

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KATHRYN F. MARTIN,
Complainant

v.

MEMORIAL HOSPITAL;
RESPONDENT

:
:
:
:
:
:
:

DOCKET NO. E-29225

FACTUAL STIPULATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

- 7) The conciliation procedure was followed.
- 8) This case was placed on the Public Hearing Docket on or about June 13, 1986.
- 9) Respondent hired Complainant as a Graduate Practical Nurse on or about September 23, 1974.
- 10) Complainant passed the State Board for Licensed Practical Nurse on or about October 1974.
- 11) Complainant sustained injuries to her cervical spine in an automobile accident in 1980 as a result of which she had several absences from work between 1980 and prior to February 28, 1984, and at times she returned to work with a lifting restriction.
- 12) In or about February 1984 Complainant again experienced cervical spine problems for which she was subsequently hospitalized and as a result of which she was absent from work.
- 13) Complainant's absence from work began February 28, 1984.
- 14) On April 26, 1984 Complainant's treating physician, Dr. Danyo, submitted a return to work form as follows:

Name: Kathryn Martin

Date: 04/26/84

/Rx/ The above patient was seen on 04/26/84 and is able to return to work on a part time basis of 3 to 4 days a week on May 7, 1984. She is restricted from the heavy lifting. She will be seen in one month from that time to determine on a full-time basis.

Law Offices
Frank B. Boyle
J. Michael Kierkegaard
William C. A. Boyle
Katherine Holtzinger Conner

/s/ J. J. Danyo, M.D./rlg

15) Complainant did contact the Head Nurse, Carol Baker, and was contacted by the Nursing Supervisor, Barbara Schell, in regard to being scheduled to return to work.

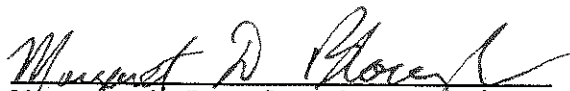
16) Following discussions had between Complainant, Carol Baker and Barbara Schell; and, Barbara Schell and Brenda Barshinger, Complainant was advised that she could not return to work by letter dated May 7, 1984, as follows:


Dear Mrs. Martin:

We are sorry to hear about your medical problem and sincerely hope that you will be able to return to work in the near future. I know that it is difficult for you to understand why you can't return at this time, but with restrictions on lifting and the use of your hand, you are unable to fullfill your job description. This could be unsafe for you and also for the patients who trust us to provide them with safe care. . . .

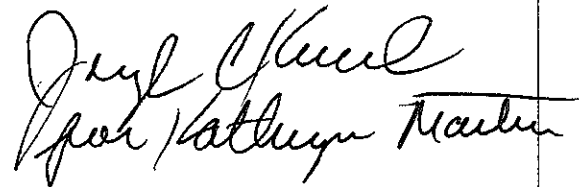
Sincerely,

Mrs. Brenda L. Barshinger, R.N.
Vice President Patient Services


Margaret D. Blough, Esquire
Assistant Chief Counsel
Attorney for the Commission
in Support of the Complainant


Frank B. Boyle, Esquire
Katherine Holtzinger Conner,
Esquire
Attorneys for Respondent
Memorial Hospital

Dated: January 25 1990


for Kathryn Martin

Law Offices
Frank B. Boyle
J. Michael Kierkegaard
William C. A. Boyle
Katherine Holtzinger Conner

FINDINGS OF FACT *

1. Kathryn F. Martin (hereinafter either "Martin" or "Complainant") is an adult individual who, in March 1984, was diagnosed as having multiple sclerosis. (N.T. 35; S.F. 1)

2. In September 1974, Martin began working at Memorial Hospital, (hereinafter either "Memorial" or "Respondent"), and beginning October 1974, Martin worked for Memorial as a licensed practical nurse, ("LPN"), primarily on Memorial's surgical orthopedic ward. (N.T. 17; S.F. 9,10)

3. In 1980, Martin was involved in an automobile accident which resulted in cervical injuries which periodically necessitated Martin taking time off from work. (N.T. 32, 86-87; S.F. 11)

