

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS PUPKIEWICZ,
Complainant

v.

COLONIAL SCHOOL DISTRICT,
Respondent

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DOCKET NO. E-27484

STIPULATIONS OF FACT

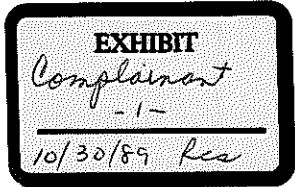
FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

FINAL ORDER



COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHYLLIS PUPKIEWICZ, : DOCKET NO. E-27484
Complainant :
v. :
COLONIAL SCHOOL DISTRICT, :
Respondent :

STIPULATIONS OF FACT

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

1. The Complainant herein is Phyllis Pupkiewicz, an adult female (hereinafter "Complainant").
2. The Respondent herein is the Colonial School District (hereinafter "Respondent").
3. Respondent, at all times relevant to the case at hand, has employed four or more employees in the Commonwealth of Pennsylvania.
4. On or about December 27, 1983, the Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-27484. A copy of the complaint is attached hereto as Appendix "A" and will be included as a docket entry in this case at time of hearing.

5. On or about September 19, 1986, the Respondent filed an Answer to the Complaint. A copy of the Answer is attached hereto as Appendix "B" and will be included as a docket entry in this case at time of hearing.

6. On November 28, 1984, Respondent filed a Motion to Dismiss the above referenced complaint in which it averred that the complaint was not timely filed with the Commission. A copy of the Motion is attached herto as Appendix "C" and will be included as a docket entry in this case at time of hearing.

7. On December 12, 1984, the Complainant filed an Answer To Motion to Dismiss. A copy of the Answer and accompanying Brief in Opposition to the Motion are attached hereto as Appendix "D" and will be included as a docket entry in this case at time of hearing.

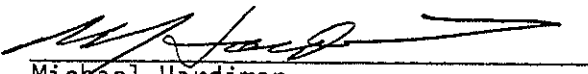
8. On or about January 29, 1985, the Commission submitted a Reply in opposition to the Motion to Dismiss. A copy of the Reply and accompanying Brief in support are attached as Appendix "E" and will be included as a docket entry in this case at time of hearing.

9. On or about February 11, 1985, the Commission issued an Order which denied the Motion to Dismiss. A copy of this Order is attached hereto as Appendix "F" and will be included as a docket entry in this case at time of hearing.

10. In correspondence, dated October 4, 1985, the Commission notified Respondent that Probable Cause existed to credit the allegations contained in the above referenced complaint.

11. Subsequent to the determination of Probable Cause, the Commission attempted to resolve the matter in dispute between Complainant and Respondent through conference, conciliation and persuasion but was unable to do so.

12. In correspondence, dated September 5, 1986, the Commission notified the Respondent that a Public Hearing had been approved in this matter.

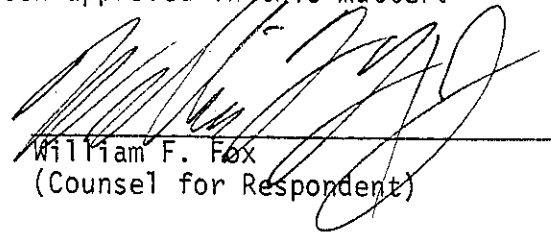


Michael Hardiman
(Counsel for the Commission on
behalf of the Complainant)

10/30/89
Date:



Norman A. Klinger
(Counsel for Complainant)



William F. Fox
(Counsel for Respondent)

10/31/89
Date:

10/31/89
Date:

FINDINGS OF FACT

1. The Colonial School District ("hereinafter "Respondent") hired the Complainant as an Elementary School Teacher in September of 1967. (N.T. 22)
2. The Complainant continued to teach at Respondent School District until December 31, 1969. (N.T. 22)
3. The Complainant advised the Respondent that she was pregnant and that she intended to resign, effective December 31, 1969. (N.T. 22)
4. The Respondent, when the Complainant advised it of her pregnancy and intent to resign, had a policy in effect regarding pregnancy. (N.T. 25)
5. The relevant policy was as follows:

"The Board grants no maternity leave of absence and requests that employees resign not later than the end of fourth month of pregnancy."
(N.T. 26)
6. The Complainant did in fact resign, effective December 31, 1969 because of her pregnancy and anticipated childbirth. (N.T. 22)
7. When the Complainant submitted her resignation to Respondent, she was not advised as to whether she had an option with respect to pregnancy other than resignation. (N.T. 23)
8. The Complainant did not request a maternity leave of absence from the Respondent. (N.T. 24)

*The foregoing "Stipulations of Facts" 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 Exhibits
S.F. Stipulations of Fact
D.E. Defendant's Exhibit

