

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIA THOMPSON-WHITE,
Complainant

v.

LYCOMING HOUSE, a subsidiary of
FIRETREE, LTD,
Respondent

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PHRC CASE NO. 200604839
EEOC CHARGE NO. 17F200761419

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant herein is Maria Thompson-White, an African American female (hereinafter "Complainant"). (N.T. II, 129)
2. The Respondent herein is Lycoming House, a subsidiary of Firetree Ltd (hereinafter "Firetree").
3. Firetree is a nonprofit 501(c)(3) charitable company that provides rehabilitation services for persons who had a brush with the criminal justice system. (N.T. II, 4)
4. Firetree's clients are people who are at the end of their prison terms. Firetree trains them, and assists them to find jobs. (N.T. II, 4-5)
5. Firetree began providing drug and alcohol rehabilitation services after learning that 80 percent of people in the criminal justice system had some sort of substance abuse problem. (N.T. II, 6)
6. On or about March 8, 1999, Firetree hired the Complainant as an Administrative Assistant. (N.T. I, 18)
7. The Complainant initially reported to facility Executive Director Le Sabre Scott for service, and then began reporting to the new facility Executive Director Linda Solano in 2001. (N.T. I, 19-20)
8. Complainant was then temporarily promoted to Acting Director of Lycoming House on July 23, 2000 for approximately four or five months. (C.E. 7; N.T. I, 19)
9. The Complainant was promoted to the position of Executive Director of Lycoming House in September 2005. (N.T. I, 21)
10. Allen Ertel is the current president of Firetree which he founded in 1992. (N.T. I, 77)
11. At all times relevant to this complaint, Mr. Ertel was chairman of Firetree's Executive Committee and William Brown was the President. (N.T. I, 151; NT II, 54)
12. The President reported to the Executive Committee which gave Mr. Ertel all of the Authority to run Firetree. (N.T. II, 55)

* 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 through these Findings of Fact for reference purposes:

N.T. I Notes of Testimony for June 29, 2009 Hearing
N.T. II Notes of Testimony for July 21, 2009 Hearing
C.E. Complainant's Exhibit

13. Mr. Ertel made the decision to hire Complainant, raised her salary and promoted her to the position of Executive Director. (N.T. II, 53,55)

14. On one occasion, Mr. Ertel approved a 6% pay raise for Complainant which was the largest percentage increase given to any Firetree employee at that time. (N.T. II, 55)

15. In September of 2006, Mr. Ertel made the decision to discharge the Complainant with the concurrence of Mr. Brown. (N.T. II, 55; C.E. 7)

16. In 2006, the Pennsylvania Department of Corrections (hereinafter "DOC"), the agency that Firetree contracted with to provide drug and alcohol rehabilitation services, began demanding that Firetree reduce its prices. (N.T. II, 15, 22)

17. As a result of the demands of DOC, Firetree began looking for alternative uses for the property. (N.T. II, 23)

18. At one point, it appears that Firetree would have to either close the facility and layoff the staff or try to get someone to take over the facility and staff. (N.T. II, 26)

19. Mr. Ertel, in trying to find an alternative use of the facility, began negotiations with Vision Quest and its President, Peter Ranalli. (N.T. II, 29)

20. On August 9, 2006, Mr. Brown sent an email to all employees stating that "Vision Quest will be moving into Lycoming House and utilizing the facility. All staff from Lycoming has been offered the opportunity to transfer to another Firetree facility or they can remain at their current facility and be employed by Vision Quest." (N.T. I, 152, C.E. 4)

21. On August 10, 2006, Complainant received a phone call from Mr. Ertel and Mr. Brown instructing the Complainant to not let any employees go, that Vision Quest had backed out of the deal. (N.T. I, 44)

22. On September 11, 2006, Firetree held a quarterly directors' meeting at its Williamsport headquarters. (N.T. I, 33)

23. The purpose of the meeting, which was titled "Missions, Values, and Goals," was to develop both a mission statement and the values needed to carry out that mission statement. (N.T. II, 183)

24. The meeting was presided over by an outside trainer, Kim Oliver. (N.T. II, 183-184)

25. Before the meeting, an agenda was handed to all participants. (N.T. I, 80-81; N.T. II, 45, 177)

26. The agenda had a statement on the bottom reminding the participants that everyone should be pleasant and not pick fights with each other. (N.T. I, 80-81; N.T. II, 177)

27. Toward the end of the meeting, Ms. Oliver opened up the floor for comments to Mr. Ertel and Mr. Brown. (N.T. II, 184)

28. At this point, only two employees made comments: Linda Solano, a Caucasian female and the Complainant, an African American female. (N.T. I, 47, 50)

29. Ms. Solano was the first to speak and she commented that the organization should recognize employees for good work and get away from the tendency to focus on things that are not working. (N.T. I, 122, 127, 129-130)

