

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

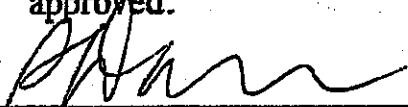
Ricardo J. Morales, :
:
Complainant : PHRC Case No. 199727687
:
v. :
:
Tresco/Fibematics, :
:
Respondent :

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 Ricardo J. Morales, an adult male (hereinafter “Complainant”).
2. The Respondent is two separate companies: Tresco and Fibematics; ~~both companies are owned by Paul Grossman.~~ MBD [signature]
3. The Respondent at all times relevant to this case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about May 20, 1998, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter Commission) at Docket No. E-87918D.
5. On or about September 22, 1998, Respondent filed an answer in response to the complaint.
6. In correspondence dated March 28, 2003, Commission staff notified the complainant and the Respondent via a Finding of Probable Cause that probable cause existed to credit the retaliatory allegation.
7. Subsequent to the determination of probable cause for the retaliation claim Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

8. In subsequent correspondence, Commission staff notified the complainant and Respondent that a public hearing had been approved.



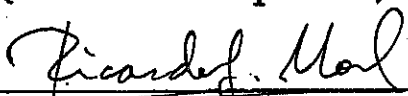
Pamela Darville
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complaint)

10-20-03
Date



Michael B. Dubin, Esquire
(Counsel for Respondent)

10-21-03
Date



Ricardo J. Morales

11/05/03
Date

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Ricardo J. Morales,

Complainant

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Treco/Fibematics,

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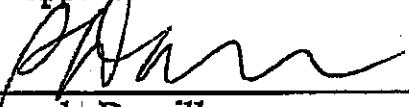
PHRC Case No. 199727687

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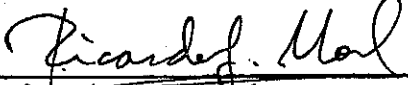
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FINDINGS OF FACTS *

1. The Complainant is Ricardo Juan Jose Morales, (hereinafter "Morales"). (S.F. 1; N.T. 27).
2. The named Respondent is Treco/Fibematics, which actually consists of two separate companies: Treco and Fibematics. (S.F. 2; N.T. 27-28).
3. On or about January 1, 1998, Morales was hired to be a Sales Associate of Fibematics. (N.T. 28; 181).
4. In or about 1968, Fibematics was formed and subsequently owned by Ivan Grossman. (N.T. 30, 174).
5. Fibematics is a paper company that manufactures industrial paper towels used for industrial cleaning. (N.T. 174).
6. In 1998, the president and majority shareholder of Fibematics was Paul Grossman, Ivan Grossman's son. (N.T. 30, 172, 173).
7. Fibematics products were marketed domestically and worldwide. (N.T. 175).

* 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 Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

S.F. Stipulations of Fact
N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

8. Looking to broaden Fibematics' sales in South America, Paul Grossman hired Morales who he met in the course of taking Spanish classes at the Berlitz Languages School where Morales had been teaching Spanish to non-Spanish speakers and English to non-English speakers. (N.T. 27, 30, 180, 181).
9. Fibematics was situated in a two-story building in which a factory and warehouse are locate on the ground floor and offices are on the second floor. (N.T. 35).
10. In 1998, Fibematics employed between 30 to 50 employees, 90% of whom were minorities. (N.T. 175, 176, 235).
11. Those working I the office spaces were: Paul Grossman; Ivan Grossman; Karen Murphy, Office Manager; Melissa Dangler, Administrator; Martha Sanchez, frequented the offices. N.T. 38, 230, 228).
12. Some of Fibematics factory workers were parolees from the prison system that Fibematics utilized in its production operations. (N.T. 91, 178, 236, 237).
13. Fibematics had an employee manual applicable to its factory workers only. (N.T. 176, 177).
14. Morales never saw the Fibematics' employee manual as there was no formal progressive discipline policy for office workers in 1998. (N.T. 179).
15. Whenever Paul Grossman had a problem with an office worker, he simply went directly to that person and spoke with them. (N.T. 179).
16. The work atmosphere at Fibematics was friendly, cozy, familiar, and relatively informal where an open door policy existed. (N.T. 85).
17. Every day, Paul and Ivan Grossman paid for lunch for office personnel. (N.T. 85).
18. Morales testified that he had never been mistreated by either Paul or Ivan Grossman and that they treated the staff very well and were great to work for. (N.T. 90, 98).

