

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DANA GARNER,
Complainant

v.

COMCAST OF WILLOW GROVE, INC.,
Respondent

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PHRC CASE NO. 200500663

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Respondent herein is Comcast of Willow Grove, Inc. (hereinafter "Comcast of Willow Grove") (C.E. 3)
2. Comcast of Willow Grove is only one of numerous service centers operated by Comcast. (N.T. 29, 30, 224)
3. In the early 90's, Comcast had approximately 6,000 employees. (N.T. 226)
4. At about that time, Comcast began to acquire other smaller companies. (N.T. 226-227)
5. By 2005, Comcast employed approximately 70,000 individuals. (C.E. 4)
6. In the late 90's, Comcast's human resources departments were decentralized and it was common for local General Managers to make decisions regarding the level of response to employee misconduct without the human resources department being integrally involved. (N.T. 224-225)
7. In or about 2002-2003, Robin Proctor (hereinafter "Proctor"), an African-American female, became Vice President of Comcast's Human Resources. (N.T. 225, 238, 250)
8. In an attempt to ensure continuity, consistency and fairness, Proctor began to develop greater structure to the Human Resources department and by approximately 2003, Proctor had centralized Comcast's human resource operations. (N.T. 228, 263)
9. By 2005, as Regional Vice President of Comcast's human resources, Proctor supervised approximately 50 professionals. (N.T. 223)
10. Anitha Verghese (hereinafter "Verghese"), ancestry – India, was one of the human resource managers Proctor supervised. (N.T. 198, 199, 223)
11. In 2005, among her duties, Verghese was the HR Manager for Comcast of Willow Grove. (N.T. 198, 199)
12. In 2005, Comcast of Willow Grove employed technicians: 14 Service Technicians; 3 Lead Service Technicians; 6 Line Technicians; and 1 Lead Line Technician. (N.T. 122, 124)

* 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:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

13. In 2005, the Complainant, Dana Garner (hereinafter "Garner"), an African-American, was employed at Comcast of Willow Grove as a Line Technician. (N.T. 29, 31)
14. Garner began employment with Comcast in July 1990, as a Service Technician. (N.T. 29)
15. Service Technicians generally perform repairs inside a subscriber's home and Line Technicians perform repairs mainly outside. (N.T. 29, 31)
16. Initially, Garner was assigned to Comcast's Wayne Avenue location where he worked for approximately seven years. (N.T. 29, 30)
17. For two years after the Wayne Avenue assignment, Garner was assigned to do warehouse work at Comcast's North East Philadelphia office location. (N.T. 30)
18. Subsequent to the warehouse assignment, Garner was assigned the job of Line Technician at Comcast of Willow Grove. (N.T. 30, 31)
19. Garner testified that during his employment with Comcast, he never heard a racially offensive comment directed at him and never witnessed any sort of racial animus towards him. (N.T. 61, 62)
20. To perform their jobs, Comcast technicians are each assigned hand tools, ladders, meters, and trucks. (N.T. 32)
21. Technicians were authorized to drive their assigned trucks home after work each day in which they kept their tools, meters and ladders. (N.T. 34, 35, 107)
22. In 2005, Anthony J. DeFabis, (hereinafter "DeFabis"), white, was Garner's Supervisor. (N.T. 12, 31, 133)
23. Along with tools and a truck, both Service Technicians and Line Technicians were issued two ladders: an 18' extension ladder and a smaller A-frame ladder. (N.T. 32; C.E. 14 at 108)
24. DeFabis testified that he instructed Line Technicians to mark the ladders assigned to them. (C.E. 14 at 117)
25. DeFabis also testified that Batavia Ladder did periodic equipment checks and notated inspection dates on ladders. (C.E. 14 at 106)

