

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

AIKO OGDEN,
Complainant

v.

REHABILITATION AUDITING AND
PLACEMENT, INC.,
Respondent

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DOCKET NO. E-40310

STIPULATIONS OF FACT

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

AIKO OGDEN, :
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Complainant :
:
v. : Docket No. E-40310
:
REHABILITATION AUDITING :
& PLACEMENT, INC., :
:
Respondent :

JOINT STIPULATIONS OF FACT

The following represents Stipulations agreed upon by the undersigned:

1. The Complainant, Aiko Ogden, is an adult individual who resided in Pennsylvania at the time of the complaint.
2. The Respondent, Rehabilitation Auditing and Placement, Inc., was located at 2121 Noblestown Road, Pittsburgh, Pennsylvania 15205 at the time of the complaint.
3. The Respondent employed more than four employees at the time of the complaint.
4. Ms. Ogden filed a complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket Number E-40310 on May 7, 1987.
5. On or about June 8, 1987, Commission staff served Respondent with notice of the complaint.
6. On September 28, 1987, Respondent submitted a letter denying the discrimination in response to the complaint.
7. The Commission approved a probable cause finding on December 7, 1991.

8. Respondent was notified of the Commission's finding of probable cause on or about January 16, 1992.
9. Conciliation efforts were unsuccessful.
10. In a correspondence dated April 30, 1992, the Commission notified the Respondent that it had voted to hold a public hearing.
11. A pre-hearing conference was held on June 5, 1992.
12. The Complainant, Aiko Ogden-Erumbly, and Commission Counsel were present at the conference.
13. The Respondent was not represented.
14. All procedural requirements necessary for a public hearing have been met.
15. On January 9, 1987, Ms. Ogden became employed by the Respondent as a secretary at the rate of \$3.75 per hour.
16. Ms. Ogden's job duties consisted of typing and filing. *m*
17. Ms. Ogden was hired after filling out an application and questionnaire, and taking a typing test in 1987.
18. The Respondent employed 6 secretaries in 1987.
19. ~~_____~~ *m*
20. Ms. Ogden was not permitted to relieve on the telephone as did the other secretaries.
21. Ms. Ogden was employed by the Respondent until May 1, 1987.
22. On May 4, 1987, the Respondent's Controller, Eugene Czuczman, called Ms. Ogden and instructed her not to report to work on May 5, 1987.

23. None of the other secretaries were instructed not to report to work.

24. [REDACTED] m

[REDACTED] m

25. [REDACTED] m

[REDACTED]

26. [REDACTED] m

[REDACTED]

[REDACTED]

[REDACTED]

27. The pre-employment typing test had been administered on January 2, 1987 and Ms. Ogden had nonetheless been hired on January 9, 1987.

Diane Blancett-Maddock 8/27/92
Diane Blancett-Maddock
Counsel for Commission

Aiko Ogden-Brumby
Aiko Ogden-Brumby
Complainant

Millie Marino 8/27/92
Millie Marino
Respondent

FINDINGS OF FACT*

1. The Complainant is an adult individual who resided in the Commonwealth of Pennsylvania at the time of the complaint. (J.S. 1)
2. At all times relevant to the instant complaint, the Respondent employed more than four employees. (J.S. 3)
3. The Complainant was hired, in January, 1987, as a secretary at Rehabilitation Auditing and Placement, Inc. (hereinafter "Respondent"). (N.T. 5)
4. The Respondent recruited the Complainant from the JTPA program which assists minorities in locating employment. (N.T. 6)
5. The Complainant was hired by Respondent as a temporary employee with the possibility of obtaining a permanent position in the future. (N.T. 44)
6. The Respondent hired the Complainant and maintained her services despite discovering, during the Complainant's period of employment, that she did not pass the mandatory entrance typing exam. (N.T. 59)
7. The Complainant felt overburdened when the Respondent asked her to file papers in addition to her typing duties. (N.T. 52)
8. The Complainant missed approximately five days of work at Respondent's place of business. (N.T. 40)
9. The Complainant claimed she was fired because she received a lower salary than the other secretaries employed by the Respondent. (N.T. 48)