19. Ivan Grossman testified that in his 53 years in business, Morales' complaint was the first discrimination complaint ever brought against him. (N.T. 281).
20. When hired, Morales was told that it would take up to a year to become a good salesman and up to 14 months to get a feel for the business. (N.T. 55).
21. Morales' main function was to learn the business. (N.T. 182).
22. Paul Grossman was both Morales' direct supervisor and considered by Morales to be his mentor. (N.T. 86, 183, 184, 269).
23. Paul Grossman attempted to train Morales in every aspect of Fibematics and on a regular basis walked Morales through the factory. (N.T. 119, 181).
24. Paul Grossman wanted Morales to know why products were made certain sizes, how machinery worked, the volume to expect from the equipment and other technical applicable information. (N.T. 183).
25. Morales also did light clerical duties, customer follow-up, prepared correspondence, created spreadsheets, and computed math problems relating to the products. (N.T. 32, 37, 181).
26. Early on, Morales attempted to use the internet to locate companies that could use Fibematics' products. (N.T. 32).
27. Morales had little success finding leads on the internet. (N.T. 124).
28. After a time, because of the lack of success, Paul Grossman instructed Morales to stop the internet efforts to locate leads. (N.T. 192).
29. During Morales' employment Paul and Ivan Grossman discussed Morales' performance. (N.T. 271).
30. During business hours, Morales often played chess on the office computer and frequented internet chat rooms. (N.T. 32, 33, 124, 126, 127, 128, 187).

31. After Morales was terminated, Paul Grossman learned that Morales had ordered a book from the company's computer that Morales thought would give him leads to women willing to pay him for sex. (N.T. 34, 133).
32. Morales agreed that ordering such a book from the office computer reflected poor judgment and was illegal, but at the time, he was only thinking of himself and his sex life. (N.T. 138, 139).
33. Several times, Paul Grossman told Morales the office computer was not there to feed his personal vices. (N.T. 193).
34. Paul Grossman also instructed Morales to try to learn more about Fibematics' products. (N.T. 108, 111).
35. While Paul Grossman often told Morales of his expectations, twice Morales was told there was a concern that he was not getting a feel for the business. (N.T. 56, 108).
36. Paul Grossman took Morales along on a trip to a paper convention in Baltimore, Maryland. (N.T. 52).
37. To get into the convention, Paul Grossman and Morales had to wait in line approximately two hours. (N.T. 211).
38. When they finally received their materials, Morales noted that his name had been misspelled and because of this, Morales wanted to get back in line to have his name changed. (N.T. 211).
39. Morales' actions left Paul Grossman with the impression that Morales did not have a feel for the situation. (N.T. 211).
40. At the Baltimore convention, Morales divulged proprietary information to a customer. (N.T. 147, 166, 211, 246).
41. Paul Grossman spoke to Morales about his actions. (N.T. 166, 213).