9. After June of 1970 and no later through 1974, the Respondent adopted a written policy that permitted teachers who were pregnant to utilize a maternity leave of absence. (C.E. #2 at A #20)
10. At the said time the Respondent began to credit years of service earned immediately prior to a maternity leave of absence in the same manner as it credited such service with respect to other types of approved leaves of absences. (C.E. #2 at A #21)
11. The Complainant began to work as a per diem substitute teacher for Respondent in September of 1970, and continued as such until December, 1971. (C.E. #2 at A #23)
12. The Complainant applied for re-employment with Respondent in April of 1971 for work as a full-time teacher. (N.T. 26)
13. The Complainant was hired and is still teaching in the Respondent School District as of the date of this public hearing. (N.T. 26)
14. In 1983, the Respondent advised the Complainant that there was going to be some suspensions, and that she was one of the teachers who would be suspended. (N.T. 26)
15. The Complainant advised the Respondent that she was requesting a hearing on her suspension. (N.T. 26)
16. The Respondent, on July 14, 1983, held a hearing in regard to the Complainant's suspension. (N.T. 27)
17. In September of 1983, effective on the 6th, the Respondent hired the Complainant as a long-term substitute teacher at Ridge Park Elementary School. (N.T. 27)
18. Later in September of 1983, the Respondent reinstated the Complainant to a contracted full-time teaching position. (N.T. 27)

19. In October of 1983, the Respondent upheld the suspension of the complainant and gave her a contract for the full-time teaching position. (N.T. 27)
20. The Respondent at all times relevant to the instant case, always selected teachers for suspension in inverse order of seniority. (C.E. #2 at A #32)
21. The Complainant, at the time of the recommended suspension list in May of 1983, was credited with 11.333 years of service from January 1972 until 1983. (C.E. #2 at A #33; C.E. #18 at #3)
22. The Respondent did not credit the Complainant with 2.5 years of service during the time period of September 1967 through December, 1969. (N.T. 29)
23. The Respondent's decision not to credit the Complainant with the 25 years of service was based upon its policy of not crediting prior years of service for seniority purposes where such service was terminated either by resignation or discharge. (C.E. #2 at A #36)
24. The Respondent, in regard to the suspension list of 1983, did credit prior years of service with respect to any teacher whose service was interrupted by an approved leave of absence. (C.E. #2 at A #37)
25. The Complainant became aware, in 1976, that the Respondent was not crediting her with the 2.5 years of service for seniority purposes. (N.T. 36)
26. The Complainant became aware at this time because she saw the seniority list issued by the Respondent. (N.T. 36)
27. Subsequent to 1976, the Respondent issued a seniority list which reflected her years of service based on the credits she received for seniority. (N.T. 36)

28. The Respondent on a yearly basis after 1976, gave teachers in the District a form by which a teacher could question the computation of his/her seniority. (N.T. 36)

29. The Complainant was aware that the time period from 1967 - 1969 was not counted as seniority. (N.T. 29)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the Complainant and Respondent.
2. The PHRC has jurisdiction over the subject matter of the complaint under the Pennsylvania Human Relations Act. ("PHRA")
3. All parties and the Commission has complied with the procedural prerequisites to a public hearing in this matter.
4. The Complainant is an "individual" within the meaning of Section 5(a) of the PHRA.
5. The Respondent is an "employer" within the meaning of Section 4(b) and 5(a) of the PHRA.
6. The Respondent's policy in 1969, of refusing to grant maternity leaves and requiring pregnant teachers to resign, was an act of sex based discrimination in violation of Section 5(a) of the Act.
7. In determining the timeliness of a complaint, the proper focus is on the time of the alleged discriminatory act not upon the time of the consequences of the Act.
8. A person filing a claim of discrimination dependent on discrimination outside the statute of limitations cannot complain of a continuing violation.
9. The Complainant did not file a timely complaint.

OPINION

The instant case arises on a complaint filed by Phyllis Pupkiewicz ("Complainant") against the Colonial School District ("Respondent") with the Pennsylvania Human Relations Commission ("PHRC"). In her complaint filed on December 27, 1983 the Complainant alleged that the Respondent discriminated against her because of her sex, female, in violation of Section 5(a) of the Pennsylvania Human Relations Act ("PHRA") when it suspended her from her position. The Complainant specifically asserts that the Respondent's refusal to credit the Complainant with 2.5 years of service, beginning in 1967 and ending in 1969, amounted to an ongoing discrimination practice perpetuating the effects of prior unlawful conduct.