* To the extent that the Opinion which follows recites facts in addition to those here listed, such fact shall be considered to be additional Findings of Fact. The following abbreviations will be utilized through these Findings of Fact for reference purposes:

N.T. Notes of Testimony
J.S. Joint Stipulations

10. The Complainant's salary was comparable to the salaries of the other secretaries. (N.T. 52)
11. On May 4, 1987, the Complainant was instructed not to report to work the following day. (J.S. 22)
12. The Complainant filed a complaint with the Pennsylvania Human Relations Commission, (hereinafter "PHRC") on May 7, 1987. (J.S. 4)
13. The Complainant alleged that Respondent unlawfully discharged her due to her Japanese/American ancestry. (N.T. 5)
14. The Respondent owner believed that the Complainant was Black. (N.T. 58)
15. The Respondent owner could not discern any accent on the part of Complainant. (N.T. 73)
16. The Respondent owner alleges that she fired the Complainant because of complaints she received from other employees regarding excessive typographical errors made by the Complainant. (N.T. 59)
17. The Respondent warned the Complainant that if her productivity did not improve, she would be terminated. (N.T. 69-70)
18. The productivity level expected of the clerical staff was 50 letters a day and 6-7 reports. (N.T. 70)
19. The Complainant could not keep up with the productivity level because of the number of corrections of her typing. (N.T. 70-71)
20. The Complainant was replaced by a person not a member of the Complainant's protected class. (N.T. 5)

CONCLUSIONS OF LAW

1. The PHRC has jurisdiction over the parties and the subject matter of this case.
2. The parties and PHRC have complied with all procedural prerequisites for a public hearing.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. The Respondent is an employer within the meaning of the PHRA.
5. The Complainant bears the burden of establishing a prima facie case of discrimination.
6. The Complainant has met her burden of establishing a prima facie case by showing that:
 - a. She is a member of a protected class, Japanese/American ancestry;
 - b. She was qualified for the position;
 - c. She was terminated despite her qualifications; and
 - d. Respondent sought other equally qualified applicants and filled the position with a person not of Complainant's protected class.
7. The Respondent has met its burden of production in that the Respondent has produced evidence of legitimate non-discriminatory reasons for its action.
8. Once the Respondent meets its burden of production, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination.
9. The Complainant can succeed in its ultimate burden of persuasion by showing that the Respondent's proffered explanations are unworthy of credence and/or pretextual.

10. The Complainant has failed to establish that the Respondent's articulated reason for its action is pretextual or unworthy of credence.

OPINION

This case arises from a complaint filed by Aiko Ogden, (hereinafter "Complainant") against Rehabilitation Auditing and Placement Inc., (hereinafter "Respondent"), Docket No. E-40310, with the Pennsylvania Human Relations Commission, (hereinafter "PHRC"). On May 7, 1987, the Complainant filed a complaint with the PHRC alleging that the Respondent discharged her from her secretarial position because of her Japanese/American ancestry. A broad view of the instant complaint reveals that Complainant also alleged that she was terminated because she questioned Respondent's pay scale. These are allegations of violations of Section 5(a) of the PHRA, the Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §955(a).

The PHRC staff investigated the allegation and found probable cause to substantiate the allegation of discrimination based on the Complainant's ancestry. Thereafter, the Commission attempted to conciliate this matter, and efforts were unsuccessful. Therefore, a Public Hearing regarding this matter was approved on April 30, 1992.

The Public Hearing was held on August 27, 1992, before Permanent Hearing Examiner Phillip A. Ayers, Esquire. Diane Blancett-Maddock, Assistant Chief Counsel, appeared on behalf of the complaint and the Respondent owner, Millie Marino, represented herself in the Public Hearing Commission Counsel submitted a post-hearing brief on November 25, 1992. The Respondent owner did not submit a post-hearing brief in this matter.