42. In or about late April 1998, Paul Grossman took Morales with him on a week long business trip to call on potential customers in the mid-west. (N.T. 47, 49, 114, 205).
43. Paul Grossman and Morales drove approximately 500 to 600 miles one-way on the mid-west trip. (N.T. 117).
44. Prior to leaving on the trip, Paul Grossman stopped by Morales' place to pick him up and before leaving Morales smoked marijuana in front of Paul Grossman. (N.T. 48, 114).
45. When they arrived at a hotel where they were staying for several nights, they were put into a suite. (N.T. 49, 113, 114).
46. Morales asked Paul Grossman why Paul Grossman had taken the bedroom as opposed to the sofa bed in the common room. (N.T. 49, 113, 114).
47. Morales got upset that he could not have the bedroom, and Paul Grossman had to tell Morales he is the boss and that Morales had to get a better feel for the situation and have better judgment. (N.T. 114, 193, 207).
48. Paul Grossman had to become intense and serious with Morales because Morales could not understand the arrangements. (N.T. 114, 207).
49. Within ten minutes of visiting the showroom of a potential customer, Morales asked the potential customer if he could have a rubber-based utensil. (N.T. 51, 115, 116).
N.T. 51, 115, 116).
50. While on the mid-west trip, Morales and Paul Grossman were at dinner with a client and several women at the next table were overheard discussing sex. (N.T. 50, 115, 206).
51. Morales excused himself from the table to go to the women's table where he included himself in their conversation. (N.T. 206).

52. When the client went to the bathroom Paul Grossman told Morales to "knock it off". (N.T. 207).
53. Morales acknowledged his behavior demonstrated bad judgment. (N.T. 116).
54. Paul Grossman did not fire Morales while they were in the mid-west because they had to drive back to Philadelphia together. (N.T. 210-211).
55. Morales purchased two sports jackets for a meeting. (N.T. 54).
56. Morales had the jackets altered and the Grossman's became aware that Morales subsequently returned one of the jackets. (N.T. 54, 119, 215).
57. Morales told Paul and Ivan Grossman that he had purchased a pair of eyeglasses that had a warranty under which the glasses would be replaced for free if anything happened to them. (N.T. 53).
58. Morales broke the glasses in order to get a new pair. (N.T. 217).
59. On another occasion, the office staff were out to lunch and after lunch, everyone had to wait for Morales in the parking lot. (N.T. 213).
60. After approximately ten minutes, Morales appeared telling the Grossmans that he had stayed in the restaurant to ask the waitress on a date. (N.T. 213).
61. Morales used the company telephone to make lengthy personal calls to his sister in Puerto Rico. (N.T. 145).
62. Paul Grossman informed Morales that he did not want him on the telephone for an hour with his sister in Puerto Rico. (N.T. 146, 214).
63. Sanchez's national origin is Puerto Rico. (N.T. 43).
64. Morales perceived that Murphy and Dangler were impatient with Sanchez and asked her to do things in a rough, harsh, and rude tone. (N.T. 44).
65. On one occasion, Morales told Paul and Ivan Grossman that Sanchez was being mistreated. (N.T. 94).

66. Both Paul and Ivan Grossman treated Sanchez properly. (N.T. 239, 240).
67. Generally, Sanchez appeared fine when working, and possibly spoke to Paul Grossman once about Murphy and Dangler not being warm to her. (N.T. 239, 240).
68. Sanchez resigned effective May 6, 1998. (N.T. 46; R-10).
69. Sanchez did not file a claim against Fibematics. (N.T. 235).
70. Shortly after returning from the mid-west trip, Paul Grossman left for an extended business trip to Europe. (N.T. 101, 117).
71. Prior to leaving for Europe, Paul Grossman articulated a list of things he wanted Morales to accomplish in his absence. (N.T. 102, 194; R-5).
72. Paul Grossman was testing Morales to see how well he would perform in his absence. (N.T. 210).
73. On Wednesday, May 6, 1998, while Paul Grossman was in Europe, Ivan Grossman received a telephone call from a lawyer who purportedly represented Sanchez. (N.T. 55, 273).
74. Ivan Grossman told Morales about the call but did not provide Morales with any details of the telephone conversation. (N.T. 276).
75. Morales neither knew Sanchez had contacted a lawyer nor had he ever spoken with a lawyer representing Sanchez. (N.T. 87, 99).
76. Approximately once a week, Ivan Grossman speaks by telephone with his niece in California who happens to be an attorney. (N.T. 276, 278).
77. Ivan Grossman shared with his niece that while Paul Grossman was in Europe he had a salesman who was moping around the office, playing on the internet, and generally not doing anything. (N.T. 276).
78. On Friday, May 8, 1998, Ivan and Paul Grossman spoke by telephone. (N.T. 221).

