COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CLIFTON B. MEBANE, a/k/a C. BEN-YAMEEN MEBANE, Complainant

v.

READING EAGLE COMPANY, Respondent

DOCKET NO. E-30222D

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

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STIPULATIONS

The following facts are admitted by the parties, and no further proof thereof shall be required.

1. Complainant, C. Ben-Yameen Mebane, is an individual whose race is black.
2. Respondent's legal name is the Reading Eagle Company, and its principal office is located at 345 Penn Street, Reading, PA. 19603.
3. Respondent employs more than four individuals in the Commonwealth of Pennsylvania.
4. Respondent hired Complainant on or about November 7, 1979 and discharged him on June 20, 1984.
5. Respondent employed Complainant as an elevator operator between the hours of 4:00 p.m. and midnight from the time he was hired until the elevator was automated in January, 1984. Then Respondent employed Complainant as a janitor on night shift.
6. Complainant was a polite elevator operator.
7. In 1981, Respondent's managing editor, Edward Taggert, wrote an article which featured Complainant.
8. In January, 1984, after Respondent's elevator was automated, Respondent offered Complainant a job as a janitor on the night shift which Complainant accepted. George Martin, the other elevator operator, a white male, was not offered another position. He had been absent due to illness since August, 1983 and was eligible for early retirement.
9. At time of discharge Complainant was the only permanent black employee in a group of janitors whose working hours were from 10:30 p.m. until 6:00 a.m. for a total of 37.5 hours per week.
10. At the time of discharge Complainant was earning $6.9066 per hour for a work-week of 37.5 hours.
11. At the time of Complainant's discharge the janitors on night shift were directly supervised by Harold C. Reinert, night janitorial leader, and Edward J. Hudzik (nicknamed "Pinky"), assistant night janitorial leader, individuals whose race is white. Harold C. Reinert reported to Jack R. Bender whose race is white.

12. From the time that Harold C. Reinert became night janitorial leader in 1977 until his retirement in 1989, the break times for all night janitors were from midnight to 12:15 a.m., from 2:00 a.m. to 2:30 a.m., and from 4:00 a.m. to 4:15 a.m.
13. Harold C. Reinert knew that several janitors often slept for approximately the last hour of the night shift, and he permitted this practice to occur.
14. On the evening of June 20, 1984, Harold Reinert found Complainant sleeping at approximately 10:45-10:50 p.m., thought he smelled alcohol on Complainant's breath, and reported this information to Jack Bender. Jack Bender observed Complainant asleep but did not smell alcohol on Complainant's breath.
15. Jack Bender, building superintendent since 1981, discharged Complainant. Prior to becoming superintendent, Bender was employed as assistant superintendent.
16. The Building Superintendent heads Respondent's building services department and is responsible for the guards, watchmen, maintenance men, and janitors on all shifts. Prior to the automation of the elevator in January 1984, the Building Superintendent was also responsible for elevator operators.
17. Jack R. Bender and his two assistant building superintendents, Dennis Swartz and Robert Drexel, work daytime hours but are on call 24 hours a day, seven days a week.
18. Dennis Swartz became an assistant superintendent on or about May 4, 1981. Prior to that time he held hourly positions with Respondent as a print composer and then as an electronics technician.
19. As a department head, Jack R. Bender normally reports to William James Anthony ("Tony") Rohn, Vice-President/General Manager of the Reading Eagle Company.
20. Jack R. Bender was authorized to hire, promote, discipline, and discharge employees in his department with the knowledge and permission of Mr. Rohn.
21. In the absence of Mr. Rohn, Jack R. Bender reports to either Thomas A. Gannon, Controller, or William S. Flippin, Publisher.
22. Myrtle B. Quier is Respondent's President and Chairman of the Board of Directors.
23. On July 18, 1984, in response to a notice of Complainant's application for unemployment compensation and a request for separation information received from the Reading Office of Employment Security, Respondent, by its Controller, Thomas A. Gannon, certified that Complainant was "[d]ismissed because of habitual sleeping on the job."
24. Prior to discharge, Complainant received two written warnings from Jack Bender regarding sleeping/intoxication on the job: May 1, 1981 and May 14, 1984.
25. In 1982, Respondent discovered janitors, Edward. J. Hudzik and Lester K. Bohn, Sr., race white, asleep and gave them verbal, but not written, warnings.
26. At all times relevant to this complaint, Respondent had no personnel department and no written employment or disciplinary policy. Respondent did have an unwritten policy and practice regarding discipline.
27. Brian Caldwell, race black, was employed by Manpower, Inc. and was assigned to Respondent as a temporary worker from August 1, 1983 through October 7, 1983 (as a night janitor) and from October 24, 1983 through December 27, 1983 (as a daytime elevator operator).
28. During the latter period of his assignment at Respondent, Brian Caldwell complained to Jack Bender and to Manpower's Industrial Division Service Representative about what he believed was racial discrimination in the Respondent's workplace. The Manpower representative contacted Jack Bender about Brian Caldwell's complaint.