PHRC staff investigated the allegations and, in October 1985, informed the Respondent that probable cause existed to credit the allegations. Thereafter the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion but were unable to do so. The Commission then, by letter dated September 5, 1986, notified the parties that it had approved the convening of a public hearing in this matter. On October 30, 1989, the Commission held the public hearing in this matter. Prior to said hearing all parties agreed to waive their right to a hearing before three Commissioners. Commissioner Thomas L. McGill, Jr. and Commissioner Robert Johnson Smith served on the hearing panel, with Commissioner McGill serving as the Chairperson of the panel. Following the testimony at the Public Hearing, both parties were afforded the opportunity to submit post hearing briefs and did so.

As the record indicates in not only the hearing transcript but also the post hearing briefs, the main issue in this case is timeliness.

The then applicable provision of the PHRA provided:

*"Any complaint filed pursuant to this section must be so filed within 90 days after the alleged act of discrimination." (43 P.S. ,959(g))

It is not disputed by the parties that the applicable statute of limitations in this matter is 90 days.

The facts in this case are, for the most part, not in dispute. The Complainant was first employed by the Respondent in September of 1967. In October of 1969, the Complainant resigned her position as a teacher because of her pregnancy. The Respondent, at that time, had a policy which provided:

"The Board grants no maternity leave of absence and requests that employees resign not later than the end of the fourth month of pregnancy."

In 1971, the Respondent rehired the Complainant as a teacher with employment commencing in January of 1972. From 1972 until May of 1983, the Complainant taught in the Respondent School District. At that time, the Respondent informed Complainant that she was one of the teachers to be suspended effective at the end of the school year. It is agreed by the parties that the suspensions were effectuated under the Public School Code, 24 P.S. §11-1125.1 which provides that suspension based on declining enrollment are made in inverse order of seniority. The Complainant appealed her suspension and was granted a hearing on July 14, 1983. The District upheld the Complainant's suspension on the basis of declining enrollment. In computing the seniority of teachers, the Respondent based its computation on continuous years of teaching within the District. If a teacher resigns and is later rehired,

*The PHRA was amended in 1986 to change the filing time from 90 days to 180 days after the alleged act of discrimination.

the original resignation is considered a break in service for seniority purposes, and the seniority is calculated from the date of his or her reemployment. The primary focus of this case is the 2.5 years that the Complainant taught in the District prior to her resignation in 1969. In regard to seniority, the resignation was considered a break in service, and the Complainant's seniority was calculated from the date of her reemployment in January of 1972 until the date of suspension of 1983. It is undisputed that the Complainant was aware in 1976 that she was not given seniority credit for the 2.5 years of service before her resignation.

The main issue in this case is whether the Complainant filed her complaint in a timely manner, and secondly, whether the alleged discriminatory act by Respondent in 1969 is having a present discriminatory impact upon the Complainant, and whether that discrimination is continuing. In regard to the question of timeliness, it is clear that the Complainant did not file her complaint in a timely manner. In response to that issue, the Complainant states in page 32 of her post hearing brief:

The Complainant, in the aforementioned complaint, does not seek to directly challenge either the refusal of the Respondent to grant her a maternity leave of absence in 1969 or the requirement that she resign in that year because she was pregnant. Her cause of action with respect to those events ceased to exist 90 days after the policy or practice that permitted such conduct to occur was discontinued, whichever happened later. See 43 P.S. §959(g); and see 16 Pa. Code §42.11(a).

The Complainant contends that the Respondent's continued adherence in 1983, to a policy that perpetuates prior unlawful conduct creates a

present violation of Section 5(a) of the PHRA. There are a number of cases dealing with the issue of "present impact of past discrimination" and/or continuing discrimination. The major case in this area is United Airlines, Inc. v. Evans, 431 U.S. 553, 97 S.Ct. 1885 (1977). As counsel for the Respondent notes, the facts in the Evans case are similar to the facts presently before the Commission. In the Evans case, the Complainant was an airline stewardess who worked for United Airlines from 1966 to 1968. At the time United Airlines had a policy requiring that all flight attendants be single. Consequently when the Complainant was married in 1968, she was fired. The Complainant's cause of action protesting the firing was barred because it was not filed within the 90-day limitation period. Evans was eventually rehired by United in 1972, but as far as seniority was concerned, she did not receive seniority credit for the period from 1966-1968. The argument asserted by Evans was that the seniority system utilized by United Airlines gave present effect to United's past discrimination act. In the Evans case, Evans did not file a complaint within 90 days of realizing how her seniority was being computed. The Supreme Court held that the complaint was not filed in a timely manner. The court in Evans said:

"...She advances two reasons for holding that United's seniority system illegally discriminates against her: First, she is treated less favorably than males that were hired after her termination in 1968 and prior to her reemployment in 1972; second, the seniority system gives present effect to the past illegal act and, therefore, perpetuates the consequences of forbidden discrimination. Neither argument persuades us that United is presently violating the statute.