79. During that telephone conversation, Ivan Grossman informed Paul Grossman that Morales had been on the computer a lot and was moping around the office. (N.T. 203).
80. Following his telephone discussion with Paul Grossman on May 8, 1998, Ivan Grossman sent Morales home to await Paul Grossman's return from Europe to deal with Morales. (N.T. 203, 279).
81. Morales was sent home because he had been moping around the office which adversely affected office morale, he was on the computer too much and he was not doing the work he had been assigned. (N.T. 225).
82. After returning from Europe, on the morning of Monday, May 18, 1998, Paul Grossman called Morales into his office and handed him a letter of termination. (N.T. 59, 60, 107; RE-6).
83. Morales was terminated because Paul Grossman considered him unprofessional, unethical, disinterested, distracted, moody, immature, and because Morales had not been developing a clear understanding of the business. (N.T. 185).
84. Morales' termination was not related in anyway to the telephone call Ivan Grossman had received from Sanchez's lawyer. (N.T. 106, 204, 234).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the complaint.
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter.
3. The Complainant is an individual within the meaning of Section 5(a) of the PHRA.
4. The Respondent is an employer within the meaning of Section 4(a) and 5(a) of the PHRA.
5. Section 5(d) of the PHRA, prohibits employers from unlawfully discriminating against any individual because such individual has opposed any practice forbidden by the PHRA.
6. To establish a *prima facie* case of retaliation under the opposition clause of Section 5(d), Morales must establish:
 - a. that he opposed a practice forbidden by the PHRA;
 - b. that Fibematics took adverse employment action against Morales; and
 - c. that a casual connection exists between the opposition and the adverse action.
7. Morales failed to establish a *prima facie* case of retaliation.

OPINION

This case arises on a complaint filed by Ricardo J. Morales, (hereinafter "Morales"), on or about May 20, 1998, at PHRC Case No. 199727687, against Treco/Fibematics, (hereinafter "Fibematics"). Generally, Morales' complaint alleges national origin/ancestry-based discrimination and retaliation. More specifically Morales' complaint alleges, that on May 18, 1998 Morales was terminated because of his national origin/ancestry, Hispanic and because Morales had been named in a complaint of discrimination and because Morales told the owner of Fibematics that he would back up another employee's "story of . . . mistreatment . . ." At the pre-hearing conference of this matter, Morales withdrew the national origin/ancestry component of his complaint leaving only Morales' retaliation allegation remaining. Morales' complaint alleges a §5(d) violation of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951 et.seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC"), staff conducted an investigation and found probable cause to credit Morales' allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for Public Hearing.

The Public Hearing was held in Philadelphia, Pennsylvania on November 5, 2004, before a three member panel of PHRC Commissioners. The Chairperson of the panel was Commissioner Raquel Otero de Yiengst, and the other two panel members were Commissioner Toni M. Gilhooley and Commissioner Timothy Cuevas. Panel Advisor Carl H. Summerson assisted the panel. Michael B. Dubin, Esquire, appeared on behalf of the Respondent, and Pamela Darville, Esquire, represented the State's interest in the matter.

Fibermatics post-hearing brief was received on February 20, 2004, and the post-hearing brief on behalf of the state's interest in the complaint was received on February 26, 2004.

Section 5(d) of the PHRA is the provision which forbids employer retaliation against employees who file charges or otherwise engage in protected activity. Section 5(d) states in pertinent part:

“ It shall be an unlawful discriminatory practice . . . [f]or any . . . employer . . . to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.”