26. In 2005, it was Comcast's policy that an employee who lost equipment assigned to him would be responsible to pay for the lost equipment. (C.E. 14 at 80)
27. The cost to replace an A-frame ladder was approximately \$200.00. (C.E. 14 at 80-81)
28. Much of the property at Comcast's Willow Grove location was under video surveillance, 24 hours a day, 7 days a week. (N.T. 129)
29. Everyone was aware of the video system. (N.T. 71, 161)
30. On or about April 12, 2005, Chris Cocola (hereinafter "Cocola"), a Lead Service Technician, removed his A-frame ladder from his truck in order to put an extra extension ladder on his truck to complete a job (N.T. 39, 130-131, 166; C.E. 14 at 72)
31. Cocola had asked his supervisor, William Hannigan (hereinafter "Hannigan"), white, if he could use a second extension ladder. (N.T. 120, 164, 169)
32. After Cocola temporarily stored his A-frame ladder at a location where ladders were not generally stored, Hannigan observed Cocola's A-frame ladder against the wall. (N.T. 136, 154)
33. On April 12, 2005, Garner removed Cocola's ladder by putting it on his truck and taking it to use to hang drywall at one of Garner's rental properties in North East Philadelphia. (N.T. 39, 86, 144; C.E. 14 at 66; R.E. 1)
34. When Cocola discovered his ladder was missing, he mentioned it to Hannigan, and began to ask around whether anyone had seen Cocola's ladder. (N.T. 130, 132)
35. At meetings of the Comcast of Willow Grove Service Technicians, Cocola asked if anyone had seen his ladder. (N.T. 39, 40, 86, 132, 166)
36. Garner testified that he overheard Cocola inquiring about his missing ladder at a Service Technician meeting. (N.T. 39, 79)
37. After approximately three weeks went by without anyone coming forward with any information about Cocola's missing ladder, Hannigan spoke with his supervisor, Kerry Hummel, (hereinafter "Hummel") about the possibility of reviewing the video surveillance tape. (N.T. 134-135)

38. As the video surveillance system retains approximately 30 days of video before the system begins to tape over previous recordings, Hannigan's opportunity to review video taped on or after April 12, 2005 would soon end. (N.T. 134)
39. When Hannigan reviewed the video tape for April 12, 2005, he saw Garner placing an A-frame ladder into the back of his truck. (N.T. 135)
40. The following day, Hannigan showed Hummel the tape prompting Hummel to call Verghese. (N.T. 138)
41. Subsequently, Hannigan shared the video tape with DeFabis who also reviewed the tape. (C.E. 14 at 52, 69)
42. DeFabis then spoke with his supervisor, Regional Director Curt Molko (hereinafter "Molko"), about the ladder and the two discussed Garner being a "good guy" and a "good worker" and wanting to afford Garner an opportunity to come forward about having taken the ladder. (N.T. 165; C.E. 14 at 81, 83, 87)
43. DeFabis socialized with Garner and considered him a friend and counted on Garner's loyalty. (C.E. 14 at 55, 63-64)
44. For instance, DeFabis testified that he became aware that Garner had possibly been running a personal business from Comcast's Willow Grove property but DeFabis did not recommend discipline. (C.E. 14 at 58)
45. Molko and DeFabis decided to have a meeting with all Line Technicians. (C.E. 14 at 83)
46. At the meeting, Molko emphasized three or four times that an A-frame ladder had been taken from the property and asked if anyone knew anything. (C.E. 14 at 82, 87)
47. The Line Technicians were told if someone has the ladder, they should bring it back, otherwise Cocola would have to pay for it with a payroll deduction. (C.E. 14 at 82)
48. DeFabis testified that, at that point, Garner said that Cocola probably took it. (C.E. 14 at 82)
49. At that moment, DeFabis was shocked and hurt and lost respect for Garner. (C.E. 14 at 64, 82)
50. Subsequently, Garner was called in from the field to meet with DeFabis and Verghese. (N.T. 43)

51. Verghese testified that the meeting began with her asking Garner if he was aware a ladder was missing and to tell her if he knows anything about it. (N.T. 204)
52. Garner responded, "Anitha, I don't know anything about a missing ladder." (N.T. 204)
53. At that point, Verghese asked Garner directly if he took a ladder from the property. (N.T. 204, 212)
54. Garner denied taking a ladder from the property and looked Verghese in the face and said he did not have it. (N.T. 204, 211)
55. Verghese then informed Garner that he has been seen on tape removing the ladder. (N.T. 204)
56. Garner then responded, "What ladder? Are you talking about an A-frame ladder? Oh – that ladder. I have that in my garage in North Philadelphia." (N.T. 204, 211, 245, 252)
57. Garner indicated that he has had the ladder 3 to 4 weeks. (N.T. 205, 211, 212)
58. Upset, Verghese then said, "I asked you about this ladder earlier and you didn't say anything." (N.T. 205)
59. Garner then replied, "Well, I'll go get it right now, it's in North Philadelphia in my garage. I'll go get it." (N.T. 205)
60. Verghese then advised Garner, "Do you realize this is considered stealing and it's not good?" (N.T. 205)
61. Garner then asked Verghese, "Anitha, am I going to get terminated for this? Am I going to get terminated for this?" (N.T. 205)
62. Verghese then informed Garner that it is an offense for which he could be terminated, but the decision is not hers. (N.T. 205)
63. Verghese instructed Garner to drive his truck to Comcast's Wayne Avenue facility, DeFabis would follow him and drive him home and Garner was to await a telephone call from Verghese in a few days. (N.T. 46-47, 205; C.E. 14 at 93)
64. DeFabis then followed Garner to the Wayne Avenue facility where Garner parked his truck. (C.E. 14 at 93)

