

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CYNTHIA MILLER,
Complainant

v.

MON-YOUGH COMMUNITY MENTAL HEALTH
AND MENTAL RETARDATION/DRUG AND
ALCOHOL/CORRECTION SERVICES, INC.,
Respondent

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Docket No. E-45409-D

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
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v.

MON-YOUGH COMMUNITY MENTAL HEALTH
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Respondent

DOCKET NO. E-45409-D

FINDINGS OF FACT *

1. The Complainant, Cynthia Miller (hereinafter "Miller"), is a white female. (N.T. 4.)
2. The Respondent, Mon-Yough Community Mental Health and Mental Retardation/Drug and Alcohol/Correction Services, Inc. (hereinafter "Mon-Yough"), is a non-profit corporation which provides a variety of services to county residents who are mentally ill, mentally retarded, drug and alcohol addicted, incarcerated or paroled in need of rehabilitation. (N.T. 12.)
3. In 1988, Mon-Yough ran 14 licensed facilities located at eight sites. (N.T. 72.)

* 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

4. At one of the sites, Mon-Yough ran a number of community living programs which included the Shaw Semi-Independent Program (hereinafter "Shaw Semi"), and a Title XIX program.

5. The Shaw Semi program differed from the Title XIX program in several fundamental ways:

a. Shaw Semi residents were not staffed twenty-four hours per day, while the Title XIX program was a twenty-four hour per day program, and

b. The funding for the programs came from different sources.

(N.T. 23, 55, 72, 126.)

6. Miller first began her employment at Mon-Yough in 1983. (N.T. 23.)

7. In January 1984, Miller was assigned the position of primary counselor in Shaw Semi, where she remained until her resignation in October 1988. (N.T. 23, 37, 53-54.)

8. As a primary counselor, Miller was assigned a three-day shift: Sunday 1:00 p.m. - 9:00 p.m. and Monday 1:00 p.m. - Tuesday 9:00 p.m. (N.T. 20.)

9. Miller counseled three adult women who were mild to moderately retarded. (N.T. 20, 120.)

10. Miller's immediate supervisor was Barbara Johnson, a black female. (N.T. 24.)

11. In 1988, Miller also held a second job as a high school teacher of students with learning disabilities. (N.T. 20.)

12. Miller's teaching job was for half days, five days per week, 7:30 a.m. to 11:00 a.m. daily. (N.T. 21.)

13. This teaching schedule posed a Tuesday a.m. conflict with Miller's counselor position at Mon-Yough. (N.T. 21.)

14. Nearly all Mon-Yough employees held second jobs. (N.T. 32, 61.)

15. Miller's Tuesday a.m. conflict was covered by her supervisor, Johnson. (N.T. 25, 61.)

16. In March 1988, Johnson resigned, creating a vacant program supervisor position. (N.T. 18, 133.)

17. The basic qualifications listed for the program supervisor position was either a master's degree or a bachelor's degree with one year experience working with the mentally retarded. (N.T. 134; C.E. 2.)

18. Miller and three other internal Mon-Yough employees applied for the promotion. (N.T. 19, 27, 30-31.)

19. The four applicants were: Miller, Darlene Jackson (hereinafter "Jackson"), Joe Shulik (hereinafter "Shulik"), and John Parillo. (N.T. 135.)

20. Jackson is black, and Shulik and Parillo are white. (N.T. 30-31, 135.)

21. As early as December 1986, the idea of restructuring Mon-Yough's workforce began to be discussed. (N.T. 117.)

22. One of Mon-Yough's primary problems was that staff schedules were too flexible, which resulted in an unmanageable situation. (N.T. 127, 164-165.)

23. The restructuring team was composed of Mon-Yough's Director of Mental Retardation Services, Doug Williams (hereinafter "Williams"); the Director of Mental Retardation Residential Services, Denise Plowman (herein-

after "Plowman"); the Human Resource Director/Personnel Director, Reverend Lacy Richardson (hereinafter "Richardson"); the program coordinator, Mary Hiddle; and three program supervisors, Chris Michaels, Barb Johnson, and Anna Marie Trumbull. (N.T. 28, 70, 104-105, 116, 117.)

24. Williams was Plowman's supervisor, and Plowman supervised the program supervisors. (N.T. 116, 150.)

25. One aspect of the restructuring program was to attempt to formulate a master schedule. (N.T. 127.)

26. In the Fall of 1987, Plowman sent Mon-Yough employees a questionnaire soliciting their input regarding plans for restructuring. (N.T. 125.)

27. In February 1988, a letter regarding restructuring was also sent to Mon-Yough employees. (N.T. 59-60, 127.)

28. In this letter, Mon-Yough employees were notified that it was Mon-Yough's intention to consider Mon-Yough as an employee's primary employer, and that Mon-Yough would not give consideration to a Mon-Yough employee's second job. (N.T. 61, 127.)