The anti-retaliation provision of the PHRA generally arms employees who have denounced workplace discrimination with a cause of action above and beyond the protections the act affords against any underlying actual discrimination. Such protection is necessary in order to enable employees to engage in statutorily protected activities without fear of employer retaliation.

Section 5(d) of the PHRA addresses two different types of employee conduct which the Act's retaliation provision protects: (1) opposition to any practice forbidden by the PHRA; and (2) participation in a proceeding under the PHRA. In this case, the provision implicated is the opposition clause only. Generally, paragraph 3(a) of Morales' original complaint alleged that Morales had been “named in a complaint of discrimination against the respondent.”

It appears that at the time of making his PHRC complaint, Morales thought that Martha Sanchez, (hereinafter “Sanchez”) had filed a PHRC claim. Sanchez was a co-worker of Morales until on May 1, 1998, Sanchez submitted her resignation effective May 6,

1998. As the Public Hearing evidence unfolded, it became clear that Sanchez never did file a PHRC claim.

In order for the participation clause of Section 5(d) to apply, fundamentally, there must be a PHRC proceeding or hearing. Under the circumstances of this case, the only proceeding ever taken against Fibematics was Morales' PHRC complaint. Accordingly, Morales' claim of retaliation must rest in the opposition clause of Section 5(d).

To establish a *prima facie* claim of retaliation under the opposition clause of Section 5(d), Morales must show:

- (1) that the opposed a practice forbidden by the PHRA;
- (2) that Fibematics took adverse employment action against him; and
- (3) that a causal connection exists between the opposition and the adverse action.

Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989), cert. denied, 493 U.S.1023 (1990); Consumers Motor Mart v. Human Relations Comm'n, 108 Pa. Commw. 59, 529 A.2d 571 (Pa. Commw. Ct. 1987); Weston v. Comm. of Pennsylvania, 251 F.3d 420 (3rd Cir. 2001); Farrell v. Planters Lifesavers Company, 206 F.3d 271 (3rd Cir. 2000); Krause v. American Sterilizer Co., 126 F.3d 494 (3rd Cir. 1997).

Morales may establish these *prima facie* elements by either offering direct evidence of retaliation or by using the familiar burden-shifting approach established by the U.S. Supreme Court in McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973). Cases in which there is direct evidence of retaliation are few and far between. See, e.g. Verprinsky v. Flour Daniel, Inc., 87 F.3d 881, 893 (7th Cir. 1996). The overwhelming majority of courts rely on the burden-shifting approach when reviewing retaliation claims.

Here, we find that Morales fails to present evidence which amounts to direct evidence of retaliation. Accordingly, the burden-shifting analysis is applicable here. Under this oft

used scheme, if a Complainant establishes a *prima facie* case of retaliation, the Respondent must articulate a legitimate non-discriminatory reason for its adverse employment action. Once a Respondent meets this burden of production, a Complainant must show that the Respondent's non-discriminatory reasons are merely pretextual.

This is done by proffering what is essentially a second showing of causation, though one with a higher threshold of proof than what was shown to establish the *prima facie* case. See EEOC v. Avery Dennison Corp., 104 F.3d 858 (6th Cir. 1997). This second showing requires evidence that the adverse action would not have occurred except for the fact that the Complainant opposed a practice forbidden by the PHRA. See Dwyer v. Smith, 867 F.2d 184 (4th Cir. 1989).

Returning to Morales' burden to establish a *prima facie* case, we find that Morales failed to meet this first required showing. Indeed, Morales is unable to meet the very first element of the requisite *prima facie* requirement.

The PHRA states that Morales must have opposed a practice forbidden by the PHRA. The evidence in this case reveals two separate instances Morales argues he opposed a practice forbidden by the PHRA. The first instance arose sometime during the courses Morales' employment. In effect, Morales testified that he perceived that Martha Sanchez, an office co-worker, was being treated rudely and coarsely by Melissa Dangler, an administrator, and Karen Murphy, the office manager, because of Sanchez's national origin, Puerto Rico.