65. At that point, Garner apologized to DeFabis for letting him down and Garner asked DeFabis what he should do. (C.E. 14 at 94)
66. DeFabis told Garner to go home and hope it is only a final warning. (C.E. 14 at 94)
67. Neither at the meeting with DeFabis and Verghese nor in the Wayne Avenue parking lot did Garner say he thought the ladder he took was his. (N.T. 207, 252, C.E. 12, C.E. 14 at 93, 96)
68. Garner's version of what he said during the meeting with DeFabis and Verghese and later in the parking lot with DeFabis is not credible. (N.T. 44, 48)
69. After meeting with DeFabis and Garner, Verghese returned to her office where she reviewed Garner's personnel file. (N.T. 206)
70. Verghese discovered that Garner's file reflected the following incidents:
 - a. In the early 90's Garner had been issued a written warning for taking a truck home without approval. (N.T. 78)
 - b. In July 1996, Garner was disciplined after he became involved in an accident with a Comcast vehicle and it was learned that he had cocaine in his system. (N.T. 77, 200) Garner was sent to a 1½ month program and then returned to a Line Technician position. (N.T. 77)
 - c. In the late 90's Garner failed to report that his New Jersey driver's license had been suspended following a DUI conviction. An internal audit caught the fact that Garner's license had been suspended and he had been driving a Comcast vehicle while under a suspended license. (N.T. 73, 90; C.E. 4) Until his license was restored Garner was reassigned to a non-driving position in Comcast's warehouse. (N.T. 75, 90, 200; C.E. 14 at 55)
 - d. In December 2004, Garner left the scene of an accident where he had damaged another vehicle and failed to report the incident either to the police or to Comcast. (N.T. 64-66, 201) This incident occurred approximately four months before the incident with Cocola's ladder. (N.T. 236) Garner was issued a discipline notice warning him that further incidents may result in his termination. (N.T. 67; R.E. 6)

71. Following Verghese's review of Garner's file, Verghese reported her findings to Proctor saying, "I don't see how you cannot terminate him. He's already got all these things in his file." (N.T. 206)
72. Believing that Garner had lied to her face, Verghese recommended Garner's termination. (N.T. 199, 207, 245-46)
73. Proctor arranged for a conference call to discuss the situation. (N.T. 246)
74. Participating in the conference call were Proctor, Molko, Verghese and Debra Thacker, Area Vice President, white. (N.T. 246; C.E. 5, 12)
75. At first Proctor wavered as she had known Garner since 1991 and had helped him obtain his position at Willow Grove after his time in the warehouse. However, once Verghese outlined Garner's history of incidents, Proctor concluded, "This is a termination." (N.T. 233, 248, 264)
76. On Friday, May 13, 2005, Verghese called Garner at home informing him that the decision had been made to terminate him. (N.T. 48)
77. When Garner asked why, Verghese said he had been given a chance to come clean but because he did not, this showed a lack of integrity and trustworthiness. (N.T. 49)
78. Approximately three or four days later, Garner received a termination letter written by Verghese advising Garner that he was terminated "for unauthorized possession of property that belongs to Comcast . . ." (N.T. 50; R.E. 5)
79. Garner presented evidence that others used Comcast tools for personal use but were not disciplined:
 - a. Dave Dougherty, white – used a Comcast ladder to trim trees at his home. (N.T. 38, 110-11)
 - b. Hannigan testified that he used a screwdriver and used a ladder to clean his home's gutters. (N.T. 127)
80. Garner presented evidence of several others who had been disciplined:
 - a. Joseph Cannon, white – His mother had falsified work orders to reduce his repeat rate. On 9/24/03, he was issued a final warning and a three day suspension. (C.E. 11)
 - b. Vincent Acey, African-American – terminated for using a Comcast gas card to buy gas for his personal vehicle. (C.E. 8, 13, 14 at 26)

