COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARK A. WRIGHT, Complainant
v.
NEVILLE CHEMICAL COMPANY, Respondent

DOCKET NO. E55607D

STIPULATIONS OF FACT

FINDINGS OF FACT

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Mark A. Wright, was hired by the Respondent as a production trainee. (NTI 34-35.)

2. Respondent, Neville Chemical Company, is an employer who employs four or more persons in the Commonwealth. (CE A.)

3. The Respondent implements an Absence, Tardy and Early Quit Policy ("ATE Policy") for its employees. (CE B.)

4. Under the terms of the policy, employees accumulate points on the basis of infractions of attendance rules. (CE B.)

5. An employee would receive three ATE points for each absence which does not qualify as an "excused absence". (CE B.)

***** The foregoing Stipulations of Fact are 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:

CE Complainant's Exhibit
NT Notes of Testimony (Volumes I, II, III, IV)
RE Respondent's Exhibit
SF Stipulations of Fact

6. Excused absences are defined as follows:

a. absences when assigned to jury duty (certificate of service required);
b. absence for military reserve duty (certificate of service required);
c. qualified absence for authorized union business;
d. prearranged leave of absence;
e. qualified absence for death in the family; and
f. absence for sickness or accident compensable under the company's workers' compensation program or the insured accident and sickness program. (CE B.)

7. The Respondent issues a warning letter to any employee who accumulates 25 ATE points. (CE B.)

8. If an employee commits another ATE violation, then the employee is suspended for one day. (CE B.)

9. If an additional violation occurs, then the employee receives a three-day suspension. (CE B.)

10. A third violation results in an employee receiving a five-day suspension leading to termination. (CE B.)

11. The Complainant had knowledge of the posting of the ATE Policy and he was familiar with the particulars of the ATE Policy. (NTI 48.)

12. The Complainant understood that employees received ATE points for absences which were not excused under the ATE Policy. (NTI 49-50.)

13. Furthermore, the Complainant understood that, through a grievance process, he could challenge a determination that an absence was unexcused. (NTI 51-52.)

14. The Complainant, as of January 12, 1990, had accumulated 25 ATE points. (RE 20.)

15. Thereafter, the Complainant committed a series of ATE violations, missing work days on January 13, 1990; January 16, 1990; January 17, 1990; January 18, 1990; and January 19, 1990. (NTI 55-57.)

16. None of these absences was excusable under the ATE Policy. (NTII 71; NTIII 137.)

17. The Complainant's mother testified that she attempted to have the Complainant entered into a drug and rehabilitation program on January 18, 1990. (NTII 85.)

18. However, her action would not have rendered the January 17th absence excusable. (CE B.)

19. The Complainant, on January 17, 1990, did not seek treatment for detoxification, but rather for back and shoulder pain. (RE 28.)

20. There is nothing in the record which indicates that any of the Complainant's January absences were excusable, or in any way related to his race. (RE 28; CE B.)

21. Pursuant to ATE Policy, the Complainant was suspended for one day because of his absence on January 13, 1990. (CE B, C.)

22. Pursuant to ATE Policy, the Complainant was suspended for three days because of his absence on January 16, 1990. (NTII 14-15.)

23. Pursuant to ATE Policy, the Complainant was suspended for five days, leading to termination, because of his absence on January 17, 1990. (CE B.)

24. Each of the above notices informed the Complainant that he should contact Vice-President William Roper if there were any questions in regard to the disciplinary actions. (CE C, D.)

25. The Complainant never filed any grievance alleging that any absence from January 13, 1990 through January 19, 1990 should have been excused. (NTI 167.)

26. Prior to the public hearing the Complainant never suggested to the Respondent or any Respondent representative that his January 17, 1990 absence should be an excused absence. (NTI 167.)

27. On January 20, 1990, the Complainant entered a drug and rehabilitation program at Brighton Woods Treatment Center and remained there until February 15, 1990. (NTI 68, 70, 83.)

28. The Respondent continued to pay Complainant during his stay at Brighton Woods and treated all of the absences as excused. (NTI 71.)