Morales testified that he once told both Paul and Ivan Grossman that Sanchez was either being treated poorly or that she was being mistreated. (N.T. 94, 230). While there is a question whether Morales ever spoke with Ivan Grossman about Sanchez, Paul Grossman's testimony does confirm that Morales did tell him that Sanchez was being mistreated. The question about Morales speaking to Ivan Grossman arises because of

Morales' answers to a Request for Admissions. (N.T. 96; R-3,R-4). Morales was asked to admit "you never spoke with Ivan Grossman about Ms. Sanchez' allegations of alleged mistreatment." In response, Morales wrote, "Admitted, however, Complainant observed that Martha Sanchez was being mistreated at work."

This blatant contradiction found in Morales' version aside, we now look to the message Morales conveyed and find that what he said to Paul Grossman about Sanchez does not support a finding that he opposed a practice forbidden by the PHRA. We find that all he said was that Sanchez was being "mistreated." This communication neither explicitly nor implicitly asserts opposition to national origin discrimination or that national origin, discrimination was the reason for the alleged mistreatment.

The case of Barber v. CSX Distribution Services, 69 FEP 81 (3rd Cir. 1995) illustrates this principle of law. In that case, Barber felt he had been denied a promotion and that the position was awarded to a less experienced and less qualified applicant. Barber wrote the following letter to the company's Human Resources Department questioning the promotion decision.

I recently submitted a Job Application Form for the position of Territorial Account Executive (Job Vacancy No. 199) at Pittsburgh, PA.

Mr. Robert W. Edmonds, Jr., Director-Sales, Pittsburgh, has informed me the position has been awarded to Ms. Kathy Ball from Telemarketing at Baltimore. In view of my 21 years of experience in this field (14 years direct sales and 7 years customer service), I am quite puzzled as to why the position was awarded to a less qualified individual.

I would greatly appreciate your response as to why I was not awarded this job.

Subsequently, Barber was called into the HR department where disappointment over Barber's letter was expressed. A short while later, Barber received notification that his

position was being eliminated. Barber subsequently filed a complaint alleging his position had been eliminated in retaliation for having written the letter.

The Court indicated that Barber's letter was "just too vague to support a finding that his job was eliminated because he engaged in [protected conduct]." Barber at 86. The court noted that Barber's letter was clear that Barber felt that he had been treated unfairly when neither explicitly nor implicitly alleges age was the reason for the alleged unfairness. The court declared that "a general complaint of unfair treatment does not translate into a charge of illegal . . . discrimination." Barber at 87.

In the case of Hunt v. Nebraska Public Power District, 88 FEP 452 (8th Cir. 2002), a Complainant merely complained that she felt she was entitled to a pay increase and change in job title, the court in Hunt found that by failing to attribute the asserted failures to sex discrimination, the Complainant failed to present sufficient evidence that she had opposed an unlawful employment practice. Accordingly, the court determined that Hunt did not establish a *prima facie* case of retaliation.

Similarly, in the case of Webb v. R&B Holding Co., 76 FEP 387 (S.D. 76 1998), a Complainant simply voiced opposition to co-workers speaking Spanish in the workplace. Subsequently, the Complainant was terminated. On the Complainant's retaliation allegation, the court observed that in order to constitute opposition to an unlawful discriminatory practice, an employee "must, at the very least, communicate her belief that discrimination is occurring to the employer. It is not enough for the employee merely to complain about a certain policy or certain behavior of co-workers and rely on the employer to infer that discrimination has occurred." Webb at 393, citing Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411, 43 FEP 870 (9th Cir. 1987).

Applying the principles articulated in this line of cases to the present case, the evidence that Morales told Paul Grossman that Sanchez was being "mistreated" falls short

of being a sufficient opposition to a practice forbidden by the PHRA. Accordingly, we turn to the second separate instance where Morales argues he opposed a practice forbidden by the PHRA.