30. Ms. Solano's comments focused on better communication between the corporate office and employees (N.T. I, 127)

31. The Complainant spoke next and her comments were specifically related to Lycoming House and specifically directed at Mr. Ertel and Mr. Brown. (N.T. I, 122; N.T. II, 188)

32. The Complainant demanded that Mr. Ertel and Mr. Brown apologize to the employees for the manner in which they attempted to effectuate the transfer to Vision Quest. (N.T. I, 160)

33. The Complainant's comments clearly were personalized toward Mr. Ertel and Mr. Brown. (N.T. I, 160)

34. Larry Early, Executive Director at Firetree's Capital Pavilion facility in Harrisburg, testified that the nature of the Complainant's comments were clearly different than Ms. Solano's comments. (N.T. I, 150)

35. Mr. Ertel testified that the Complainant said that he and Mr. Brown had done a terrible job with Firetree and should apologize for the Vision Quest matter. (N.T. II, 48-49)

36. Harold Imber, Director of Special Projects, credibly testified that the Complainant's attitude was angry and defiant. (N.T. II, 167)

37. Scott Snyder, Director of Administration for Firetree, credibly testified that the Complainant's comments were an aggressive attack directed specifically at Mr. Ertel. (N.T. II, 187)

38. Mr. Ertel credibly testified that the Complainant, at the meeting, kept saying "we did not run the organization right and that she would run it differently." (N.T. I, 99)

39. As a result of the Complainant's personal attacks on Mr. Brown and Mr. Ertel, Mr. Ertel made the decision to terminate the Complainant. (N.T. I, 78-79; N.T. II, 51-52)

40. On September 15, 2006, Corby Myers, Firetree's Chief Operating Officer and Larry Early traveled to the Complainant's office to tell her she was being terminated. (N.T. I, 55)

41. At the time of her termination, the Complainant did not complain to Mr. Myers or Mr. Early that she felt the decision had been made because of her race. (N.T. II, 120)

42. The Complainant in fact, did not complain to anybody at Firetree's corporate offices that she was terminated because of her race. (N.T. II, 117-118)

43. Firetree's handbook has a termination appeal policy which provides that an individual should send a written request to the Director of Human Resources within seven days of receiving their termination notice. (N.T. II, 181-182; R-2)

44. The Complainant was aware of the termination appeal policy and did not pursue an appeal. (N.T. II, 63, 122)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the complaint under the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The parties and Commission have complied with the procedural prerequisite to a public hearing in this matter.
3. The Complainant is an individual within the meaning of the PHRA.
4. The Respondent is an employer within the meaning of the PHRA.
5. The complaint herein satisfies the Section 9 filing requirements found in the PHRA.
6. In order to establish a *prima facie* case with regard to an allegation of race discrimination, the Complainant must show:
 - 1) she is a member of a protected class;
 - 2) she is qualified for the position;
 - 3) she was subjected to an adverse employment action; and
 - 4) others not in the Complainant's protected class who were similarly situated were treated more favorably.
7. The Complainant has failed to establish a *prima facie* case.

OPINION

This case arises on a complaint filed by Maria Thompson-White (hereinafter "Complainant") against the Lycoming House, a subsidiary of Firetree, LTD (hereinafter "Firetree") on or about April 17, 2007, at PHRC Case No. 200604839. The Complainant alleged that she was discriminatorily terminated from her position with Firetree on the basis of her race, African American. Complainant further alleged that her termination was in violation of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, *as amended*, 42 P.S. Section 955(a) (hereinafter "the PHRA").

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated the Complainant's allegation and, at the conclusion of the investigation, found that probable cause existed to credit the Complainant's allegation. 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 June 29, 2009 and July 21, 2009 in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Phillip A. Ayers. The case on behalf of the complaint was presented by PHRC Assistant Chief Counsel Ryan Hancock; John Dominy, Esquire, appeared on behalf of the Complainant; and Daniel F. Schranghamer, Esquire, represented Firetree in this matter. Following the public hearing, the parties were given the opportunity to submit post-hearing briefs. Firetree filed its brief on September 29, 2009 and the Complainant filed its brief on September 25, 2009.

In a case involving disparate treatment allegations, we often 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 a Complainant meets her initial burden, a Respondent must articulate a legitimate, nondiscriminatory reason for its action. Once a Respondent articulates a legitimate, nondiscriminatory reason, a Complainant must prove that the stated reason was merely a pretext for racial discrimination. Clearly, the ultimate burden is on the Complainant to persuade by a preponderance of the evidence.

The initial question is whether the Complainant has established the requisite *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 FEB 1018 (6th Cir. 1987).