4. Prior to May 1984, upon Martin's return to work following both the initial cervical injury and subsequent debilitating bouts with this injury, Martin was restricted from any heavy lifting. (N.T. 32,)

5. On each of these occasions, Memorial accommodated Martin's no heavy lifting restrictions. (N.T. 32)

6. Memorial also accommodated others returning to work with lifting restrictions. (N.T. 33, 85)

7. Initially, following the automobile accident in 1980, Martin's doctor was Dr. Nachtigall, a physician at Memorial. (N.T. 35, 87)

8. In seeking a second opinion, Martin eventually changed from Dr. Nachtigall to Dr. Danya, a physician who practiced at another hospital. (N.T. 35, 104)

* The foregoing "Factual Stipulations" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainants' Exhibit
R.E. Respondent's Exhibit
F.S. Factual Stipulations

9. In January 1984, Martin again experienced problems with her neck and back with an additional factor reported as tingling and numbness of Martin's right arm and hand. (N.T. 104,105)

10. On February 28, 1984, Martin had told Dr. Danyo that her arm felt as if it weighed 100 pounds, and that she had been dropping things, and that she had burned herself three times on a tea kettle. (N.T. 106; C.E. 21)

11. Dr. Danyo recommended that Martin be seen for a neurological evaluation. (C.E. 21)

12. On February 28, 1984, Martin began an absence from work. (S.F. 13)

13. Martin was hospitalized at York Hospital where tests led to a multiple sclerosis diagnosis. (C.E. 12)

14. Martin testified that in March 1984, following her release from York Hospital, she and a friend and co-worker, Judy Goss, visited Memorial. (N.T. 42, 43)

15. Martin further testified that on that occasion, she spoke with the head nurse of her ward, Carol Baker ("Baker"). (N.T. 42)

16. Both Martin and Goss testified that at this time, Martin told Baker of the M.S. diagnosis. (N.T. 44, 180)

17. Baker testified that she recalled speaking with Martin but that it was on April 26, 1984, when Martin brought her doctor's note in so she could be put on the schedule for work. (N.T. 85, 205)

18. During the conversation between Martin and Baker, despite whether it was in March or April 1984, Martin and Baker, discussed Martin's concern about possibly having difficulty giving injections because of the tingling and numbness of Martin's right arm and hand. (N.T. 44, 113, 114, 206, 208)

19. Martin testified that she told Baker she hoped she could return to work and hoped she was still able to give injections. (N.T. 44)

20. Baker's testimony indicates that when Martin gave Baker her doctor's note, Baker told Martin she would schedule her for medication until the lifting restriction addressed in the note was lifted. (N.T. 206)

21. Baker further testified that it was at this time that Martin expressed concern regarding giving injections. (N.T. 206)

22. On the orthopedic ward where Martin worked, LPN's were generally assigned either direct patient care duties or medication dispensing duties. (N.T. 83, 196)

23. Direct patient care involved many functions which often required lifting patients. (N.T. 196)

24. Medication duties included giving injections. (N.T. 82, 197)

25. Following Baker's discussion with Martin which encompassed Martin's concern regarding giving injections, Baker told her supervisor, Barbara Shell, about assignment concerns raised by the combination of Martin's lifting restriction and Martin's stated concern about giving injections. (N.T. 206, 218)

26. Martin's April 26, 1984 doctor's note in effect stated that Martin was able to return to work part time beginning on May 7, 1984, however, Martin was restricted from heavy lifting. (S.F. 14; C.E. 14)

27. Only Martin herself revealed a concern regarding the effects of tingling and numbness in her right arm and hand. (N.T. 107)

28. After Martin spoke with Baker, Baker spoke with Shell, who in turn spoke with the then director of nursing, Brenda Barshinger, ("Barshinger"), about the issue of the assignment of Martin. (N.T. 227, 230, 274; S.F. 16)

29. Regarding Martin's return to work, Barshinger wrote Martin and stated in a letter dated May 7, 1984, the following:

"We are sorry to hear about your medical problem and sincerely hope that you will be able to return to work in the near future. I know that it is difficult for you to understand why you can't return at this time, but with restrictions on lifting and the use of your hand, you are unable to fulfill your job description. This could be unsafe for you and also for the patients who trust us to provide them with safe care.