29. The Respondent also paid for Complainant's stay at Brighton Woods. (NTI 71.)

30. By letter dated February 26, 1990, Respondent notified Complainant that as a result of his absence on January 17, 1990, he was suspended for five days, subject to discharge. (CE E.)

31. On March 6, 1990, Respondent held a special third-step grievance meeting in regard to Complainant's grievance. (NTII 32.)

32. The president of Complainant's union specifically requested that Respondent reinstate Complainant, subject to a "Last Chance Agreement." (NTII 32.)

33. The Respondent was under no obligation to reinstate Complainant. (NTIII 39-40.)

34. Some of Respondent's employees who have undergone rehabilitation return to work without a Last Chance Agreement. (RE 48.)

35. In deciding whether to bring back an employee who has completed rehabilitation under a Last Chance Agreement, the Respondent considered the Complainant's record at the time he went into rehabilitation. (NTIII 141.)

36. An employee with a drug and alcohol problem requiring rehabilitation would not be required to enter into a Last Chance Agreement if he/she had an otherwise acceptable work record. (NTIII 141-142.)

37. An employee with problems (such as absenteeism, *et al.*) is reinstated only with a Last Chance Agreement. (NTIII 143.)

38. Because of his excessive absenteeism at the time he entered rehabili-tation, and because of his prior Last Chance Agreement prompted by sleeping on the job, the Complainant was reinstated, but only subject to a Last Chance Agreement. (NTIII 145.)

39. At the time Complainant went into rehabilitation, he could have been discharged purely on the basis of his absenteeism. (NTIII 145.)

40. The Respondent has, on occasion, reinstated an employee under a Last Chance Agreement, even when they were not subject to discharge. (NTIII 146.)

41. Joseph Diskin, a white individual, was an employee who was subject to a Last Chance Agreement even though he was not subject to discharge. (NTIV 43-44.)

42. Respondent has in the past conditioned reinstatement upon a Last Chance Agreement in a number of cases involving white employees. (NTIV 43, 44.)

43. The names of such white employees are: David Beatty, David Barczak, James Herman, Richard Morrow, Robert Scherling, Joseph Diskin, Robert Sparbanie, and Wesley Shumbard. (NTIII 175, 180; RE 48, 49, 52, 54, 55, 57, 58, 60, 61.)

44. At this time, Complainant did not suggest that he should not have been required to be subject to a Last Chance Agreement. (NTI 170-171.)

45. Neither the Complainant nor the union challenged the Last Chance Agreement. (NTI 171; NTIII 144.)

46. Pursuant to the Last Chance Agreement, Respondent agreed to reinstate Complainant subject to certain conditions. (NTI 88.)

47. The conditions included the following:

> ". . . [Mr. Wright] will maintain his participation in the drug and alcohol rehabilitation program and furnish proof of same when requested. If he should fail to do so, he will be terminated without recourse to the grievance procedure.

. . . This Agreement will remain in force for an entire calendar year commencing with the date of his first return to work following this agreement." (CE I.)

48. Also, Complainant admits in his Amended Complaint, "I was required to undergo a rehabilitation program and comply with the prescribed aftercare." (CE 1.)

49. As part of his rehabilitation program at Brighton Woods, the Complainant referred to "90/90 A/A - N/A Meetings". (NTI 78.)

50. A/A refers to Alcoholic's Anonymous and N/A refers to Narcotic's Anonymous. (NTI 78.)

51. Complainant never attended any A/A meetings. (NTI 178.)

52. On the basis of Complainant's aftercare program, the Respondent expected that the Complainant would attend meetings of both Alcoholic's Anonymous and Narcotic's Anonymous. (NTIII 149-150.)

53. A note dated October 18, 1990 from Counselor Wayne Reagan indicated that "N/A and A/A meetings have been recommended" for the Complainant. (RE 36.)

54. The Last Chance Agreement clearly required that the Complainant "maintain his participation in the drug and alcohol rehabilitation program." (CE 1.)

55. Brighton Woods referred Complainant to ten weeks' attendance at a specific aftercare group, and to individual counseling with Chuck Goetz. (CE G.)