In the instant matter before the Commission, the Complainant alleges that she was discriminated against on the basis of her race, African American. Specifically the Complainant contends that she was discharged for making certain statements when a white employee made similar statements and was not discharged. Using the McDonnell Douglas model analysis, the Complainant, in order to make a *prima facie* showing, must establish,

- 1) she is a member of a protected class;
- 2) she was qualified for the position;
- 3) she was subjected to an adverse employment action; and
- 4) others not in the Complainant’s protected class who were similarly situated were treated more favorably.

The Complainant clearly satisfies the first three elements of the *prima facie* showing. The Complainant is African American and the evidence before the Commission clearly indicates she was qualified for the position she held with Firetree. Further, the Complainant was subjected to an adverse employment action when Firetree terminated her.

We now move to the fourth element of the *prima facie* showing. The essence of any case involving an alleged inference of discrimination involves the particular Complainant showing that she was treated differently than other similarly situated employees. In this case, the Complainant alleges she was discriminated against because she made similar comments as Linda Solano, a white employee, but Ms. Solano was not discharged.

The evidence presented at the public hearing clearly establishes that the Complainant’s statements were not similar to those of Ms. Solano. The record reflects that six witnesses testified that the Complainant’s statements were different than Ms. Solano. Ms. Solano testified that her statements were that the organization should recognize employees for good work and not focus on things that aren’t working. Mr. Brown testified that the Complainant’s statements were directed at Mr. Ertel and himself personally about the way they handled Vision Quest’s potential takeover. Mr. Snyder testified that the Complainant’s statements were aggressive attacks directed specifically at Mr. Ertel, while Ms Solano’s statements focused on better communication between the corporate office and employees. Mr. Ertel testified that the Complainant’s statements were a personal attack. The Complainant said that Mr. Ertel and Mr. Brown did a terrible job with Lycoming House and owed the employees an apology for the Vision Quest matter. (N.T. II, 48, 49) Ms. Solano, Mr. Early, Mr. Brown, Mr. Ertel, Mr. Imber and Mr. Snyder all testified that the Complainant’s statements were markedly different than Ms. Solano. The tone of the Complainant’s statements was angry and defiant and was delivered in an aggressive manner. (N.T. II, 167)

Lastly, and most importantly, the Complainant agreed that her statements were different than Ms. Solano. The Complainant testified that Ms. Solano said that Firetree should thank its employees for a job well done. (N.T. II, 120) However, the Complainant stated that she said we should admit when we are wrong, for example, when Mr. Ertel came down to Lycoming House, the way he tried to close it “was not right.” (N.T. II, 120) The evidence clearly shows that the Complainant’s statements at the meeting were different in content and tone from Ms. Solano and therefore she is not similarly situated to Ms. Solano.

In regard to the decision maker in this case, Mr. Ertel, there is a strong inference that race discrimination was not a determining factor in terminating the Complainant. When the individual who hires an employee is the same individual who terminates that employee, a strong inference arises that discrimination is not a determining factor. Proud v Stone 945 F. 2d 769 (59 FEP Cases 301) (4th Cir. 1991) and Tyndall v. National Education Center 31 F. 3d 209, 214-15 (4th Cir. 1994) The Complainant was hired in 1999 as an Administrative Assistant and was promoted to Acting Director of Lycoming House on July 23, 2000. In September of 2005, she was promoted to Executive Director of Lycoming House. On September 15, 2006, she was terminated from the position of Executive Director. All of the above decisions were made by Mr. Ertel. In addition, Mr. Ertel approved a 6% pay raise for the Complainant which represented the largest percentage increase given to any Firetree employee. The actions of Mr. Ertel in this case do not support the allegation that he acted in a discriminatory manner when he terminated the Complainant. On the contrary, the Complainant was terminated because Mr. Ertel considered her statements at the Directors’ Meeting to have been unacceptably aggressive and offensive.

As the Complainant has presented no other evidence of disparate treatment, she fails to raise an inference of discrimination. Accordingly the Complainant has failed to establish a *prima facie* case.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
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MARIA THOMPSON-WHITE,
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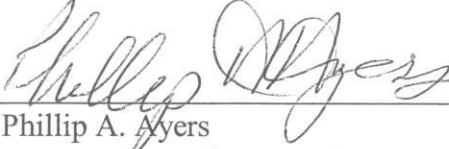
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PHRC CASE NO. 200604839
EEOC CHARGE NO. 17F200761419

RECOMMENDATION OF 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 discrimination in the instant case. It is, therefore, the Permanent Hearing Examiner's Recommendation that the attached 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.

12/17/09
Date


Phillip A. Ayers
Permanent Hearing Examiner

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FINAL ORDER

AND NOW, this 26TH day of JANUARY, 2010, 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 Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said 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 parties to the complaint and hereby

ORDERS

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION



STEPHEN A. GLASSMAN
Chairperson



Dr. Daniel D. Yun
Secretary