- c. Abdul Kaloko, African-American – terminated on March 26, 2004 for installation of unauthorized service. (C.E. 8, 13)
 - d. Miguel Roman, Hispanic – terminated on August 19, 2002 for fighting and possession of a firearm on Company property. (C.E. 8, 13)
 - e. Kevin Waddington, white – in 1999, issued a final written warning and demoted for directing a subordinate not to terminate unauthorized services to his mother. (N.T. 216, 276-77; C.E. 10)
81. As part of her job as Vice President of HR, Proctor was responsible for recruiting and taking measures attempting to achieve affirmative action goals. (N.T. 223)
82. Between 2003 and 2005, Proctor increased Comcast’s hiring activities as there was a need for more technicians. (N.T. 240)
83. Proctor took measures to ensure the candidate pool included a meaningful ratio of minorities. (N.T. 240)
84. Proctor testified that by 2005, Comcast increased the number of African-American employees in Philadelphia and Willow Grove by approximately 4%. (N.T. 241)
85. Garner presented generalized statistical data showing that in the period 2003 through 2005, Comcast had terminated 79 individuals:
- 39 White
 - 30 African-Americans
 - 10 Hispanics (C.E. 9, 12)
86. In May 2005, the racial distribution of 227 employees in Philadelphia and Willow Grove was:
- 100 African-Americans 44%
 - 80 White 35.2%
 - 41 Hispanics 18.1%
 - 6 Asian 2.6% (C.E. 13)
87. Proctor testified that during the period 2003 through 2005, under Comcast’s “Comtech” program, new hires were required to meet certain performance criteria or be terminated. (N.T. 241)
88. A new Technician was hired as a ComTech 1 and had to progress to ComTech 2 within a certain time frame. (N.T. 242)

89. New employees were evaluated on their training, field experience and test scores. (N.T. 242)
90. ComTech 2's were then responsible to progress to ComTech 3 within a certain time frame and failure to do so resulted in termination. (N.T. 242)
91. Proctor testified that, during the two year period, one opening might be filled a number of times for a variety of reasons. (N.T. 243, 244)
92. In the period between 2003 through 2005, 79 employees were terminated for the following reasons:

Reason	White	African-American	Hispanic
Violation of Rules	21	16	4
Policy Violations	3	3	1
Failure to Return from Leave	2		4
Unsatisfactory Performance	5	5	1
Job Abandonment	3	1	
Involuntary Termination	4	4	
Attendance/Tardiness	1	1	
Total	39	30	10

(C.E. 9,12)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over Garner, Comcast of Willow Grove and the subject matter of Garner's complaint under the Pennsylvania Human Relations Act ("PHRA").
2. The parties have fully complied with the procedural prerequisites to a Public Hearing in this matter.
3. Garner is an individual within the meaning of Section 5(a) of the PHRA.
4. Comcast of Willow Grove is an employer within the meaning of the PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discriminating against individuals because of their race.
7. Garner has the burden to establish a *prima facie* case by a preponderance of evidence by showing:
 - a. That he is a member of a protected group;
 - b. That he was qualified for the position he held;
 - c. That he was terminated; and
 - d. Similarly situated persons who are not members of the protected class were treated more favorably, or that his termination was under circumstances that give rise to an inference of discrimination.
8. Garner failed to establish a *prima facie* case of race discrimination, because he failed to establish either that others not in his protected class were treated more favorably or that he was discharged under circumstances that gave rise to an inference of discrimination.

OPINION

This case arises on a complaint filed by Dana Garner (hereinafter "Garner"), against Comcast of Willow Grove, Inc (hereinafter "Comcast of Willow Grove") on or about August 11, 2005, at PHRC Case No. 200500663. In his complaint, Garner alleged that Comcast of Willow Grove terminated him from his position of Line Technician because of his race, African-American. Garner's claim alleges that Comcast of Willow Grove violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et. seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit Garner's allegation of unlawful discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. However, these efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on July 28, 2009 before Permanent Hearing Examiner Carl H. Summerson. Garner was represented by Yuval Rubenstein, Esquire. PHRC staff attorney, Ryan A. Hancock, represented the state's interest in the complaint. Frank A. Chernak, Esquire appeared on behalf of Comcast of Willow Grove. At the conclusion of the Complainant's case, Attorney Chernak moved to dismiss Garner's complaint for failure to make out a *prima facie* case. A ruling on this motion was reserved until C.E. 14 could be reviewed.

Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. The post-hearing brief on behalf of Garner was received on September 14, 2009 and the post-hearing brief on behalf of Comcast of Willow Grove was received on September 16, 2009. Subsequently, by letter dated September 15, 2009, Garner supplemented his post-hearing brief by citing a case he considered relevant. By letter dated September 16, 2009, Comcast of Willow Grove responded to Garner's September 15, 2009 letter, to which Garner replied by letter dated September 29, 2009.