I am forwarding a Leave of Absence Form for you to complete and return to me by May 18, 1984. You may request a medical leave for up to one year. If your physician removes all restrictions prior to the expected date of your return, call the nursing office and we will discuss your return according to departmental policy..."

(C.E. 15)

30. Prior to Martin's receipt of Barshinger's letter, Martin first met with Memorial's Personnel Director, George Trout, ("Trout"). (N.T. 52, 325.)

31. Trout testified that Martin described to him that she had severe tingling in her right arm. (N.T. 329)

32. Trout further testified that he and Martin discussed her job description and the issue of whether Martin could do injections. (N.T.)

33. Trout also indicated that Martin was instructed to contact the nursing department. (N.T. 330)

34. As of September 1, 1982, Memorial had adopted the following policy:

RETURN TO WORK EXAMINATIONS

PURPOSE

To protect the employee and employer and place the employee in the most appropriate work area.

POLICY

1. All employees absent due to work-related injuries must be evaluated by the employee health physician and must return to work through the employee health service. Alternative duties will be provided for employees with restricted activities due to occupational injuries.
2. Any employee absent due to illness for three consecutive work days will return to duty through the employee health service.
3. All employees returning to duty following any illness or accident of a non-occupational origin must be able to perform work duties as outlined by their job description.

(N.T. 324, 441; R.E. 2)

35. After meeting with Martin, Trout contacted Barshinger who shared with Trout her uncertainty regarding the seriousness of Martin's condition. (N.T. 331)

36. In a later conversation, Barshinger conveyed to Trout that because of the combination of restrictions Martin had, it appeared Martin would be unable to perform her LPN job and in order to return to work, Martin would be required to go through Memorial's Employee Health Service. (N.T. 332)

37. Trout also indicated that, he later conveyed to Martin the requirement that before any decision could be made, Martin was required to be examined by Memorial's Employee Health Service. (N.T. 332, 333)

38. Also before Martin received Barshinger's May 7, 1984 letter, Martin met with Memorial's President/Chief Executive Officer, Dennis P. Heinle, ("Heinle"). (N.T. 55, 120, 450)

39. When Martin met with Heinle, Heinle testified that he told Martin, and it was already crystal clear to Martin, that she could attempt to return through the Employee Health Service. (N.T. 121, 453, 454)

40. Martin understood that the purpose of the Employee Health Service was to make evaluations and verify restrictions. (N.T. 130)

41. At the meeting with Heinle, and through her private attorney, an offer was made to have Martin examined by a neutral doctor rather than go through Memorial's Employee Health Service. (N.T. 58, 123, 129, 454)

42. Heinle testified that he did not completely reject the idea of an alternative doctor but maintained that Martin would also be required to go through Memorial's Employee Health Service pursuant to Respondent policy. (N.T. 454, 455, 462, 467)

43. Martin, acting solely on the advice of her private attorney, refused to go through Memorial's Employee Health Service. (N.T. 128, 129, 469)

44. Both Trout and Heinle discussed the possibility of positions at Memorial other than an LPN on the surgical orthopedic ward, however, Martin indicated that she only wanted to be an LPN. (N.T. 337, 339, 340, 454)

45. Martin's refusal to be physically evaluated by Memorial's Employee Health Service was based solely on advice given to her by her private attorney. (N.T. 129)

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 in this case.

3. Memorial is an "employer" within the meaning of the PHRA.

4. Martin is an "individual" within the meaning of the PHRA.

5. When the issues of a case are fully tried on the merits, the fact finder must then simply decide whether the action alleged to be discriminatory was violative of the PHRA.

6. Martin failed to prove by a preponderance of the evidence that Memorial's actions were discriminatorily motivated.

7. This matter is not ripe for resolution due to Martin's failure to be physically evaluated by Memorial's Employee Health Service.