Clearly, on May 6, 1998, Ivan Grossman received a telephone call from a woman purporting to be a lawyer for Sanchez. What occurred after that telephone call is in dispute. Ivan Grossman testified that to his recollection, after the telephone call, he may have generally said he received a call from a lawyer. Ivan Grossman testified with greater certainty that he did not single anyone out to tell them he had received a call from Sanchez's lawyer, (N.T. 275), and that he positively did not speak to Morales about the details of the call. (N.T. 276).

Morales' version of the events after Ivan Grossman received the call differ significantly. Morales testified that Ivan Grossman and Karen Murphy came into the lunch room where Ivan Grossman announced that he "just got a call from Martha Sanchez's lawyer and your name came up. Do you know why your name would come up?" (N.T. 56-57). Morales testified that he responded by saying that he would back up (support) what she said about being harassed. (N.T. 57, 99).

Morales then testified that Ivan Grossman said, "it was in the best interest of the company, according to their lawyer, that [Morales] be sent home for a week with pay, to handle the situation."

Given the glaring discrepancy between these testimonies, a credibility assessment is necessary. On this point, we find Ivan Grossman testified credibly and Morales did not. We already noted one instance of Morales contradicting himself. Additionally, the record shows that Morales was not sent home until May 8, 1998, two days after Ivan Grossman spoke with the individual purporting to be a lawyer for Sanchez. Morales attempts to offer that he was sent home as part of the alleged discussion about the telephone call.

Two other major discrepancies are easily found regarding Morales' credibility. During the cross examination of Morales, he testified that he did not recall telling a customer where Fibematics was buying its products, (N.T. 146), but later admitted that he divulged this proprietary information. (N.T. 166). His later admission was likely influenced when his thoughts were refreshed with his prior deposition testimony that indicated he did recall divulging information he was not supposed to. (N.T. 147).

Lastly, on direct examination, Morales testified that while at dinner with Paul Grossman and another individual on a mid-west business trip, the three of them engaged several women at a nearby table in a conversation about sex. (N.T. 50). On cross examination, Morales admitted that Paul Grossman spoke to him about excusing himself from the table to participate in a sex survey. (N.T. 111). Only Morales engaged the women in conversation.

On the whole, Morales' testimony lacks credibility. Accordingly, we credit Ivan Grossman's testimony regarding the events following his telephone conversation with the person purporting to be Sanchez's lawyer.

Since we credit Ivan Grossman's testimony, we again find that Morales fails to establish that he opposed a practice forbidden by the PHRA. Even if we were to credit Morales' testimony, he still falls short of opposing a practice forbidden by the PHRA. In order to effectively oppose a practice forbidden by the PHRA, at the very least, one must articulate their belief that the action being opposed is discriminatory. Merely to say either that you oppose "mistreatment" or that "you would support" what someone said about being harassed falls short of opposing a practice forbidden by the PHRA. At the very least, one would need to say they oppose mistreatment being done because of that person's protected class or they would support a person's version of harassment based on a protected

category under the PHRA. Here, Morales cannot even establish the first element of the requisite *prima facie* case.

Assuming arguendo that Morales could establish a *prima facie* case, his case still fails. Clearly, Fibematics articulated legitimate non-discriminatory reasons for terminating Morales. The totality of the record reveals overwhelming support that Morales was indeed unprofessional, unethical, disinterested, distracted, immature, and generally unable or unwilling to develop a clear understanding of the business. It is likely that Paul Grossman would have fired Morales on the mid-west trip had he not had to ride 500 to 600 miles back to Philadelphia with Morales. When Paul Grossman went to Europe shortly after returning from the mid-west, his intent was to give Morales yet another chance to display something other than poor judgment and a lack of professionalism. He left Morales with a list of things to accomplish in his absence and wanted to see what Morales would do on his own. Instead of doing the items on the list, Morales was found playing on the computer, moping around and generally not working.