Section 5(a) of the PHRA provides in relevant part:

It shall be an unlawful discriminatory practice . . . for any employer because of the race . . . of any individual . . . to discharge from employment such individual . . . if the individual . . . is the best able and most competent to perform the services required

When a Complainant alleges disparate treatment, liability depends on whether race actually motivated the termination decision. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141, (2000) *citing* Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993). Generally, Complainants have an opportunity to demonstrate intentional race-based discrimination in two ways: (1) by presenting direct evidence of discrimination under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); or (2) by presenting indirect evidence of discrimination that satisfies the oft-cited familiar three-step analytical framework of McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

Here, since no direct evidence was presented, we turn to a disparate treatment analysis under the McDonnell Douglas proof formula which requires an initial *prima facie* showing by a Complainant and if a *prima facie* case can be

established, a burden of production shifts to a Respondent to articulate a legitimate non-discriminatory reason for its actions. Finally a burden of persuasion shifts back to a Complainant to prove by a preponderance of evidence that the reasons offered by a Respondent for its actions are a pretext and that actual discriminatory reasons motivated the Respondent. Throughout this formula, at all times, Garner retains the ultimate burden of persuasion that his termination was motivated by race discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 62 FEP Case 96 (1993).

In effect, both Garner's post-hearing brief and Comcast of Willow Grove's post-hearing brief submit there are four elements to a requisite *prima facie* showing. First, Garner must establish that he is in a protected class. Second, Garner must show that he was qualified for the position. Third, Garner must establish that he suffered an adverse employment decision. Finally, that Garner must establish that he was discharged under circumstances that give rise to an inference of discrimination. Spanish Council of York v. PHRC, 879 A2d 391 (Pa. Commonwealth Ct. 2005). Both Comcast of Willow Grove's post-hearing brief and Garner's post-hearing brief submit that the fourth element requires Garner to show that he was treated less favorably than "similarly situated" persons outside his protected class. See Abramson v. Williams Paterson College of New Jersey, 260 F.3d 265, 281-82 (3rd Cir. 2001); and Goosby v. Johnson & Johnson Med., Inc., 228 F.3d 313, 318 (3rd Cir. 2000).

In McDonnell Douglas, the U.S. Supreme Court observed that the elements of a *prima facie* showing will necessarily vary. 411 U.S. at 802.

Indeed, the fourth element of the requisite *prima facie* showing in termination cases is frequently listed as the element suggested by the post-hearing briefs of the parties.

We are mindful that a major purpose of requiring a *prima facie* showing is to eliminate the most obvious lawful reasons for an adverse action. In Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978), the U.S. Supreme Court explained that the *prima facie* showing was never intended to be rigid, mechanized, or ritualistic.

In effect, Comcast of Willow Grove's post-hearing brief concedes that Garner can establish the first three elements of the requisite *prima facie* showing. Comcast of Willow Grove focused its initial argument on the contention that Garner failed to prove there are individuals similarly situated to Garner who are not in his protected class who received more favorable treatment. Conversely, Garner's post-hearing brief generally submits there were individuals not in Garner's protected class who were treated significantly different with respect to discipline. Additionally, Garner's post-hearing brief argues that Garner has established the requisite *prima facie* inference of intentional discrimination through a statistical showing.

Regarding Garner's statistical evidence, Garner generally submits there are two separate statistical disparities that serve to establish the requisite inference of discrimination. First, Garner suggests that 11 technicians were terminated in Philadelphia and Willow Grove for theft and/or dishonesty offenses between May 2003 and May 2005. Garner contends that the evidence shows

that of these 11 terminations, one technician is white, seven are African-American and three are Hispanic.

Garner points to C.E. 13 at p. 2 as the purported evidence of the 11 “terminations.” C.E. 13 at p. 2 lists 10 individuals: Vincent Acey, African-American; Michael Austin, African-American; Aaron Brown, African-American; Jose Gerena, Hispanic; Abdul Kaloko, African-American; Marcus Logan, African-American; Rafiz Mappn, African-American; Roy Miller, White; Louis Ragusa, Hispanic; and Miguel Roman, Hispanic. However, the 10 individuals listed in C.E. 13 at p. 2 are individuals who are noted as having been “disciplined” for unauthorized possession of Comcast equipment, a theft related offense, or offenses of dishonesty not for having been “terminated.” Indeed in C.E. 13 at p. 2, the paragraph immediately following the listing of 10 named individuals outlines the specific circumstances of the “discipline” of one of the listed individuals, Marcus Logan, an African-American. Clearly, Logan was not terminated, but was merely issued a written warning.