29. According to EEO-1 Reports filed by Respondent, Respondent had a total work force of the size indicated below for the periods listed and employed the number of blacks indicated by sex:

Period	Total Employees	Black Males	Black Females
3/10/80 - 3/16/80	542	2	2
3/09/81 - 3/15/81	532	2	1
3/08/82 - 3/14/82	526	1	1
3/07/83 - 3/13/83	501	1	1
3/12/84 - 3/18/84	501	1	1
3/11/85 - 3/17/85	512	2	1
3/09/86 - 3/15/86	511	3	1
3/09/87 - 3/15/87	508	1	2
3/07/88 - 3/13/88	511	1	1

30. Vacancies in Respondent's building services department are not listed with the State Employment Service. In the past decade, the majority of the vacancies there have been filled through referrals by current employees.
31. After Complainant's discharge his duties were performed by other janitors, and Respondent subsequently hired Gary Melerski whose race is white as a permanent replacement.
32. Had Complainant continued in Respondent's employ as a janitor, he would have been paid at the same hourly rate as William W. Summers whose wage rates are listed below:

Year	Rate/Hour
1984	$6.9066
1985	7.3067
1986	7.7333
1987	8.1333
1988	8.5333
1989	8.9600

33. If Complainant had been employed with Respondent for 10 consecutive years after his hire in 1979, he would be vested in Respondent's retirement plan beginning in the year 1990.
34. Respondent's employees, including janitors, are entitled to 3 weeks of vacation after 4 consecutive years of employment and 4 weeks of vacation after 10 consecutive years of employment.
35. Respondent pays 100% of the premium to provide its employees, including janitors, with Blue Cross/Blue Shield coverage which includes major medical and vision program. Respondent's cost for such coverage for a single employee is $85.81 per month in 1989, $80.65 per month in 1988, $70.02 per month in 1987, $65.06 per month in 1986, and $67.67 per month in 1985.

36. As a Respondent employee, Complainant's insurance coverage would be: life insurance of $5,000, accidental death benefit of $5,000, and accident and sickness of $100 per week.
37. On or about August 13, 1984 Complainant filed a complaint with the Pennsylvania Human Relations Commission ("Commission") and subsequently amended the complaint on or about March 19, 1985.
38. Respondent filed an answer to the complaint.
39. After investigation, the Commission determined that probable cause existed for crediting the allegations of the complaint and endeavored, without success, to conciliate the complaint.

Francine Ostrovsky
FRANCINE OSTROVSKY
Pa. Human Relations Commission
Harrisburg Regional Office
Counsel in support of complaint
10-13-89
Date

Robert T. Miller
ROBERT T. MILLER
STEVENS & LEE
Counsel for Respondent
10/16/89
Date

FINDINGS OF FACT

The foregoing "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.	Complainant's Exhibit
R.E.	Respondent's Exhibit
S.F.	Stipulations of Fact

1. Clifton B. Mebane, a/k/a, C. Ben-Yameen Mebane, (hereinafter either "Mebane" or "Complainant"), attended 2 years of college and had served 4 years in the U. S. Army. (N.T. 22)
2. Immediately prior to coming to work for the Reading Eagle Company, (hereinafter either "Reading Eagle," or "Respondent"), Mebane worked in a shoe shine establishment located next to the Reading Eagle. (N.T. 23)
3. Mebane was given a job at the Reading Eagle after he asked Reading Eagle's publisher, William Rohn, for a job. (N.T. 23)
4. Between November 1979, and January 1984, Mebane worked as an elevator operator for Reading Eagle. (N.T. 24; S.F. 4, 5, 8)