56. Complainant never attended any meetings with Mr. Goetz. (NTI 178.)

57. Complainant admitted that he violated the provisions of his aftercare plan by experiencing a "relapse." (NTI 82.)

58. Complainant also testified at his deposition that he estimated he drank alcohol six times after his discharge from Brighton Woods. (NTI 183-184.)

59. Complainant, after his "relapse," stopped meetings for approximately "a month or more." (NTI 104-105.)

60. Complainant knew that Respondent could at any time require proof of his participation in the drug and alcohol rehabilitation program. (NTII 63.)

61. Complainant also knew that he could verify attendance at N/A meetings by simply asking the secretary at the meeting for a note reflecting his presence. (NTI 224-225.)

62. After Complainant was reinstated, he continued to commit violations of the ATE Policy. (NTII 37.)

63. Complainant not only continued to have unexcused absences but did not even telephone Respondent to advise them of his absence. (RE 20.)

64. As of October 5, 1990, the Complainant had accumulated 25 additional ATE points. (NTIII 155-156.)

65. On October 8, 1990, Complainant was again absent and received a one-day suspension under the policy. (NTIII 156; RE 20.)

66. Thereafter, Mr. Pesce, Respondent employee, was asked to contact the Complainant to determine if he was complying with the requirements of the Last Chance Agreement. (NTIII 151, 156.)

67. At a meeting on October 18, 1990, Complainant stated that he was not attending meetings "as regularly as I had at the beginning" and that he would "try to get back on track." (NTI 100.)

68. Furthermore, Complainant testified that he admitted to Mr. Leja that he was not attending any meetings. (NTI 223.)

69. In an October 22 memo detailing the meeting of October 18th, Complainant told Mr. Leja that he had neglected his participation in aftercare counseling. (CE K.)

70. Based on Complainant's own representations, he was not attending aftercare at this time. (NTIV 69.)

71. As of December 4, 1990, based on Complainant's own representations, with the exception of one meeting, he was still not attending aftercare. (NTIV 69.)

72. When the Respondent determines that an employee has failed to comply with a Last Chance Agreement, then the Respondent terminates that employee. (NTIII 60.)

73. Effective December 13, 1990, and as set forth in a letter dated December 12, 1990, Respondent terminated Complainant's employment based upon his failure to comply with the conditions of his Last Chance Agreement. (NTIII 160.)

74. On December 14, 1990, at the request of Complainant's union, there was a meeting with the Complainant, Mr. Pesce and union representatives. (NTIII 160.)

75. Complainant, at this meeting, stated that he did not get serious about rehabilitation until December 1990. (NTII 57.)

76. Complainant also admitted that he had not attended any A/A meetings. (NTI 226.)

77. Complainant stated that he had resumed drinking alcohol on a regular basis because alcohol was not a problem for him. (NTIII 162.)

78. At the December 14, 1990 meeting the Complainant was unable to remember when or where he had last attended a meeting. (NTI 226-227.)

79. At the December 14th meeting the Complainant wrote out a list of meetings that he "felt that I may have attended." (NTI 114.)

80. Although Complainant said that he was unable to remember dates, his list contained December 13, 1990 as a date of a meeting he attended. (NTIII 167.)

81. When confronted with this discrepancy, Complainant then indicated that the list simply reflected meetings that were held. (NTIII 168.)

82. Complainant could not provide any documentation that he had attended the meeting on December 13, 1990, or any other meeting. (NTI 227, 230.)

83. Complainant has not presented any evidence that the Respondent's monitoring of his compliance with his Last Chance Agreement was related to his race. (NTIII 150.)

84. The Complainant did not comply with his Last Chance Agreement, in that he neither maintained adequate participation in the drug and alcohol rehabilitation program, nor could he furnish proof of same to the Respondent. (NTIII 162; NTI 226.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.

2. The parties have complied with all of the procedural prerequisites to a public hearing.

3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act.