C.E. 13 at p. 2 does not support Garner’s argument that African-Americans were seven of eleven employees “terminated.” As noted, we know that Logan was not terminated. We also know from C.E. 8 that Acey, Kaloko, and Roman were terminated. Of course, Garner was terminated. Of the remaining six individuals listed in C.E. 13 at p. 2, the level of “discipline” they received is unknown. Frankly, had the remaining six individuals been terminated we would expect that Garner would have furnished evidence of such terminations as he did with Acey, Kaloko and Roman. C.E. 13 at p. 2 simply states that an

individualized assessment of all circumstances is made when determining the appropriate level of discipline. What that level was for six of the 11 technicians remains unclear.

Garner's second effort at presenting a statistical disparity involves a purported disparity in the number of African-American technicians terminated between May 2003 and May 2005. Garner submits that although African-Americans were 28% of the technicians in the Philadelphia area as of May 2005, 40% of the technicians terminated between May 2003 and May 2005 were African-Americans.

In this regard, Garner offers statistical data drawn from C.E. 12 which outlines the May 2005 racial distribution in the "Philadelphia and Suburban System." Garner submits that of 693 employees, 195, or 28%, were African-American. However, in C.E. 13, the racial distribution in "Philadelphia and Willow Grove" is much different. In C.E. 13, of the 227 employees in "Philadelphia and Willow Grove," 100, or 44%, were African-American in May 2005. If 40% of those terminated are from a group that composes 44% of the employees, there would be no showing of disparity in terminations.

Upon a review of the record presented, it is clear that the statistics offered by Garner are general and incomplete. It is unmistakable that statistics can serve an important role where there is a dispute regarding whether discrimination motivated an action. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 329 14 FEP Cases 1514 (1977); and Diaz v. AT&T, 36 FEP Cases 1742,

1747 (9th Cir. 1985). However, the ultimate usefulness of statistics depends on all the surrounding facts and circumstances. *Id.* at 340.

We also generally note that the importance of statistical evidence varies greatly depending on the type of case and the stage of proof involved. In an individual disparate treatment case, like this one, the role of statistics is necessarily a limited one. This is true because the ultimate issue in a disparate treatment case is whether a particular Complainant was the victim of an illegally discriminatory decision. See Ward v. Westland Plastics, Inc., 23 FEP Cases 128, 130 (9th Cir. 1980).

In the present case, Garner appears to rely heavily on purported statistical imbalances as the primary support for establishing the requisite *prima facie* case. In Bell v. EPA, 232 F.3d 546, 84 FEP Cases 630 (7th Cir. 2000), statistical evidence that showed a general pattern of systematic discrimination was allowed to be considered in conjunction with other evidence for the purpose of establishing pretext. Generally, at the pretext stage is where statistics are most often used. However, at this point, we are still in the *prima facie* stage.

In the initial *prima facie* stage, most courts require a Complainant to provide more than a statistical analysis to raise the requisite inference of discriminatory intent. See Martin v. Citibank, N.A., 762 F.2d 212, 37 FEP Cases 1580 (2nd Cir. 1985); and Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 35 FEP Cases 791 (11th Cir. 1984). However, some courts have permitted statistics alone to establish a *prima facie* case in an individual disparate treatment case. See Davis v. Califano, 198 U.S. App. D.C. 224, 613 F.2d 957

(D.C. Cir. 1979); Williams et al v. Wells Fargo Financial Acceptance, 564 F.Supp.2d 441, 104 FEP Cases 714 (E.D. Pa. 2008); O'Brien v. Sky Chefs, Inc., 670 F.2d 864, 866, 28 FEP Cases 1690 (9th Cir. 1982); and Murphy v. Price Waterhouse Coopers, LLP, 357 F.Supp.2d 230 (D.D.C. 2005).

In this case, Garner suggests that the statistics he offers are supported by evidence of more favorable treatment of similarly situated non-African-Americans. Later we will discuss whether Garner can point to anyone who is similarly situated to him. If he cannot, Garner is left with only the statistical evidence he offered.

Of course, statistics offered by Respondents also have potential relevance with respect to attempts to rebut whether a *prima facie* case has been established. For instance, a showing of a balanced workforce or a history of affirmative action measures may be helpful to a Respondent. However, similar to the weight of a Complainant's statistics, in an individual disparate treatment case, the ultimate question remains was the motivation for a particular decision discriminatory?