29. Miller received this notice and further understood that part of the restructuring would entail schedules changes. (N.T. 33, 62-63, 125.)

30. Shaw Semi counselors, including Miller, actively opposed the adoption of any schedule which did not accommodate an employee's second job. (N.T. 131.)

31. Shaw Semi counselors drafted their own restructuring plan and submitted it for consideration. (N.T. 131.)

32. In March 1988, when Johnson resigned, thereby opening a program supervisor position, the new position was designed to be a transition position. (N.T. 67, 143.)

33. Initially, the open program supervisor position was to begin supervision over Shaw Semi and a Title XIX program, with a third program to be added shortly. (N.T. 67, 143.)

34. When Miller applied for this promotion, she was aware the position was in transition. (N.T. 67.)

35. Plowman saw this program supervisor opening as her first opportunity to promote someone who would help implement the developing restructure program. (N.T. 135.)

36. Plowman perceived the position would be a role model for the commencement of the restructure program. (N.T. 128, 160-161.)

37. The expectation for the position was that the person selected would begin to distance themselves from direct care and become more involved with management issues. (N.T. 140-142.)

38. All four applicants went through two interviews--the first held on or about March 10, 1988 by Plowman, and the second on March 16, 1988 by Plowman, Williams and Richardson. (N.T. 27, 30, 31, 36, 74, 136.)

39. Plowman and Williams are white and Richardson is black. (N.T. 36.)

40. Going into the first interview, Miller understood the position she was seeking was a supervisory position and that the expected work hours were 9:00 a.m. to 5:00 p.m. (N.T. 38, 58.)

41. During the first interview, Plowman asked each applicant the same questions. (N.T. 136.)

42. All four applicants were considered good employees. (N.T. 25, 85, 136, 176, 178.)

43. Miller testified that at her first interview, she did not discuss all her past supervisory experience because she felt she had been asked to articulate her work experience, not supervisory experience. (N.T. 58, 146, 184.)

44. During Jackson's first interview, she did relate her prior supervisory experience. (N.T. 139-140.)

45. During Miller's first interview, the subject of her second job was discussed. (N.T. 28-29, 145.)

46. Miller testified that she perceived Plowman to have been open to the possibility of an extended shift after Miller asked Plowman for consideration about Miller's second job until June 10, 1988, if she was selected. (N.T. 28-29, 38-39.)

47. Plowman testified that Miller's first interview left Plowman with the impression that Miller was not open to the inevitable changes restructuring would bring. (N.T. 145.)

48. Plowman testified that Miller's reluctance to see management's side of the restructuring issue made Plowman question the quality of Miller's prior supervisory experiences. (N.T. 185.)

49. During Miller's second interview, Miller was asked if she would quit her second job if selected. (N.T. 39.)

50. In effect, Miller indicated she would rather pass up the promotion opportunity than break the teaching commitment she had made. (N.T. 169.)

51. During Miller's second interview, Miller again displayed opposition to the planned restructuring. (N.T. 150.)

52. In effect, Miller also related that, if selected, she would only tell Plowman things when matters were out of control, and that she considered it a weakness to use a supervisor as a sounding board. (N.T. 149.)

53. This caused concern in Plowman whose supervisory style was to develop close working relationships with those she supervised. (N.T. 149-150.)

54. On March 16, 1988, shortly after all the applicants were interviewed, the decision initially came down to either Jackson or Shulik (N.T. 78, 154.)

55. Jackson was ultimately selected. (N.T. 36.)

56. Both Miller's clear refusal to leave her second job and her hard feelings regarding the restructuring contributed to the decision not to select Miller for the promotion. (N.T. 96, 155.)

57. Mon-Yough wanted someone to sell the restructuring, not oppose it. (N.T. 180.)

58. Within a week to ten days following her promotion, Jackson's brother became seriously ill. (N.T. 150-171.)

59. As a result of her brother's illness and subsequent death, Jackson developed medical problems. (N.T. 88.)

60. Jackson never was assigned supervisory responsibility for more than one program. (N.T. 30, 40, 177.)

61. In October 1988, Jackson was demoted and shortly thereafter she resigned. (N.T. 38.)

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AND MENTAL RETARDATION/DRUG AND	:	
ALCOHOL/CORRECTION SERVICES, INC.,	:	
Complainant	:	

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and 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. Miller is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Mon-Yough is an employer within the meaning of the PHRA.
5. Miller has the burden of establishing a prima facie case for the allegation of race-based discrimination raised in her complaint.
6. Miller has established a prima facie case of failure to promote by showing:
 - a. she is a member of a protected class;
 - b. she applied for and was qualified for a position for which Mon-Yough was seeking applicants;
 - c. she was denied a promotion; and

d. the promotion was awarded to a person of a different race with equal qualifications.

