COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ZAHIR HAMID RA, Complainant	:	
v.	:	DOCKET NO. E-21344
COMMONWEALTH OF PENNSYLVANIA, STATE EMPLOYEES RETIREMENT SYSTEM, Respondent	:	

OPINION

I. FACTUAL STATEMENT AND HISTORY OF THE CASE

Zahir Hamid Ra (hereinafter "Complainant"), on or about October 22, 1981, filed a complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission"). The Complainant alleged that his employer, the Commonwealth of Pennsylvania (hereinafter "Commonwealth" or "Respondent"), and the State Employees Retirement System (hereinafter "System" or "Respondent") are discriminating against him because of his race (Black) and religion (Raism) with respect to the terms and conditions of his employment in violation of Sections 5(a) and (e) of the Pennsylvania Human Relations Act (hereinafter "Act"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 955(a) (e).

The specific act of harm alleged by the Complainant to have occurred stems from his contention that he is

required to participate in the state retirement system and that a compulsory deduction is taken by the Commonwealth from each of his bi-weekly paychecks for investment by the system.

The Complainant takes issue with the investment policies of the system insofar as they include investment of money in companies that either do business or invest money in South Africa. The Complainant considers the action by the Commonwealth and the system to discriminate against Commonwealth employees of all races and religions who are committed to the concept of racial equality.

On or about January 11, 1982, the Respondent submitted a Motion to Dismiss the complaint. The Motion contained three separate grounds under which relief was sought: (1) the Commission lacks subject matter jurisdiction; (2) the Complainant lacks standing; and (3) the Complainant fails to set forth with specificity a claim for which relief can be granted.

The Commission on behalf of the Complainant subsequently submitted a Reply to the Motion to Dismiss. Both parties also submitted supporting briefs. On January 22, 1982 oral argument was heard before Commissioners Joseph X. Yaffe, Esquire; Benjamin S. Loewenstein, Esquire; and Thomas L. McGill, Esquire. The parties were permitted to file post argument briefs and Respondent did so.

II. PROCEDURAL NOTE

By filing a Motion to Dismiss the complaint at this stage of the proceedings, the Respondent is seeking what amounts to a judgment on the pleadings. Bogojavlensky v. Logan, 124 A.2d 412, 416 (Super. 1956). Judgment on the pleadings should be granted only if the case is free from doubt and a hearing would be fruitless. City of Philadelphia v. Hennessey, 411 A.2d 567, 568 (Cmwlth. 1980). In passing on the merits of a motion for judgment on the pleadings, the reviewing body must consider the pleadings and inferences therefrom in the light most favorable to the non moving party. Thomas Merton Center v. Rockwell International Corporation, 421 A.2d 688, 687 (Super. 1980). The moving party admits the truth of all allegations of the non moving party. Tate v. Com., Pa. Board of Probation and Parole, 396 A.2d 482, 483 (Cmwlth. 1979). Failure to state a claim upon which relief can be granted is a permissible basis for awarding a judgment on the pleadings. Enoch v. Food Fair Stores, Inc., 331 A.2d 912, 914 (Super. 1974). The Commission must examine the Motion at hand aware of this procedural posture.

III. ISSUE FORMULATION

> Does a Complainant alleging discrimination because of race and religion state a cause of action under the Act (thus investing the Commission with subject matter jurisdiction) where the alleged act of discrimination focuses on participation by the Complainant in a retirement system which invests funds in a manner inconsistent with the Complainant's racial and religious beliefs?

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IV. ANALYSIS

As indicated previously, Respondent has asserted three grounds upon which to support its Motion to Dismiss. In analysing these three grounds it is apparent that the question of subject matter jurisdiction is crucial. Clearly, if the Commission lack subject matter jurisdiction no need exists to examine the other two. On the other hand, if subject matter jurisdiction does exist, standing cannot be disposed of with further investigation since factual dispute exists regarding whether the Complainant is/was required to contribute to the system. SEE: City of Philadelphia v. Hennessey, cited infra. Certainly, as a Black Commonwealth employee currently a member of the retirement system, the Complainant would appear to have standing to bring the charge. Therefore, denial of the Motion to Dismiss appears likely on this ground. The same is true with respect to the specificity issue. The Act requires that the particulars of the alleged discriminatory act be set forth. 43 P.S. 959. A complaint is not sufficient if it does no more than simply restate Section 5(a) of the Act. SEE: Pennsylvania Human Relations Commission v. St. Joe Minerals Corporation Zinc Smelting Division, 357 A.2d 233, 235 (Cmwlth. 1976).