O P I N I O N

This case arises on a complaint filed by Kathryn F. Martin, ("Martin" or "Complainant") against Memorial Hospital ("Respondent" or "Memorial") with the Pennsylvania Human Relations Commission ("PHRC") on or about June 11, 1984, at Docket No. E-29225. The Complainant alleged that Memorial discriminated against her on the basis of her non-job related handicap/disability, Multiple Sclerosis, by refusing to reinstate her to her position of LPN, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("PHRA").

Following an investigation, PHRC staff found probable cause to credit the allegation of discrimination. The PHRC then attempted to resolve the situation through conference, conciliation and persuasion. When these efforts were not successful, the case was approved for public hearing. The hearing was held in York on January 25 and 26, 1990, before Hearing Examiner Carl H. Summerson.

The case on behalf of Memorial was presented by Katherine E. Hottzinger Conner, Esquire. The case on behalf of Martin was overseen by her private attorney, Joseph C. Korsak, Esquire, and the PHRC interest in the complaint was presented by Margaret D. Blough, Esquire. The post-hearing brief in support of the complaint was received on April 13, 1990, and Memorial's brief was received on April 16, 1990. Reply briefs were received on May 11, 1990.

Normally, an analysis of a disparate treatment allegation begins with resolution of whether a Complainant was able to establish a prima facie case by a preponderance of the evidence. However, when the issues of a case are fully tried on the merits, it becomes incumbent on the fact finder to simply decide whether the alleged action was discriminatory within the meaning

of the PHRA. See U.S. Postal Service Board of Governor's v. Aikens, 460 U.S. 711 (1983). Here, since during the Public Hearing, Memorial did everything required of it had Martin made out a prima facie case, whether Martin actually did or did not is no longer relevant. Id. at 712.

The important factual inquiry left to resolve is whether, under all the circumstance of this case, Memorial intentionally discriminated against Martin. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

The primary issue in this case is whether Memorial's actions amounted to a denial of a reasonable accommodation of Martin's multiple sclerosis. Another important, yet secondary, issue is consideration of witness credibility since testimony concerning important factual matters was at times dissimilar.

We begin by addressing the issue of credibility. Here, when we look at the record, it clearly reveals a number of glaring inconsistencies in the evidence presented.

First, when Martin offered testimony concerning the nature of duration of the problem she experienced with her right arm and hand, Martin first testified that she "had some tingling in [her] right arm and hand..." (N.T. 36) Later Martin related that after being released from the hospital she "had some tingling yet in [her] right hand, right arm." (N.T. 42) Further Martin suggested that after three weeks of medication following her release from the hospital, "[e]verything cleared." (N.T. 43) However, Martin then immediately responded to a question regarding whether the tingling in her hand continued by answering, "A little bit, yes." (N.T. 43) Martin then submitted that the tingling ceased around mid-April. (N.T. 43) Martin had also testified that she had not experienced "numbness." (N.T. 104) However, Martin admitted that she had told her doctor she had experienced "tingling and

numbness." In fact what she told her doctor on February 28, 1984 was that her arm felt like it weighed 100 pounds, that she had been dropping things and that she had burned herself three times that week on a tea kettle. (N.T. 105; C.E. 21)

Although Martin was called as a rebuttal witness, and specifically asked what condition she had told Trout bothered her, (N.T. 477) Martin did not contradict either Trout's or Heinle's testimony that as late as May 1984 Martin was still describing the condition of her arm as having "severe tingling," (N.T. 329) or "tingling in her hands periodically." (N.T. 452)

Martin's testimony on this issue, considered as a whole, leads to the conclusion that Martin's testimony was not wholly candid regarding the extent of the problem she had in her arm and hand. The impression given as that there had been some testimonial distortion of the duration and nature of this problem.