Upon his return from Europe, unaware there had been a call from a person purporting to be Sanchez's lawyer, Paul Grossman terminated Morales. The evidence presented falls far short of establishing that the non-discriminatory reasons offered for Morales termination were a pretext for discrimination. On the contrary, the evidence, considered as a whole, supports a finding that Fibematics was fully justified in terminating Morales.

As a final matter, the Respondent's post-hearing brief submits that the Respondent is entitled to reimbursement of attorneys' fees and costs it incurred in this matter. The Respondent points to section 9(f.2) of the PHRA and submits that this section authorizes an award of attorney fees and costs to a prevailing Respondent if the Respondent proves that a complaint was brought in bad faith.

Fundamentally, it is apparent that the Respondent has read section 9(f.2) incorrectly.

Section 9(f.2) states:

“If, upon all the evidence at the hearing, in those cases alleging a violation of Section 5(d), (e), (h) or 5.3 where the underlying complaint is a violation of Section 5(h) or 5.3, the Commission finds that a respondent has not engaged in or is not engaging in any unlawful discriminatory practice as defined in this act, the Commission may award attorney fees and costs to a prevailing respondent if the respondent proves that the complaint was brought in bad faith.”

The critical portion of this section that is applicable to this matter is the phrase “where the underlying complaint is a violation of Section 5(h) or 5.3...” Here, while the main portion of the Complainant’s complaint alleges retaliation under section 5(d) of the PHRA, clearly, the underlying complaint is neither a violation of Section 5(h) or 5.3. These provisions relate to matters alleging violations under the act’s housing provisions. Here, the underlying complaint alleges a discharge from employment. Because of this, the Respondent’s request for attorney fees and costs is denied.

An order dismissing this matter follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICARDO J. MORALES,
Complainant

v.

TRECO/FIBEMATICS
Respondents


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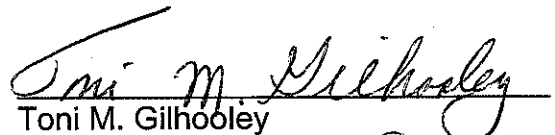
PHRC CASE No. 199727687

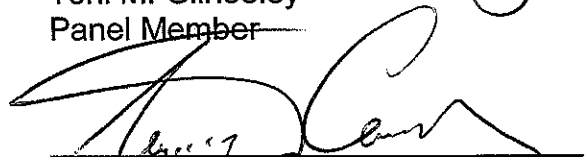
RECOMMENDATION OF THE HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, we the three members of the Hearing Panel find that the Complainant has failed to prove discrimination in violation of Section 5(d) of the Pennsylvania Human Relations Act. It is, therefore, our joint recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. We further recommend issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Raquel Otero de Yienst
Chairperson


Toni M. Gilhoolley
Panel Member


Timothy Cuevas
Panel Member

COMMONWEALTH OF PENNSYLVANIA

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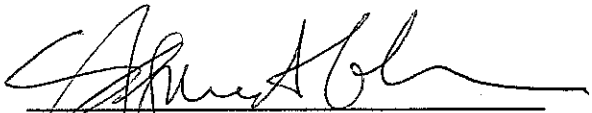
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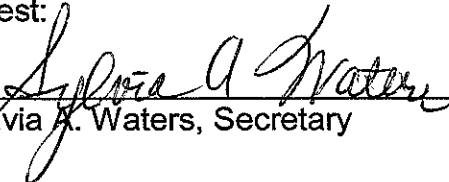
FINAL ORDER

AND NOW, this 27th day of April, 2004, after a review of the entire record in this matter, the full 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 Hearing Panel. Further, the full 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

ORDERS

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

By: 
Stephen A. Glassman, Chairperson

Attest:

Sylvia A. Waters, Secretary