4. The Respondent is an employer within the meaning of the Act.

5. The Complainant has met his initial burden of establishing a *prima facie* case of discharge by showing:

a. he is a member of a protected class;
b. he was qualified for the job he was performing;
c. he was discharged from the position; and
d. employees not in Complainant's protected class were not discharged.

6. The Respondent articulated legitimate, nondiscriminatory reasons for its action in discharging the Complainant.

7. The Complainant bears the burden of showing that the proffered reason of the Respondent is pretextual.

8. The Complainant has not met his ultimate burden of persuasion by his failure to demonstrate by a preponderance of the evidence that he was the victim of intentional discrimination.

OPINION

This case arises on a complaint filed by Mark A. Wright (hereinafter "Complainant") against the Neville Chemical Company (hereinafter "Respondent") on or about April 27, 1991, at Docket No. E-55607. The Complainant alleged that he was discriminatorily terminated from his position with Respondent on the basis of his race, African American. Complainant further alleged that his termination was in violation of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, *as amended*, 43 P.S. Section 955(a) (hereinafter "the Act" or "PHRA").

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated the Complainant's allegations and, at the conclusion of the investigation, found that probable cause existed to credit the Complainant's allegations.

Thereafter, the PHRC attempted to eliminate the alleged unlawful, race-based termination through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing in this matter.

The public hearing was held on August 10 and 11, 1996, and continued August 22 and 23, 1996, in Pittsburgh, Pennsylvania, before Permanent Hearing Examiner Phillip A. Ayers. The case on behalf of the complaint was presented by PHRC Assistant Chief Counsel Lorraine S. Caplan; John Stember, Esquire, appeared on behalf of the Complainant; and Robert W. Hartland, Esquire, represented the Respondent in this matter. Following the public hearing, the parties were given the opportunity to submit post-hearing briefs.

In a case involving disparate treatment allegations, we must 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 (1981). The Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. *Allegheny Housing Rehabilitation Corp. v. PHRC*, 516 Pa. 124, 532 A.2d 315 (1987); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Once the Complainant meets his initial burden, the Respondent must articulate a legitimate, nondiscriminatory reason for its action. Once the Respondent articulates a legitimate, nondiscriminatory reason, the Complainant must prove that the stated reason was merely a pretext for racial discrimination. The essence of the shifting burdens is shown in *Allegheny Housing*, *supra*:

> ". . . If such evidence is presented, the question for the Commission is whether, on all the evidence produced, the plaintiff has persuaded it by a preponderance of the evidence, that the employer intentionally discriminated against [him]."

Clearly, the ultimate burden is on the Complainant to persuade by a preponderance of the evidence.

Next, we move to the establishment of the *prima facie* case. In *McDonnell Douglas*, the United States 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.

Although the *McDonnell Douglas* test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of a *prima facie* case will vary substantially according to the differing factual situations of each case. *McDonnell Douglas*, 411 U.S. at 802. 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).

To establish a *prima facie* case of race-based termination, the Complainant must show that:

1. he is a member of a protected class;
2. he was qualified for his position;
3. he was discharged; and
4. others not in Complainant's protected class were not discharged.

In the instant case, the Complainant, an African American, certainly meets the first element of the *prima facie* case. Since the Complainant was working for the Respondent, and there has been no allegation that he was not qualified, the Complainant shall be deemed qualified. Certainly the Complainant meets the third element of the *prima facie* case, in that he was terminated by the Respondent. Finally, there is some evidence in the record that there were some white employees not in his protected class on "last chance agreements" who were not terminated by the Respondent. As the burden of establishing a *prima facie* is not an onerous one, the Complainant in the instant case has met his burden.

As aforementioned, by utilizing the shifting burden analysis, once the Complainant meets his burden of establishing a *prima facie* case, the Respondent must simply articulate a legitimate, nondiscriminatory reason for its action in terminating the Complainant. In the instant case, the Respondent articulates that after repeated violations of the no-fault attendance policy, the Respondent reinstated him pursuant to a last change agreement. The Respondent subsequently discharged the Complainant because of non-compliance with the last chance agreement. Consequently, the Respondent has met its burden of articulating a legitimate, nondiscriminatory reason for its action in terminating the Complainant.