Next, Martin specifically testified that during the meeting with Heinle, Heinle asked Martin if she would see one of Memorial's doctors. (N.T. 147) Later, while offering rebuttal testimony, Martin submitted that Heinle had never mentioned the Employee Health Service. (N.T. 477) Clearly, Martin testified that she had understood she could return through the Employee Health Service. (N.T. 121) Martin knew about Memorial's policy in this regard, (N.T. 100), and once again, Martin failed to offer rebuttal to Trout's testimony that he specifically told Martin she was required to go through the Employee Health Service to come back to work. (N.T. 332) Furthermore, Martin testified that since 1984, she has recognized that going through the Employee Health Services has been an option open to her. (N.T. 129)

Finally, Martin testified that during her meeting with Heinle, she had agreed to be seen by a doctor that both Heinle and Martin would agree upon. (N.T. 58) However, Respondent Exhibit 9 suggests that the conversation

had been otherwise. Respondent Exhibit 9 is a copy of a May 11 incoming phone message to Heinle which indicates that "the Martins prefer an independent examining physician." This message suggests that Heinle's testimony is more accurate with regard to what was told to Martin at the May 11, 1984 meeting. With respect to witnesses offered by the Respondent, each witness substantially corroborates each other without the type of gaping inconsistencies found in Martin's testimony. Accordingly, witnesses offered by the Respondent have been deemed more credible.

With this fundamental question resolved, we turn the focus onto the primary issue in this case. On this issue, several things are abundantly clear: First, Martin was fully aware that as of 1982 Memorial had a policy that utilized hospital staff to evaluate the conditions of employees. The service Memorial used was called the employee Health Service.

Next, it is also clear that by telling Baker she was experiencing tingling in her arm and hand, Martin began a series of events which ultimately resulted in a decision to require a physical evaluation of her. Martin seems to want to rely solely on her April 26, 1984 doctor's note which only restricts her from heavy lifting and to part time work. With only this restriction, it is also clear that Martin and other Memorial employees had been previously accommodated by Memorial. However, in Martin's case, she added a significant factor by expressing her concern regarding whether she would be able to give injections.

Next, the record considered as a whole dispels any doubt that Martin was advised that one definite prerequisite to her returning to work is that Martin be physically evaluated by Memorial's Employee Health Service.

Equally clear is that Martin has, without just cause shown, refused to avail herself of Memorial's Employee Health Service for an evaluation on what limits, if any, Martin's condition might place on her performance as an

LPN on Memorial's surgical orthopedic ward. As Heinle testified, Martin was free to see an independent doctor, but despite what Martin did, she would still be required to go through Memorial's Employee Health Service.

On the question of accommodation, Memorial argues that Memorial stood ready, and willing to consider offering Martin an accommodation, but Martin never gave Memorial the chance to accommodate her by her ill-considered refusal to be physically evaluated pursuant to Memorial's policy.

Martin's refusal to adhere to Memorial's policy raises the question of whether this case is ripe for resolution. Had there been no other action other than Barshinger's letter, this matter would be ripe for resolution. Barshinger's May 7, 1984 letter appears to leave no room for the possibility of an accommodation by instructing Martin that, "if your physician removes all restrictions...we will discuss your return according to departmental policy..." However, the evidence in this case makes it clear that both Memorial's personnel director and its president, in effect, instructed Martin that in order to evaluate her for possible accommodation measures she had to be evaluated by the Employee Health Service.

Memorial offered evidence that Martin was not the first to be requested to physically go through the Employee Health Service. Further, others who had gone through the service had been accommodated.

Had Martin gone through the Employee Health Service as instructed and then been rejected, this matter would be ripe for resolution. As it stands, Martin's refusal to adhere to Memorial's policy left Memorial without an evaluation by its doctors regarding the extent of limitations, if any, caused by her stated condition.

It was reasonable for Memorial to require Martin to be physically evaluated pursuant to its policy and fundamentally unreasonable of Martin to

refuse. It is primarily for this reason that Martin has failed to prove that Memorial's actions were discriminatory towards her.

Accordingly, the complaint in this matter should be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KATHRYN F. MARTIN,
Complainant

v.

MEMORIAL HOSPITAL,
Respondent

:
:
:
:
:
:
:

DOCKET NO. E-29225

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 Factual 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

KATHRYN F. MARTIN,
Complainant

v.

MEMORIAL HOSPITAL,
Respondent

:
:
:
:
:
:
:

DOCKET NO. E-29225

FINAL ORDER

AND NOW, this 28th 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 Factual Stipulations, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Factual 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 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:


Raquel Otero de Yiengst
Secretary