At the Public Hearing, the focus was placed on a disparate treatment analysis of the allegations made and the evidence received. The order and allocation of proof in a disparate treatment case was first

defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and recently clarified by the Pennsylvania Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 PA 124, 532 A.2d 315 (1987) No. 32 W.D. Appeal Docket, 1986. The Pennsylvania 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]." Id at 320. If the Respondent meets this burden of production, the Complainant, in order to prevail, 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. Id at 318.

In the instant case, the Complainant must meet her burden of a prima facie case. In order to make a prima facie showing, the Complainant must show:

1. She is a member of a protected class;
2. She was qualified for the position;
3. She was terminated despite her qualifications; and
4. Respondent sought other equally qualified applicants and filled the position with a person not of Complainant's protected class.

The burden of establishing a prima facie case is not an onerous one. In the instant case the Complainant can clearly meet her burden. Firstly, the Complainant is a member of a protected class under the Pennsylvania Human Relations Act because of her Japanese/American ancestry. There is testimony in the record that the Respondent owner was unaware that the Complainant was of Japanese/ American ancestry. However, for the purpose of establishing a prima facie showing, it is clear that the

Complainant is of Japanese/American ancestry, and that Complainant has proceeded in this matter on that basis. Secondly, the Complainant was qualified for her position as secretary because she worked for the Respondent in that capacity from January through May, 1987.

The last two prongs of the prima facie showing are fairly straightforward. The Complainant was terminated despite her qualifications, and the Respondent sought another applicant and filled the position. As aforementioned the Complainant has met her burden of establishing a prima facie case.

As indicated, once the Complainant has established a prima facie case, the burden of production then shifts to the Respondent to "produce evidence of a legitimate non-discriminatory reason for [its action]." Allegheny Housing Rehabilitation Corp. supra. The Respondent has clearly articulated a reason for her actions. The Respondent has stated that the Complainant was terminated due to poor work performance.

The testimony presented at the hearing indicates that there was a specific productivity level required of the secretaries at the Respondent's work place. The clerical staff was expected to produce 50 letters a day and 6-7 reports. (N.T. 70) The letters were standardized letters which required the staff to simply fill in the blanks with the proper addresses. The Respondent owner testified that other employees were producing 50-75 letters a day and 6-7 reports. The Respondent owner testified that the Complainant could not keep up with this productivity level. The Complainant was making too many errors to keep up with the other staff. Furthermore, Ms. Marino (Respondent owner) testified that she met with Complainant and informed her that, unless her production improved, she would be terminated. The Respondent's specific reason for its action was the excessive amount of

typographical errors made by the Complainant. The Complainant has denied that she made an excessive amount of errors, but presented no corroborative evidence

to support her position that the number of errors attributed to her were excessive or that other staff were making errors.

The Complainant in this matter has also asserted she was discriminated against by having to file papers in the office in addition to typing duties. However, the Respondent owner testified that all secretarial staff were required to perform some filing duties, not just the Complainant. The Complainant did not present any corroborative evidence indicating that she was the only employee required to file along with her typing duties.

Finally, turning to the Complainant's allegation that she was terminated because she questioned Respondent's pay scale, the Respondent asserted that the Complainant's salary was comparable to the other secretaries. Furthermore, upon questioning by Respondent owner at the Public Hearing, the Complainant agreed that she did not receive lower pay than the other secretaries. The Complainant only said that she had been told otherwise. Once again, the Complainant did not present any corroborative evidence that she did receive lower pay.

Upon review of the entire record in this matter, the Respondent has articulated legitimate non-discriminatory reasons for its action, and the reasons have not been shown to be pretextual or unworthy of credence.

An appropriate Order follows:

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DOCKET NO. E-40310

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

BY:



Phillip A. Ayers
Permanent Hearing Examiner

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DOCKET NO. E-40310

FINAL ORDER

AND NOW, this 31st day of March, 1993, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, 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 instant complaint be, and the same hereby is DISMISSED.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Robert Johnson Smith
Robert Johnson Smith, Chairperson

ATTEST:

Russell S. Howell
Russell S. Howell, Assistant Secretary