In discussing subject matter jurisdiction, the Commission must begin with the recognition that its jurisdiction while broadly granted is not unlimited. It has only that jurisdiction which the legislature has provided. As

Commonwealth Court has advised the Commission, "It must be remembered that the power of an administrative agency must be sculptured precisely so that its operational figure strictly resembles its legislative model". Id.

The Commission, in discussing subject matter jurisdiction, also recognizes that the legislative grant of jurisdiction certainly includes authority to investigate charges of race and/or religious discrimination in employment situations. Such jurisdiction has been judicially interpreted under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., to include jurisdiction over allegations involving a racially biased work place atmosphere. Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir. 1971). Jurisdiction has also been found to exist where the complaint involves the failure to accommodate one's religious beliefs. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 73, 97 S.Ct. 2264, 53 L.Ed. 2d 113 (1977); SEE ALSO: Section 5(f) of the Pennsylvania Human Relations Commission Employment Affirmative Action Guidelines, 11 Pa. Bulletin No. 20, p. 1765 et seq. (1981). Title VII, in turn, has been recognized by the Pennsylvania Supreme Court as the federal analogue to the Human Relations Act. General Electric Corp. v. Com., Pa. Human Relations Commission, 365 A.2d 649, 654-55 (Pa. 1976).

Thus, the Commission must balance the recognized grant of legislative authority with the implicit limitations

Participation in the system is based neither on race nor religion but employment. Benefit entitlement is likewise based not on one's race or religion but rather one's contribution.

The second level of review has to do with what amounts to an allegation of psychological harm. In this regard, the Complainant alleges that the investment policy causes a racially discriminatory atmosphere. Yet, the Complainant has not alleged any treatment at work which singles him out for differing treatment because of his race or religion. As above, the Complainant is treated no differently than any other employee. The essential ingredient of a charge involving an atmosphere of racial bias in the workplace is some action (or inaction in the face of employee action) by the employer against a particular employee(s) because of race.

On both levels of review the Complainant fails to allege disparate treatment. Given this, and given the nature of his allegation, the Complainant fails to state a cause of action under the Act (discriminatory impact is not an appropriate mode of analysis in this case). In fact, the Complainant has alleged that all Commonwealth employees who share his racial/religious beliefs, irrespective of their particular race or religion, are disparately treated. This allegation highlights the true nature of the charge and also presents the obvious dilemma faced by the Commission.

As a review of the complaint indicates, the Complainant's concern is a moral/philosophical/political concern with the system of apartheid practiced by the government of South Africa. The Commission shares the Complainant's moral concerns. Moreover, the Commission is outraged by the continued disenfrancisement of such a large segment of South African society. The Commission supports the concept of equality of all people throughout the world. It is because of this shared concern and collective outrage that the Commission finds itself in a dilemma. Morally, the Commission knows exactly where its sympathy lies; however, statutorily it is without power to act.

If the Commission had statutory authority to act in the case at hand, it is apparent that jurisdiction would also exist in the following situations:

1. in all cases similar to the one at hand involving private industry pension funds;

2. where a Catholic employee objected to investment in companies doing business in England/Northern Ireland;

3. where a Jewish employee objected to investment in companies doing business in Syria, Libya, Iran or any country not recognizing its existence;

4. where an Arabic employee objected to investment in companies doing business in Israel;

5. where a female employee objected to investment in companies doing business in/with states that have not passed the Equal Rights Amendments and all countries in which women do not have equal rights.

The list could be greatly expanded. The only protected classes mentioned above are race, religion, national origin and sex. Age and handicap/disability cases present other examples that can be plugged into the formula. The examples are helpful in demonstrating the political nature of the complaint.

V. CONCLUSION

As sympathetic as the Commission is with the Complainant's rightful indignation over the racial policies practiced by the government of South Africa, the Commission is simply not the appropriate forum to seek resolution of the issue. The Commission can exercise only that jurisdiction that has been statutorily conferred upon it. The complaint under review does not fit within that statutory mandate.

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RECOMMENDATION OF MOTIONS PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the Motions Panel that the Complainant has failed to state a cause of action for which relief can be granted under the Pennsylvania Human Relations Act and, therefore, the Commission lacks subject matter jurisdiction. Accordingly, it is the Panel's recommendation that the Respondent's Motion to Dismiss be granted and the complaint be dismissed with prejudice.

Joseph X. Yaffe, Panel Chairperson	Date
Benjamin S. Loewenstein, Commissioner	Date
Thomas L. McGill, Commissioner	Date

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ORDER

AND NOW, this day of , 1982, upon consideration of Respondent's Motion to Dismiss, it is hereby

O R D E R E D

that said Motion to Dismiss complaint be granted and the complaint dismissed with prejudice.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Joseph X. Yaffe, Esq.
Chairperson

ATTEST:

By: _____
Elizabeth Scott, Secretary