5. In January 1984, when Reading Eagle's elevators were automated, Reading Eagle employed Mebane on its night shift janitorial staff which was composed of approximately 9-10 janitors. (N.T. 24, 25, 341-342; S.F. 5, 8)
6. The janitorial night shift began at 10:30 p.m. and ended the following morning at 6:00 a.m. (N.T. 35 ; S.F. 9)
7. During the night shift, all janitors were given the following breaks: Midnight to 12:15 a.m.; 2:00 a.m. to 2:30 a.m.; and 4:00 a.m. to 4:15 a.m. (N.T. 351; S.F. 12)
8. The night shift janitorial staff was supervised by night leader Harold Reinert (hereinafter "Reinert") and Reinert's assistant, Edward Hudzik, (hereinafter "Hudzik"). (N.T. 360)
9. Reinert reported to Building Superintendent, Jack Bender, (hereinafter "Bender"). (N.T. 257, 268; S.F. 11)
10. Bender's work day began at 7:15 a.m. and ended at 4:00 p.m., however, Bender was on call 24 hours a day, seven days a week. (N.T. 258-259; S.F. 17)
11. On or about May 11, 1984, Mebane had to be awakened 5 times during the course of the shift: once when Mebane remained sleeping beyond his lunch break, and the remaining 4 times were when Mebane should have been working. (N.T. 268, 346, 359; S.F. 24; C.E. 1)
12. Reinert testified that he would leave Bender a note when someone had to be awakened several times in one night. (N.T. 374)
13. Reinert also testified that generally whenever he discovered someone sleeping during working hours, he simply woke them and told them to get back to work, and if they did, that ended the incident. (N.T. 344)
14. Reinert left Bender a note informing Bender that Mebane had to be awakened 5 times on or about May 11, 1984. (N.T. 268, 374)
15. In correspondence to Mebane dated May 14, 1984, in effect, Bender warned Mebane that if Bender had to be called in because Mebane had been either drinking or sleeping on duty, Mebane would be terminated. (C.E. 2)
16. Following the May 11 incident, Bender instructed Reinert that the next time Mebane was found sleeping, Reinert should not wake him but call Bender and he would come in. (N.T. 268, 349)
17. In response to Bender's instructions, Reinert instructed the janitorial staff that if someone is found sleeping, come and tell Reinert, he would wake them and tell them to work not sleep. (N.T. 346)
18. Reinert testified that this policy started in response to Mebane. (N.T. 376-377)
19. Reinert testified that he wanted to “more or less keep a record of who was sleeping more." (N.T. 377)
20. Sleeping on duty was a common occurrence for employees on the night shift janitorial staff. (N.T. 317, 366, 368)
21. This was known to both Reinert and Bender. (N.T. 317, 344, 366, 368, 374)
22. From 5:00 a.m. on, it was routine to have members of the janitorial staff sleeping, and on occasion, men slept from the second break until the end of the shift. (N.T. 368)
23. Additionally, from time to time, everyone, including Reinert and Hudzik, slept on the night shift. (N.T. 366, 368, 378)
24. It appears that the only member of the night shift ever disciplined for sleeping was Mebane. (N.T. 371, 374, 377, 378)
25. Reinert testified that it was possible that he singled Mebane out. (N.T. 371)