7. Mon-Yough articulated a legitimate, nondiscriminatory reason why Miller was not promoted.

8. Miller failed to establish that Mon-Yough's reasons were a pretext for discrimination.

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OPINION

This case arises on a complaint filed on or about August 31, 1988, by Cynthia Miller (hereinafter "Miller") against Mon-Yough Community Mental Health and Mental Retardation/Drug and Alcohol/Correction Services, Inc., (hereinafter "Mon-Yough") with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). Miller's complaint alleged that she was not selected for promotion to a supervisory position because of her race, white. This race-based allegation alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

PHRC staff investigated the allegation, and at the investigation's conclusion informed Mon-Yough that probable cause existed to credit Miller's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified Mon-Yough that it had approved a Public Hearing.

The Public Hearing was held on August 20, 1992, in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Vincent A. Ciccone. Linda C. Plum, Esquire, appeared on behalf of Mon-Yough. Following the Public Hearing the record was held open to permit the deposition of Doug Williams to be taken and submitted in lieu of testimony. Upon the receipt of the transcript of Williams' deposition, the record was closed and the parties were afforded an opportunity to submit briefs. Both the post-hearing brief on behalf of the complaint and the brief for Mon-Yough were received on December 9, 1992.

In this disparate treatment case, Miller alleges that Mon-Yough treated her less favorably than others because of her race, white. To prevail, Miller is required to prove that Mon-Yough had a discriminatory intent or motive in failing to promote her. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); see also, Watson v. Ft. Worth Bank & Trust, 108 S. Ct. 2777 (1988).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Miller must carry the initial burden of establishing a prima facie case of discrimination. Allegheny Housing, Supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "prima facie case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the prima facie case creates the

presumption that the employer unlawfully discriminated against the employee. Id. at 254. The prima facie case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. Id. It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

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

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

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

Here we adapt the McDonnell Douglas test because this case involves an alleged race-based promotion denial. To establish a prima facie case here, Miller must show:

1. That she is a member of a protected class;
2. That she applied for and she was qualified for a position for which Mon-Yough was seeking applicants;
3. That despite her qualifications, Miller was denied the promotion; and
4. That the promotion was awarded to an applicant with either equal or less qualifications than Miller's, and who is a different race than Miller.

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

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

persuading the trier of fact that Mon-Yough intentionally discriminated against Miller remains at all times with Miller. Id. at 253.

To show pretext, Miller may directly persuade us that a discriminatory reason more likely motivated Mon-Yough, or indirectly show that Mon-Yough's proffered explanation is unworthy of credence. Id. In Patterson v. McLean Credit Union, 109 S. Ct. 2363, 49 FEP 1814 (1989), the U.S. Supreme Court commented that the "evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms." In a failure-to-promote case, a complainant might seek to demonstrate that an employer's claim to have promoted a better-qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for the position. Id. She could also seek to show pretext by presenting evidence of the employer's past treatment of her, including past instances of discrimination. Id. Though Miller may choose to utilize them, she is not required to employ any of these strategies, and "may not be forced to pursue any particular means of demonstrating that [Mon-Yough's] stated reasons are pretextual." Id.

Here, Miller successfully meets her burden of establishing a prima facie case. First, under the PHRA, all races are protected against discrimination. Clearly, Miller has a race. Equally clear is the fact that Miller applied for promotion to an open position, and Mon-Yough does not dispute that Miller was qualified for the position. As the position was awarded to Jackson, Miller has shown that she was denied the promotion.

Regarding the fourth element of the requisite prima facie showing, both Miller and Jackson met the listed qualifications for the position. In this regard, it can be said their qualifications were, on their face, equal.

Having made out a prima facie showing, the burden of production shifts to Mon-Yough to articulate a legitimate, nondiscriminatory reason for selecting Jackson over Miller. Mon-Yough successfully responded to this burden.

Mon-Yough submits that several factors distinguished Miller from Jackson and that Jackson was the better choice. First, Mon-Yough persuasively depicted the management attitude at the time of the March 1988 position opening as a desire to promote someone who would not only support a restructuring program but would also lend credibility to the desired goals.

At the time, Miller was holding a second job the scheduled hours of which would have conflicted at least two hours per day with the schedule of the open position for which Miller was applying. When asked, Miller indicated she was unwilling to quit her second job. Jackson's situation presented no such conflict. Mon-Yough indicated that an important reason restructuring was necessary was there was a need to take greater control of employees' schedules. To promote Miller and then instantly allow her to change her schedule would pose a serious dilemma. The first supervisor to be instated under the beginning of restructuring was expected to convey the need for less flexibility in schedules, and Miller's own circumstances required a high degree of flexibility.