It is true that some male employees with less total service than respondent have more seniority than she. But this disparity is not a consequent of their sex, or of her sex. For females hired between 1968 and 1972 also acquire the same preference over respondent as males hired during that period. Moreover, both male and female employees who had service prior to February 1968, who resigned or were terminated for a non-discriminatory reason (or for an unchallenged discriminatory reason), and who were later reemployed, also were treated as new employees receiving no seniority credit for their prior service.

Respondent is correct in pointing out that the seniority system given present effect to a past act of discrimination. But United was entitled to treat that past act as lawful after respondent failed to file a charge of discrimination within the 90 days then allowed by §706(b). A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue but separately considered it is merely an unfortunate event in history which has no present legal consequences.

Respondent emphasizes that she has alleged a continuing violation. United's seniority system does indeed have a continuing impact on her pay and fringe benefits. But the emphasis should not be placed on mere continuity; the critical question is whether any present violation exists. She has not alleged that the system...treats former employees who were discharged for a discriminatory reason any differently from employees who resign or were discharged for a non-discriminatory reason. In short, the system is neutral in its operation." (At pg. 1888-1889)

As noted at the outset of this opinion, the facts in the instant case are very similar to the factual situation in the Evans case. When the Respondent suspended teachers in 1983, it did so in inverse order of seniority as required by the Public School Code.

Secondly there is the issue whether the Respondent's failure to give the Complainant credit for her service when she returned to work in 1972 constituted a separate act of discrimination. The Complainant did not file an action within 90 days after return to work in 1972. Furthermore, the Complainant admitted at public hearing that she knew as early as 1976 how her seniority was being computed. In addition to her having knowledge, the Complainant was provided with a form which gave teachers the opportunity to identify problems with their seniority computation.

Another case that bears on this matter before the Commission is Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498 (1980). This is another case that involved an allegation of a continuing violation. In Hicks, a college professor who was denied tenure was given a "terminal contract." It was the policy of Delaware State College to extend a terminal contract to a professor who was denied tenure. When the professor (Ricks) received notice of his tenure denial, he was given a one-year terminal contract. Ricks did not file within 180 days of his tenure denial, but either argued that the 180 day statute of limitations did not run until the expiration of the terminal contract. Basically Ricks argued that his termination gave present effect to the college's past act of denying him tenure and perpetuated the consequences of the prior discrimination. The Supreme Court held that when one is looking at the timeliness of a complaint, the time of the alleged discriminatory act is the main issue.

In the matter before the Commission, the Complainant did not file a timely claim under the Pennsylvania Human Relations Act in response to the alleged discriminatory Act in 1969. The Complainant not only did not file a timely complaint in regard to the date of her resignation, but she also did not file a timely complaint in regard to her awareness that her seniority credit did not include the 2.5 years of service in question. The Evans case and the Ricks case both embody the view that a person cannot assert a continuing violation where the matter is centered on discriminatory occurring outside of the applicable statute of limitations. Most recently, the case of Lorance v. AT&T Technologies, Inc. ___ U.S. ___, 109 S.Ct. 2261, 104 L.Ed. 2d 961 (1989), in citing Evans and Ricks, affirmed this point of view. The court in Lorance held that the proper focus is on the timing of the alleged discriminatory act not as the timing of the consequences.

In the instant case. it is clear that the Complainant's cause of action was filed outside of the then applicable statute of limitation. We adopt the rationale of the federal cases cited in this opinion and apply the well-reasoned analysis to the facts presented in this case. Accordingly the complaint in this matter is untimely filed and an appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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COLONIAL SCHOOL DISTRICT,
Respondent

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DOCKET NO. E-27484

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above captioned matter, the Hearing Panel concludes that the Complainant did not file a timely complaint under the Pennsylvania Human Relations Act. It is therefore the Hearing Panel Recommendation that attached Stipulations of Fact, Findings of Fact, Conclusion of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Hearing Panel recommends issuance of the attached Final Order.


Robert Johnson Smith, Chairperson
of Hearing Panel

COMMONWEALTH OF PENNSYLVANIA
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DOCKET NO. E-27484

FINAL ORDER

AND NOW, this 28th day of August, 1990, the following review of the entire record in this case, the Pennsylvania Human Relations Commission hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of Hearing Panel, pursuant to Section 9 of the Pennsylvania Human Relations Act. Further the Commission adopts said Stipulations of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the 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 complaint in this case be, and the same hereby is dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Rita Clark

By: _____

Rita Clark, Vice-Chairperson

ATTEST:

Raque Otero De Yienst
Raque Otero De Yienst, Secretary