26. On June 20, 1984, Mebane came to work early so he could sleep before the shift began, and before going to sleep, Mebane asked a co-worker, Lester Bohn, to wake him when the shift began. (N.T. 25-26, 82-83, 89)
27. Bohn failed to wake Mebane at 10:30 p.m. because Reinert had previously instructed Bohn not to wake Mebane. (N.T. 89, 90)
28. When Reinert was informed that Mebane was not available for work at 10:30 p.m., Reinert searched for Mebane and. located him sleeping in a lounge area. (N.T. 349)
29. Reinert testified that approximately 10:45 p.m., he called to Mebane several times and when Mebane failed to wake up, Reinert, as instructed, called Bender. (N.T. 350)
30. Bender arrived just before 11:00 p.m. and was taken to where Mebane was sleeping. (N.T. 269, 270)
31. Mebane awoke when Bender called to him. (N.T. 269, 351)
32. Upon awakening, Mebane asked what is going on and was told by Bender that he was to be terminated. (N.T. 352)
33. Mebane asked whether his firing had racial overtones. (N.T. 288)
34. Prior to Mebane's termination the atmosphere of the Reading Eagle workplace contained instances of reprehensible racially biased behavior regarding which Reinert's and Bender's responses were appallingly inadequate and displayed callous insensitivity. (N.T. 273-275, 299, 300, 362, :363, 364, 365; C. E. 1)
35. Following Mebane's termination, Mebane went to work for a short time at his father-in-law's shoe shine concession in Reading. (N.T. 38,39)
36. Shortly thereafter, Mebane worked 12 weeks at the Reading Country Club where he polished shoes and maintained the locker room. (N.T. 381
37. Mebane offered evidence that in 1985 he worked for J. C. Ehrlich Co., an extermination company in Pennsylvania. (N.T. 40)
38. In 1986, Mebane moved to Florida. (N.T. 41, 128)
39. Before leaving Pennsylvania, in effect, Mebane testified that in 1985, since his wife was working, he did not seek alternative employment, instead he stayed home and cared for the children. (N.T. 40-41, 128)
40. Mebane offered testimony that in 1986 in Florida, he worked several room service positions for hotels. (N.T. 41)
41. In 1987, Mebane took a job with the St. Petersburg Times, as a key mailer and administrative support. (N.T. 42)
42. In St. Petersburg, Mebane also gave instruction in the martial arts at a junior college. (N.T. 43)
43. In May 1988, Mebane left Florida and moved to Arizona. (N.T. 43)
44. During the Public Hearing, the parties entered into an oral stipulation that Mebane is not making any claim for back wages beyond May 19, 1988. (N.T. 52)
45. Mebane testified that his choice to live on very little money relates to his philosophy in life: "be as simple as possible and live as close to nature as possible." (N.T. 122, 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.

3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The Respondent is an employer within the meaning of the PHRA.
5. The Complainant established a prima facie case of a race-based discharge by showing that:

    a. He is a member of a protected class;
    b. He was qualified for the job he was performing;
    c. Despite this he was discharged; and
    d. That after the discharge, Mebane's position was filled by an individual who was not a member of the protected class.

6. The Respondent successfully articulated legitimate non-discriminatory reasons why the Complainant was terminated.
7. The Complainant successfully proved by a preponderance of the evidence that the Respondent's articulated reasons for the termination were pretextual.
8. The Complainant has met his ultimate burden of persuasion that the Respondent's action violated Section 5(a) of the PHRA.
9. Once a finding of discrimination has been made, the PHRC may order the Respondent to cease and desist from the discriminatory practice and grant back pay for wages lost by the Complainant.
10. The PHRC is permitted to award interest on backpay awards at the rate of 6% per annum.

OPINION

This case arises on a complaint filed by Clifton B. Mebane, a/k/a C. Ben-Yameen Mebane, (hereinafter "Mebane") against Reading Eagle Company (hereinafter "Reading Eagle") on or about August 13, 1984, at Docket Number E-30222D. The complaint was subsequently amended on or about March 19, 1985, and again at the outset of the Public Hearing. Mebane alleged that the Reading Eagle discriminated against him by dismissing him because of his race, Black. Mebane's complaint claims that the Reading Eagle's dismissal of him violated Sections 5(a) of the Pennsylvania Human Relations Act, Act of October 25, 1955, P.L. 744, as amended, 43 P.S. §§95l et seq. (hereinafter the "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on October 18, 1989 in Reading, PA, before Carl H. Summerson, Hearing Examiner.

Robert T. Miller, Esquire appeared on behalf of the Reading Eagle and the PHRC interest in this matter was overseen by Francine Ostrovsky, Esquire, Assistant Chief Counsel, PHRC. Post-hearing briefs were simultaneously submitted by the parties in January, 1990, and a reply brief was submitted by Reading Eagle in February, 1990.

Reviewing Mebane's substantive allegation, we first recognize that the nature of his claim presents an allegation of disparate treatment. In Allegheny Housing Rehabilitation Corp. v.

PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the PA Supreme Court clarified the order and allocation of burdens in a disparate treatment case first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The PA Supreme Court's guidance indicates; that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to "simply...produce evidence of a 'legitimate, non-discriminatory reason for...[its action]." If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A Complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The PA Supreme Court also indicated that if a Complainant "produces sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than not discrimination has occurred, the [Respondent] must be heard in response." If the Respondent fails to respond the presumption of discrimination created by the prima facie showing stands determinative of the factual issue and the Complainant must prevail. However, when a Respondent offers a non-discriminatory explanation for its actions, the presumption of discrimination drops off. Allegheny Housing Authority, Supra.