Second, Mon-Yough submits that Jackson's prior supervisory experience made her the better candidate. During Jackson's interviews, she focused on her supervisory experiences, while Miller's focus was on her extensive direct care experiences. Although Miller's seniority with Mon-Yough was significantly greater than Jackson's, Mon-Yough argued that seniority only became a factor when several candidates were virtually equal

in all other respects. In Jackson's selection over Miller, Mon-Yough submits that seniority played no role in the selection.

Finally, Mon-Yough's evidence suggests that Miller's attitude on several matters weighed against her. Plowman indicated that she had several areas of concern which included questions about the quality of Miller's prior supervisory experience and how well Plowman would be able to relate to Miller. The issue of the quality of Miller's prior supervisory experience is said to arise from Miller's apparent intent to oppose restructuring rather than displaying a willingness to see the problem from management's perspective. The issue regarding relating is said to have developed from Miller's assertion that she felt it was a sign of weakness to go to a supervisor to discuss everything. In effect, Miller had indicated that she would go to a supervisor only when there was a crisis. Plowman would be the supervisor to whom the person selected reported, and she indicated that she desired a close working relationship with those she supervised.

Clearly, Mon-Yough's evidence sufficiently articulated legitimate, nondiscriminatory reasons for Jackson's selection over Miller. Miller's attempt to show pretext was interesting.

In general, Miller makes much of the fact that her seniority was not given enough weight, and further argues that her credentials were better than Jackson's. Here, the evidence, considered as a whole, reveals nothing more than a proper managerial decision after extended interviews with the four applicants. On paper, both Miller and Jackson had superior qualifications for the supervisor's position. Miller's job evaluations were excellent, and both Miller and Jackson's immediate supervisors gave them a wonderful recommendation. Mon-Yough presented evidence that it considered

Jackson's supervisory experience in the personnel field more valuable than Miller's extensive direct care experiences. Clearly, Miller's experiences were different than Jackson's, but not necessarily better. Miller's attempt to demonstrate that her experiences were more valuable falls short. The facts provided by Mon-Yough and Miller show that race was not the basis under which Mon-Yough decided to promote Jackson over Miller. Mon-Yough's choice was merely a matter of management preference after a series of interviews of the candidates. Additionally, no evidence was presented to show that seniority played any role different than the limited role Mon-Yough said it did. Without more, Mon-Yough's failure to fully credit Miller's seniority with Mon-Yough and to make the selection for promotion without regard to seniority does not automatically constitute unlawful discrimination. See Cope v. McPherson, 36 FEP 1075 (D.C. D.C. 1984).

Here, Miller attempts to reach a result not intended by the PHRA. Miller's attempt to invade a traditional management prerogative can best be seen by her insistence that if she would have been selected, Mon-Yough could have accommodated her for several hours each day. Clearly, Mon-Yough's management choices in scheduling may not be diminished by second guessing a decision without a showing of an improper motive.

Another area of attack in Miller's attempt to show pretext was the fact that Jackson had left Mon-Yough's employ for a period of approximately 42 days in October 1987, and she returned on or about November 19, 1987. Mon-Yough had drafted a promotion policy in November 1987 which stated in part:

No employee will be permitted to apply for promotion to a new position until he or she has been in the present job for a minimum of twelve months.

Miller argued that this provision should have been read to require employment for the past twelve consecutive months. Mon-Yough provided evidence which indicated they considered Jackson's temporary resignation, but that since Jackson had not left on bad terms, a decision had been made when she returned to permit her return without consequence to Jackson. Furthermore, the policy, having been drafted after Jackson's return, did not apply to Jackson. Finally, Jackson's record was checked and it was discovered that Jackson had been a counselor with Mon-Yough for almost one and one-half years.

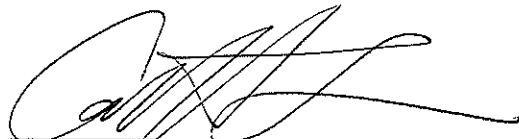
Mon-Yough's articulated reasons for its action were not shown to be pretextual. Accordingly, a judgment for Mon-Yough must be entered dismissing Miller's complaint. An appropriate order follows.

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Respondent	:	

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 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

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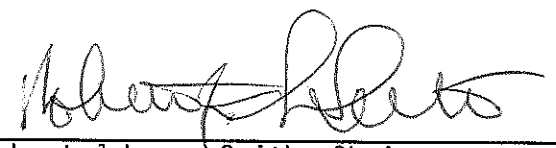
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FINAL ORDER

AND NOW, this 23rd day of December, 1992, 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 Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

O R D E R S

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

BY: 
Robert Johnson Smith, Chairperson

ATTEST:

Gregory J. Celia, Jr., Secretary