In the present case, Garner's statistics are raw numerical comparisons offered without a meaningful attempt to explain the background to the numbers presented. Furthermore, as noted above, the numbers offered regarding 11 purported terminations are supported by evidence associated with only three other terminations besides Garner's. One of the 11 was clearly not terminated, but simply disciplined. Of the six others, we have been provided with no basis to assess whether these six were "terminated" or merely "disciplined."

With respect to the 79 who were terminated between May 2003 and May 2005, all we really know is that of the 79, 30 which equals approximately 40%, were African-American. We were not presented with the personnel files of those who were terminated which would have afforded the opportunity to make a comprehensive review of the disciplinary records of those terminated. Instead, all we know is the cold numbers.

Indeed, several other factors severely undermine the probative value of the numerical showing. First, C.E. 13 reveals that in May 2005, 44% of the employees in "Philadelphia and Willow Grove" were African-American. For unexplained reasons, Garner chose to use the racial distribution from "Philadelphia and Suburban System" to extract the figure of 28% African-American employees. It would appear that the relevant statistic is found in C.E. 13, as this statistic covers where Garner worked, Willow Grove. Nothing found in the record explains precisely what area is covered in C.E. 12 with the phrase "Suburban System." This failure to present clear and complete data severely lessens the probative value of the statistical showing.

Next, credible testimony offered by Proctor reveals that Comcast had taken significant affirmative action recruitment measures to afford minorities opportunities for employment. Not only did Proctor ensure that applicant pools for technician openings included a meaningful number of minorities, Proctor testified that, in fact, the number of African-American employees increased by 4% by 2005. Further, Proctor offered that during the period 2003 through 2005, the same job may have been filled more than once. In effect, Proctor offered that

independent measurable variables contributed to the 79 terminations and these variables would, if fully analyzed, better explain why 30 of 79 terminated in the two year period between May 2003 and May 2005 were African-Americans.

Given the factual context of the statistical evidence presented by both Garner and Comcast of Willow Grove, Garner failed to show by the requisite preponderance of evidence that the statistics offered establish the requisite inference of discrimination. Indeed, as presented, and given the full circumstances of this case, the limited statistics introduced offer little help regarding Garner's individual disparate treatment claim.

Since his attempt to establish a *prima facie* case with statistics failed, Garner must show Comcast of Willow Grove treated him differently than other similarly situated employees who violated work rules of comparable seriousness, see Kendrick v. Penske Transportation Services, 80 FEP Cases 1381, 1386 (D.C. Kan. 1999); Ricks v. Riswood Int'l Corp., 38 F.3d 1016, 1019, 66 FEP Cases 257 (8th Cir. 1994); and McAlester v. United Airlines, Inc., 851 F.2d 1249, 1261, 47 FEP Cases 512 (10th Cir. 1988), and are similarly situated in all respects, see Michelson v. Waitt Broad, Inc., 187 F.Supp. 1059, 90 FEP Cases 1775 (N.D. Iowa 2002), *aff'd* 55 Fed App'x. 401 (8th Cir. 2003); Graham v. Long Island R.R., 84 FEP Cases 276, 280 (2nd Cir. 2000) and Holifield v. Reno, 115 F.3d 1555, 1562, 74 FEP Cases 511 (11th Cir. 1997), without any mitigating or distinguishing circumstances that distinguish treatment. Clark v. Runyon, 84 FEP Cases 133, 135 (8th Cir. 2000); Lynn v. Deaconess Medical Center, West Campus, 160 F.3d 484, 487-88, 78 FEP Cases 595 (8th Cir. 1998); Das v. Ohio

State University, 84 FEP Cases 691, 694 (S.D. Ohio 2000); and Humpries v. CBOCS West, Inc., 474 F.3d 387, 404-05, 99 FEP Cases 872 (7th Cir. 2007).

First, Garner's post-hearing brief submits that employees routinely took tools home, used them for personal tasks, and were not disciplined. On this general point, the record is quite clear that in 2005 all technicians took their trucks home after work every day. (N.T. 35, 36, 107, 126). Further, technicians did not need authorization to take their tools home. (N.T. 36)

Garner specifically references two white employees who used Comcast equipment at their homes. Hannigan testified that he may have periodically used a screwdriver and used a ladder to access his roof. (N.T. 127) Also, Dave Dougherty was known to have used a ladder to trim his trees. (N.T. 111) Clearly, it was common knowledge that Comcast employees used Comcast tools at their homes. However, as Hannigan noted when asked if employees were allowed to use equipment for personal use, "I don't think anyone would ever really have a problem with it." N.T. 163)

Using a Comcast tool to complete a small task at home is fundamentally different from Garner's removing someone else's ladder, taking it to another location and leaving it there for several weeks, all the while the person assigned to the ladder was looking for it. Then, when directly asked about it, Garner suggested the one looking for the ladder probably took it himself. In suggesting this, Garner was aware that lost equipment had to be paid for by the employee to whom such equipment was assigned. Further, Garner only admitted taking the

ladder after it became clear to him that his supervisor and an HR manager knew he had taken the ladder.