Following its instruction on the effect of a prima facie showing, and a successful rebuttal thereof, the PA Supreme Court then articulated principles which shall be used to ultimately resolve the liability phase of this matter. The court stated that:

> [A]s in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes." Aikens. 460 U.S. at 716. 103 S. Ct. at 1482. The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up". Allegheny Housing Authority, Supra at 319.

In this court designed triparate burden allocation, Mebane must, of course, first establish a prima facie case by a preponderance of the evidence. Since McDonnell Douglas, Supra, was a race-based refusal to hire case, the literal phrasing of the prima facie burden articulated in McDonnell Douglas does not precisely fit the act of harm alleged by Mebane. Additionally, Allegheny Housing Authority, Supra, although a discharge case, fails to specifically list the factors necessary to establish a prima facie showing of a discriminatory discharge. Accordingly, the

McDonnell Douglas proof pattern must be adopted to fit the factual variances presented by the allegation raised in the instant case.

To establish a prima facie case regarding his discharge, Mebane must establish:

> 1. That he is a member of a protected class;
> 2. That he was qualified for the job he was performing;
> 3. That despite his qualifications, he was discharged; and
> 4. That after the discharge, the position was filled by an individual who was not a member of the Complainant's protected class.
>
> See Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 14 F.E.P. 1265 (7th Cir. 1977); and Gillard v. Sears, Roebuck & Co., 32 F.E.P. 1274 (E.D. Pa. 1983).

Interestingly, the proposed conclusions of law outlined in the Respondent's brief begin by citing the Respondent's burden once a prima facie case has been established. In fact, no attempt has been made by Reading Eagle to dispute that a prima facie case has been made. Perhaps Reading Eagle accepts the inevitable that a prima facie case has been established by the record.

First, Mebane is clearly a member of a protected class. Second, there can be no dispute that Mebane was qualified to perform janitorial duties. Third, clearly, Mebane was discharged and stipulation number 31 offered by the parties fulfills the fourth element of the requisite prima facie showing. Stipulation 31 declares that following Mebane's discharge, Mebane's replacement was White.

Reading Eagle's response to the prima facie showing submits that Reading Eagle has clearly met its burden of production by introducing evidence that Mebane was terminated for sleeping on the job. This is certainly an articulation of a legitimate non-discriminatory reason for Mebane's discharge. Accordingly, the presumption created by Mebane's prima facie showing drops off.

As indicated, the burden now rests with Mebane to establish by a preponderance of the evidence that the reason offered was pretextual and ultimately that the evidence produced as a whole establishes that he was the victim of discrimination.

The brief in support of the complaint asserts several general propositions in support of its pursuit of a finding of pretext: (a) unequal treatment; (b) work atmosphere; and (c) statistics. Frankly, an analysis of the evidence presented reveals that the unequal treatment aspect, standing alone, is sufficient to establish pretext in this case.

Although Reinert was night leader for eight years prior to Mebane's assignment to Reinert's shift, Reinert had never before instructed his crew not to wake up a sleeping employee but instead to come get Reinert and he would come wake them. Quite clearly, the evidence depicts the janitorial night shift as a crew whose members often slept during working hours, whether it be from 5:00 a.m. to 6:00 a.m. when, as Reinert puts it, all the work was done, or throughout the night. Reinert actually testified that “from time to time I guess everybody [slept on the job]." This even included Reinert and his assistant.

Any attempt to suggest Mebane's May 11, 1984 incident, where it was reported he had to be awakened 5 times, was a more serious sleeping incident flies in the face of the facts. Reinert's testimony points out that when he discovered someone sleeping during work hours he simply woke them and told them to get to work. If they did, that ended the issue. In later testimony, Reinert added, Bender was informed when an employee had to be awakened several times. In other words, Bender and Reinert both were abundantly aware of instances where staff members had to be repeatedly awakened. However, only when Mebane became the focus of the inquiry did Reinert initiate a policy where anyone found sleeping should not be awakened but Reinert should be told and he will wake them.

Of course, this newly activated policy ultimately led to Mebane's dismissal. On June 20, 1984, we find Mebane coming to work a bit early to nap before the shift begins. Again, a common event with the janitorial staff. Mebane asked a co-worker to wake him when the shift starts. However, the co-worker, recalling Reinert's instructions, did not wake Mebane.

