, the Respondent hired 43 persons to fill a variety of

positions, most of which Pratt's years of experience and schooling had more than qualified her for.

Considering the record as a whole, Howell's testimony that suggested Pratt was less than an outstanding employe is rejected as not credible. Pratt had never been warned of a deficiency, and there was ample testimony that Pratt was a hard working, conscientious, efficient asset to The Fish Market's operations. Also lacking credibility was Howell's testimony that Pratt "did not express [a desire to take any job] with a vocal quality that would indicate to me that was a sincere interest on her part." In response to Howell telling Pratt she was being terminated, while crying, Pratt expressly asked to remain an employe in any capacity. Considering the scene, Howell's suggestion that Pratt's sincerity was in question is simply out of line with common experience. There was nothing about Pratt's reaction which would lead anyone to conclude anything except Pratt wanted to continue working for The Fish Market.

Added to these factors which support a finding of pretext, Pratt testified regarding an inferred admission against interest stated to her on May 15, 1987 by Lewis Norsworthy, Respondent's vice president, director, shareholder, and general manager. Pratt testified, without contradiction, that Norsworthy stated to her, "I'm sorry Anna to see you go, we had another female here who was pregnant and she had trouble climbing the steps."

During the Public Hearing the Respondent intermittently offered testimony which suggested Pratt's pregnancy hindered her ability to complete her job duties. For example, testimony was elicited which depicted the unusual configuration of The Fish Market floor plan. Supplies were generally kept in the main storage area in the basement and kitchen employes were required to carry them up to the kitchen located on the 2nd floor. Howell's testimony touched on Pratt asking for assistance in carrying some items for her. However, it became clear that the rule of thumb was to accomplish the task with team work and it was normal for people to help each other with assigned tasks, including carrying supplies.

Pratt's doctor testified that he could see no reason why Pratt's pregnancy would interfere with Pratt fully fulfilling her duties. It was simply customary that co-workers assisted each other with carrying supplies from the basement.

The Complainant's brief points out one other consideration which sheds some light on the Respondent's motive for Pratt's termination. Paragraph 8 of the Respondent answer to this complaint states:

"Although Complainant's termination had nothing whatsoever to do with her pregnancy. Respondent believes and avers that Complainant's pregnancy did seriously interfere with her ability to perform her job related duties."

The record considered as a whole shows that Pratt's pregnancy did not interfere with her ability to perform her duties. Frankly, the Respondent failed to offer any evidence to support a claim that Pratt was in any way unable to perform her assigned duties. Even if Pratt did ask others to help her carry things, there is no showing that suggests she could not have done it herself if asked to do so.

In summary, Pratt has successfully shown that the Respondent's articulated reasons are pretextual. Accordingly, we next turn to the issue of an appropriate remedy.

Normally, when liability is found in discharge cases, cease and desist and reinstatement measures are contemplated. Here, such remedies are precluded by the fact that the Respondent ceased doing business on December 17, 1988. Thus, the remaining issue is whether a backpay award is appropriate.

Here, Pratt quite candidly testified that between her layoff on May 15, 1987 and April 11, 1988, she did not look for work. Pratt's testimony and post hearing brief submits that Pratt did not seek alternative employment because she thought she might be recalled from a layoff. However, several factors suggests that this position is neither reasonable nor credible.

Although it is clear that Pratt's May 15, 1987 discharge resulted in financial loss to her, a serious question arises with regard to whether Pratt failed to mitigate damages by making no attempt to secure interim employment until April 1988. First, the record reveals that Pratt was aware that the Respondent had placed want ads in the newspaper, seeking people to do the job she held prior to being "laid off." Pratt agrees that she made no effort to contact the Respondent to inquire regarding whether there was an opening for her.

Second, Patricia Marie Porter, a co-worker of Pratt's, testified that Pratt had told her that she had been fired. Porter indicated that Pratt came to her prior to May 15, 1987 and told her, "well, we're leaving on the same day, but yours is by choice and mine is not." Porter then says, "she told me that she had been fired."

Porter was also leaving the Respondent's employ on May 15, 1987. Porter had quit to take a better job.

Finally, when Pratt filed her PHRC complaint in July 1987, Pratt termed the Respondent's action as a discharge. It is simply unreasonable for Pratt to collect unemployment compensation and make no attempt .to secure alternative employment.

Under the circumstances presented here, the Respondent's evidence is sufficient to establish a complete failure to mitigate damages between May 15, 1987 and April 11, 1988. Once Pratt did begin to seek alternative employment, she almost immediately secured another position.

The parties agreed that damages would be cut off on December 17, 1988, the date the Respondent closed. Here, the wages Pratt earned at her new job were greater than those she would have earned had she been working at The Fish Market between April 11, 1988 and December 17, 1988. Accordingly, Pratt is entitled to no backpay award.

Since no remedial measure are available, the following order is made.

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

ANNA LYNCH-PRATT, Complainant

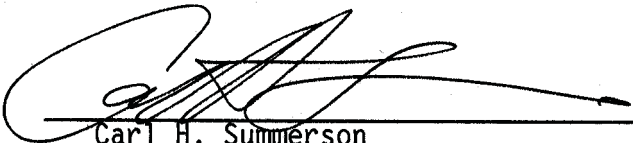
v.

THE FISH MARKET RESTAURANT, Respondent

DOCKET NO. E-40955

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Respondent discharged the Complainant because she was pregnant. 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 Stipulations, Findings of Fact, Conclusions of Law and Opinion be Approved and Adopted by the full Pennsylvania Human Relations Commission. If so Approved and Adopted the Permanent Hearing Examiner recommends issuance of the attached Final Order.



Carl H. Summerson
Permanent Hearing Examiner

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

ANNA LYNCH-PRATT, Complainant

v.

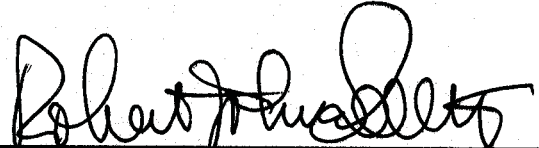
THE FISH MARKET RESTAURANT, Respondent

DOCKET NO. E-40955


FINAL ORDER

AND NOW, this 1st day of June, 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 Stipulations, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint.

BY:


Robert Johnson Smith, Chairperson

ATTEST:


Raquel Otero de Yienst, Secretary