Now that the Respondent has met its burden, we must look at the entire record to determine whether the Complainant can show that the Respondent's articulated reason is pretextual. As always, the Complainant has the ultimate burden of persuasion. In *Allegheny Housing, supra*, the court said, "If, however, the [employer] offers a non-discriminatory reason for the dismissal, the presumption drops from the case. As 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 [employer] 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'."

In the case before the Commission, the Complainant has not met his ultimate burden of persuasion. Firstly, we must look at the Respondent's Absence, Tardy and Early Quit Policy ("ATE Policy"). (CE B.) The essence of the policy is that employees would accumulate points based on infractions of attendance rules. Employees would receive three ATE points for each absence which was not an excused absence. An "excused absence" would be:

1. absences when assigned to jury duty (certificate of service required);
2. absence for military reserve duty (certificate of service required);
3. qualified absence for authorized union business;
4. prearranged leave of absence;
5. qualified absence for death in the family; and
6. absence for sickness or accident compensable under the company's worker's compensation program or the insured accident and sickness program. (CE B.)

Once an employee accumulates 25 points, he is issued a warning letter. Another violation results in a one-day suspension. An additional violation results in a three-day suspension, and a fourth violation leads to a five-day suspension, leading to termination. In the instant case, the Complainant admits that the policy was posted, and that he was familiar with it. Furthermore, the Complainant would periodically inquire as to the status of his ATE points. (NTI 48.) This fact certainly indicates that the Complainant was well aware of the grievance process.

In the extensive record before the Commission, the Complainant has clearly not carried his burden of persuasion in that the Complainant has not shown that Respondent's articulated reasons were pretextual or unworthy of credence. The record is replete with the Complainant's violations of the Respondent's ATE Policy. The Complainant's argument that his January 1990 absences should have been excused is without merit. Also, Complainant's argument that the decision to reinstate him under a last chance agreement was racially motivated is without merit. In fact, the record reflects the contrary, that white employees were treated the same as the Complainant. There is evidence in the record that the Respondent permitted both black and white employees to return to work without a last chance agreement. The decision as to whether an employee is reinstated with or without a last chance agreement was dependent on the employee's record at the time the employee went into rehabilitation. In the instant case the Complainant had significant problems at the time of his entry into the last chance agreement.

Also, the record clearly reflects that the Complainant's last chance agreement was not more or less onerous than last chance agreements given to white employees. Approximately one-half of the white employees who participated in drug and alcohol programs were reinstated contingent upon last chance agreements.

Out of eight white employees who were in rehabilitation programs and returned under last chance agreements, seven were terminated for violations of the agreement.

Lastly, Complainant has not shown that the Respondent's decision that Complainant had violated the conditions of his last chance agreement was discriminatory in any manner. The relevant conditions were:

> ". . . [Mr. Wright] will maintain his participation in the drug and alcohol rehabilitation program and furnish proof of same when requested. If he should fail to do so, he will be terminated without recourse to the grievance procedure.
>
> . . . this Agreement will remain in force for an entire year commencing with the date of his first return to work following this agreement."

The facts in this case show that the Complainant did violate the terms of his last chance agreement by failing to maintain his participation in his rehabilitation program and by failing to provide proof of same when requested. The information provided by the Complainant was not credible. For example, the Complainant, at a meeting on December 14, 1990, supplied a list of meetings that he "felt that I may have attended." Also the Complainant indicated that he was unable to remember specific dates relating to his attendance. However, the list contained December 13, 1990 as the date of a meeting he attended. When confronted with this, the Complainant then said that the list only reflected meetings that were held, not meetings he attended. Specifically, the Complainant could not document that he attended the December 13, 1990 meeting, or any other meeting.

Having shown that the Complainant has not met his ultimate burden of persuasion, an appropriate Final Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARK A. WRIGHT, Complainant
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DOCKET NO. E55607D

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 not proven discrimina- tion in the instant case. 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.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARK A. WRIGHT, Complainant
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FINAL ORDER

AND NOW, this 21st day of April, 1997, 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 as its own finding in this matter and incorporates the same 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