Regarding the precise nature of the instructions given, there is some question whether the instructions were either, as Reinert testified, general instructions covering anyone sleeping, or specific instructions referring only to when Mebane was found sleeping. The co-worker, Lester Bohn's, testimony is telling when Bohn stated "...we were told not to wake [Mebane] up...[by] Harold Reinert." (N.T. 82-83)

The shift begins at 10:30 p.m., by 10:45 p.m. Mebane is found sleeping, Bender is called in from home, and by 11:00 p.m. Mebane is fired. There is no evidence that Mebane was even afforded an opportunity to submit that he had asked Bohn to wake him but Bohn did not. It seems, instead, that Mebane's discharge was a foregone conclusion.

Bender's interaction with Reading Eagle's vice president and general manager, William Rohn, provides a further illustration of Bender's mind set. Rohn testified that Bender had appraised him of developing problems with Mebane before the May 14, 1984 warning. However, Bender never came to Rohn regarding other employees sleeping. The evidence is clear on two points. First, Bender knew others had been sleeping, and second, prior to May 11, 1984, Mebane's actions had supposedly not been a magnitude to have prompted Reinert to advise Bender.

Although sleeping on the job certainly can support a termination decision, such a decision must be applied equally to all employees if it is to withstand a challenge alleging discrimination. Here, the evidence supports a denial of equal treatment. In fact, Reinert candidly declared in a deposition taken prior to the Public Hearing that it is possible that he singled Mebane out. Such disparate treatment is strong evidence of pretext.

The second point is equally well taken. The work environment of the night shift at the Reading Eagle was polluted with words and actions which demeaned minorities in a reprehensible way. For example, employees openly referred to Black and Hispanic temporary employees as "spics" and "niggers". Mebane had on occasion overheard such racial slurs and derogatory comments. Furthermore, Bender and Reinert admitted to being aware of employees using derogatory terms.

Amazingly, in a prior deposition, Bender testified that he only learned at a PHRC fact-finding conference that you cannot allow this. Bender then suggests that he instructed employees from then on they cannot use derogatory names. Bender later phrased his comment to employees as, “I told them when I came back that we cannot say any derogatory things anymore." We note that Bender did not say it is inappropriate, that such slurs cause anguish and misery, just we cannot anymore.

Reinert's attitude was even more cavalier on the subject of a racially intimidating work atmosphere. Knowing, what is considered to be, an extremely offensive message had been posted on a company bulletin board, Reinert testified that he simply considered the posting a joke and even felt it didn't concern him. Obviously Reinert is completely out of touch with an employer's responsibility to maintain a working environment free of racial intimidation. That same responsibility also includes another requirement with which Reinert was unconcerned. That requirement is to take positive action when necessary to either redress or eliminate employee intimidation. In a prior deposition, Reinert testified that when he heard racial comments like "spics" and "niggers" he told the employees, "be careful what you say when they are here." Such callous insensitivity and lack of corrective action deserves strong condemnation.

Likewise, Bender's response to alleged incidents of racial harassment basically went unaddressed because the individual to whom such actions had allegedly been taken was a temporary employee who, as Bender recalled, would be leaving soon anyway.

The record as a whole shows that the atmosphere of racial harassment at Reading Eagle was neither isolated, casual, or sporadic. Rather, the incidents were vicious, frequent, and reprehensible instances which occurred in several guises.

The effect of this polluted atmosphere evidence is not being considered as proof of a discriminatory discharge of Mebane. Instead is merely being considered along with the previously discussed evidence of disparate treatment. Together, these matters have been considered when deciding the question whether Mebane has shown Reading Eagle's articulated reason for his discharge was pretextual.

Similarly, it is in this way that statistics can be useful in a Complainant's attempt to show pretext. See McDonnell Douglas v.Green, 411 U. S. 792 (1973). Fundamentally, the importance of statistical evidence can vary greatly depending on the type of case and the stage of proof involved. Here, the brief on behalf of the complaint, urges la statistical application to a disparate treatment case in the pretextual assessment stage. Most courts looking at the question of the role of statistics in disparate treatment suggest the role is necessarily limited. Larson, Employment Discrimination Vol. 2 110-127 n. 14. See Talley v. U. S. Postal Service, 720 F.2d 505. (8th Cir. 1983), Cert. denied, 466 U.S. 952 (1985). Here, broad general statistical evidence was presented in an apparent attempt to bolster the pretext argument. In effect, the Respondent challenges the statistics as overbroad and too general.