If the ladder incident was all Garner had been involved with, those who used Comcast tools for projects at their homes are simply not similarly situated to Garner. The circumstances are not even roughly equivalent.

Next, Garner points to several white employees who engaged in offenses amounting to theft or dishonesty. Garner cites the case of Kevin Waddington who had directed a subordinate to not terminate unauthorized services being supplied to his mother, then falsified a work order. (N.T. 277; C.E. 10)

For his infraction, Waddington was issued a final written warning informing him that another incident may result in his termination. (N.T. 216; C.E. 10) Additionally, Waddington was demoted from supervisor to a technician position. (N.T. 276) Finally, since this instance occurred in 1999, a time when Comcast's HR functions were decentralized, the General Manager and Director of Technicians had decided the level of discipline given to Waddington.

Two significant differences between Garner and Waddington result in Waddington not being similarly situated to Garner. First, the incidents occurred at different times when Comcast's HR policies were very different. See Zimmerman v. U.S. Bank, N.A., 483 F.3d 1106, 1120-21 (10th Cir. 2007). The conducts of Waddington and Garner occurred approximately six years apart. In Iuorno v. DuPont Pharms. Co., 129 F.Appx. 637, 641n 6 (2nd Cir. 2005), the court found conduct that was four years apart was too distant in time. Also, the decision makers were different Wyvill v. United Cos. Life Ins. Co., 212 F. 3d 296,

305 (5th Cir. 2000). Second, and far more significant, Waddington had committed one infraction while Garner's record reveals multiple serious infractions. Indeed, multiple infractions by itself is sufficient to establish that an employee is not similarly situated. See Silvera v. Orange County School Bd., 244 F.3d 1253 (11th Cir. 2001). Here, clearly, the degree and frequency of infractions of Garner differed significantly from Waddington's single violation. See Rodgers v. U.S. Bank, N.A., 417 F.3d 845, 851 (8th Cir. 2005); Leong v Potter, 347 F.3d 1117, 1124 (9th Cir. 2003); and Maull v. Div. of State Police, 39 F.App'x. 769, 773 (3rd Cir. 2002)

Next, Garner cites Joe Cannon, who, in 2003, was issued a three-day suspension and a final warning when he had his mother recode and falsify work orders to reduce his repeat rate. (C.E. 11) Cannon had also failed to follow procedures for turning in customer payments. (C.E. 11)

Once again, Garner's primary problem is that, with Cannon, he is once again attempting to compare himself with an employee who had committed only a single violation while his discipline record was extensive.

In this case, we certainly recognize the general premise that the PHRC, as fact finder, does not sit as a super personnel department. Brewer v. Quaker State Oil Refining Corp., 72 F.3d 326, 332 (3rd Cir. 1995); and Russell T.G. Missouri Corp., 340 F.3d 735, 746 (8th Cir. 2003) With this in mind, we note that Garner's record clearly portrays an employee who had an accident with a Comcast vehicle while under the influence of cocaine, drove a Comcast vehicle despite having had his license suspended for a DUI, and was involved in a

second accident with a Comcast vehicle where he failed to report the incident to either the police or to Comcast. As Proctor indicated after reviewing Garner's history and the circumstances surrounding Cocola's ladder, "I would not be doing my job if I did not say 'This is termination' because how do I terminate someone else." Frankly Garner could have been terminated on three separate occasions but was not.

Comcast of Willow Grove's Motion for Compulsory Non Suit should be granted and Garner's race-based case dismissed for failure to establish a *prima facie* case.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DANA GARNER,
Complainant

v.

COMCAST OF WILLOW GROVE, INC.,
Respondent

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PHRC CASE NO. 200500663

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, I find that the Complainant has failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is therefore, my Recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, I recommend issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

December 17, 2009
Date



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DANA GARNER,
Complainant

v.

COMCAST OF WILLOW GROVE, INC.,
Respondent

PHRC CASE NO. 200500663

FINAL ORDER

AND NOW, this 26th day of January, 2010, 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 Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the full Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings 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 is hereby dismissed.

By:



Stephen A. Glassman, Chairperson

Attest:



Dr. Daniel D. Yun, Secretary