Recognizing that evidentiary use of statistics in a disparate treatment case presents a weight of evidence issue, here, little weight has been given to the statistics presented. The evidence was relevant 'to simply depict the Respondent's general policy and practice regarding minority

employees and an apparent selection imbalance. See Bruno v. W. B. Saunders Co., 50 FEP 898 (3rd Cir. 1989). However, far too many variables exist in order to have the statistics presented carry much evidentiary weight.

Instead, the evidence regarding disparate treatment of Mebane, standing alone, was sufficient to support a pretext finding. The atmosphere evidence does help bolster the unequal treatment shown, however, the statistical evidence, although relevant, added little to the pretext showing.

In summary, the record evidence considered as a whole leads to the conclusion that the rationale articulated by Reading Eagle for terminating Mebane was pretextual. Thus, having determined that Reading Eagle's discharge of Mebane was motivated by race-based discrimination we consider an appropriate remedy.

Section 9 of the PHRA provides that hiring, with or without backpay, may be ordered after a finding of discrimination. The general function of backpay relief is to put the victim of discrimination in the position he/she would have attained absent the discrimination. Abermarle Paper Company v. Moody, 422 U.S. 405, 418-423 (1975); PHRC v. Transit Casualty Insurance Company, 478 Pa. 430, 387 A.2d 58 (1978). Further, the PA Supreme Court has declared that the PHRC has broad discretion when fashioning an award. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985).

First, it is clear that a general cease and desist order is appropriate. Additionally, the facts of this case present the issue of whether reinstatement is an appropriate remedy. The Respondent's brief argues against reinstatement and the brief in support of the complaint seeks only a backpay award for the period June 20, 1984 through May 19, 1988. Clearly, reinstatement is not a mandatory remedy upon a finding of a discriminatory discharge, but is instead an equitable remedy whose appropriateness depends upon the discretion of the fact finder in light of the facts of each individual case. Ginsberg v. Burlington Industries, Inc., 24 EPD 1118, 115, 500 F. Supp. 696 (S. D. N .Y. 1980).

Here, it is apparent that Mebane has become embittered against Reading Eagle and does not wish to work for them since his brief makes no mention of seeking reinstatement. Furthermore, Mebane is presently residing in Arizona and expressed no interest in returning to Reading, PA, to resume a janitorial position. Accordingly, reinstatement shall not be ordered.

This brings us to the remaining issue - backpay. Of course, the ultimate focus regarding this remedy is what is the proper amount to be awarded. We begin this inquiry by recognizing that a loss must first be shown. Clearly, had Mebane continued working he would have been paid the hourly rate outlined in Stipulation #32. Appendix "A", note 1, of the brief on behalf of the complaint notes that Mebane would have worked 37.5 hours per week and lists the applicable hourly rate for the years in question. Accordingly, the amounts Mebane would have earned had he not been terminated are as follows:

(a)	June 20, 1984 Dec. 31, 1984 (27 ½ weeks)	x	$259.00 per week (37.5 hrs x $6.9066 per hour)	= $7,122.50

(b)	Jan. 1, 1985 Dec. 31, 1985 (52 weeks)	x	$274.00 per week (37.5 hrs x $7.3067 per hour)	= $14,248.00
(c)	Jan. 1, 1986 Dec. 31, 1986 (52 weeks) per hour)	x	$290.00 per week (37.5 hrs x $7.7333 per hour)	= $15,080.00
(d)	Jan. 1, 1987 Dec. 31, 1987 (52 weeks)	x	$305.00 per week (37.5 hrs x $8.1333 per hour)	= $15,860.00
(e)	Jan. 1, 1988 May 19, 1988 (20 weeks)	x	$320.00 per week (37.5 hrs x $8.5333 per hour)	= $ 6,400.00
			TOTAL LOST WAGES	$58,710.50

As a general rule, lost wages are reduced by any interim earnings. Here, the evidence submitted reflects the following interim earnings.

(a)	1984	$ 2,400.00
(b)	1985	$ 1,462.00
(c)	1986	$ 3,005.13
(d)	1987	$ 6,192.89
(e)	1988	$ 2,607.97
		$15,667.99

Accordingly, lost wages for the period June 20, 1984 through May 19, 1988, minus interim earnings equals $43,042.51. Almost universal1y, federal courts have looked at another significant issue which issue has also been considered in many cases by the PHRC. That issue is what duty a Complainant has to mitigate damages following a discriminatory discharge. See eg. Kaplan v. Int'l. Alliance of Theatrical & State Employees & Motion Picture Machine Operators, 525 F.2d 1354, 10 EPD ¶10,504 (9th Cir. 1975); 10th Cir. EEOC v. Sandia Corp. 639 F.2d 600 (1980); Thurber v. Jack Reilly's Inc. 26 EPD ¶32,109; 521 F. Supp 238 (D Mass. 1981); EEOC v. Kallir, Phillips, Ross, Inc. 12 EPD ¶11,253, 420 F. Supp 919 (S.D., N.Y. 1976); Marks v. Prattco, Inc. 24 EPD ¶31,447, 633 F.2d 1122 (5th Cir. 1981).

First, the brief in support of the complaint questions whether the duty to mitigate is required of a Complainant in Pennsylvania. Following the overwhelming majority of federal cases on the subject, we find a Complainant does have a duty to make reasonable and diligent efforts to mitigate his/her damages.

Here, the Respondent argues that Mebane's efforts were not only unreasonable, but furthermore, the Respondent points to instances where Mebane's credibility is placed in question with respect to reporting income. Reading Eagle submits that it is impossible to know exactly how much Mebane earned because Mebane has shown himself to have been less than candid with respect to his earning.

On the reasonableness of Mebane's efforts to mitigate damages, at least two factors are disturbing. First, although Mebane had two years of college, and served 4 years in the military, following his discharge Mebane initially appeared satisfied to simply work either in his father-in-law's shoe shine business or shining shoes at a country club. Mebane testified that he otherwise did not seek alternative employment.

The second factor to be considered is Mebane's stated philosophy of life: live simply, close to nature. Without commenting on the choice of lifestyle itself, it is apparent that Mebane's attitude towards life in general was not conducive to Mebane using the same degree of diligence others might use when finding themselves in the economic position Mebane was in following his termination.

Although the record finds Mebane worked periodically after his discharge, the degree of diligence exerted by Mebane can only be described as minimal. In a prior PHRC case, Ore v. Albert Einstein Medical Center, Docket No. E-19935 (PA Human Relations Commission, February 9, 1984), affirmed, 87 Pa. Cmwlth Ct. 145, 486 A.2d 575 (1985), the PHRC exercised its discretion in the remedy area by reducing a backpay award by one-half because a Complainant's mitigation efforts were insufficient.

Here, Mebane's minimal efforts to mitigate his damages, along with a professed life style which in no small way contributed to Mebane’s satisfaction with pursuit of minimal income, result in a reduction of what he might otherwise be awarded. Accordingly, as in Ore Supra., the lost wages minus interim earnings amount shall be halved, for a backpay award of $21,521.25.

The final issue regarding backpay is the question of whether interest should be awarded. Here we decline to award interest in recognition that Mebane's candidness in relaying his interim wages was successfully attacked by a preponderance of evidence. Because there is just reason to believe Mebane may have earned more wages than have been addressed in this record, interest on the backpay award shall not be assessed.

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

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CLIFTON B. MEBANE, a/k/a C. BEN-YAMEEN MEBANE, Complainant

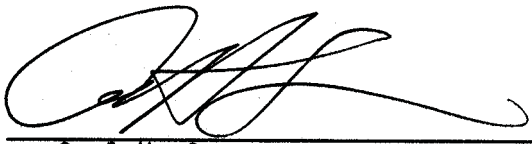
v.

READING EAGLE COMPANY, Respondent

DOCKET NO. E-30222D

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

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

CLIFTON B. MEBANE, a/k/a C. BEN-YAMEEN MEBANE, Complainant
v.
READING EAGLE COMPANY, Respondent

DOCKET NO. E-30222D

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 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 as its own findings in this matter and incorporates the 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

ORDERS

1. That the Respondent shall cease and desist from race-based discrimination with regard to terminations.
2. That the Respondent shall maintain a working environment free of racial harassment and intimidation.
3. That the Respondent shall take positive action where positive action is necessary to redress or eliminate employee intimidation.
4. That the Respondent shall create a clear company policy against racial harassment and intimidation and take strong steps to sensitize both supervisors and employees to the adverse consequences of racial harassment and intimidation.
5. That within 30 days of the effective date of this Order, the Respondent shall pay to the Complainant the lump sum of $21,521.25.
6. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Francine Ostrovsky, Esquire in the PHRC Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Robert Johnson Smith

Robert Johnson Smith, Chairperson

ATTEST:

Raquel Otero de Yiengst

Raquel Otero de Yiengst, Secretary