

FINDINGS OF FACT*

1. The Complainant is Maria Luciano, an adult female residing at 910 Sycamore Drive, Lansdale, PA, 19446. (S.F. 1)
2. The Respondent is Hansen Properties, Inc., located at Welsh and McKean Roads, Ambler, PA, 19002. At all relevant times Respondent employed four or more individuals within the Commonwealth of Pennsylvania. (S.F. 2)
3. On or about February 23, 1982, Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-22214. (S.F. 3)
4. Respondent filed an answer to the Complaint on or about March 26, 1982. (S.F. 4)
5. In correspondence dated March 1, 1983 the Commission notified the Respondent that probable cause to credit the allegations of discrimination had been found. (S.F. 5)
6. On or about June 21, 1983 the Respondent filed a second answer to the complaint. (S.F. 6)
7. Subsequent to the determination of probable cause, the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion, but were unable to do so. (S.F. 7)

*Explanation of Abbreviations:

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

8. In correspondence dated May 31, 1983, the Commission notified the Respondent that it had voted to hold a public hearing in this case. (S.F. 8)

9. Complainant was hired by Respondent as a secretary/bookkeeper on June 26, 1981, in the Accounting Department. (N.T. 13)

10. Complainant's supervisor at first was A. J. Land. (N.T. 13)

11. Mr. Land repeatedly sexually harassed Ms. Luciano throughout the course of her employment at Hansen. (N.T. 16-18)

12. Throughout the course of her employment at Hansen, Complainant performed both secretarial and bookkeeping duties. (C.E. 1, N.T. 15)

13. Ms. Luciano frequently complained about Mr. Land's harassment of her to both Respondent's president, Bud Hansen, and office manager, Darlene Martin. (N.T. 18-21)

14. Ms. Luciano discussed Mr. Land's behavior with Norma Evangelista, a bookkeeper at Hansen who resigned in August of 1981. (N.T. 18)

15. Ms. Luciano testified at Ms. Evangelista's Unemployment Compensation Hearing on December 8, 1981, to the effect that she (Ms. Luciano) had been sexually harassed by Mr. Land. (N.T. 22-25)

16. Ms. Luciano was discouraged by Respondent from testifying at Ms. Evangelista's hearing and told that her job would be in jeopardy if she did so. (N.T. 22-24)

17. Ms. Luciano was terminated by Hansen on December 17, 1981; Ms. Martin told her to find other employment. (N.T. 26-27, R. E. 15)

18. Respondent did not claim that Ms. Luciano's performance was unsatisfactory until June of 1983, well over a year after the complaint was filed and shortly after it was advised that a public hearing would be held. (S. F. 3, 4, 6, 8; Answers to Complaint)

19. Respondent corresponded with the Department of Labor, Office of Employment Security on December 28, 1981 regarding Ms. Luciano's application for Unemployment Compensation and mentioned cash flow problems, not poor performance, as the reason for letting her go. (R. E. 14, 15)

20. Respondent's Exhibit 12, offered to show documentation of Ms. Luciano's poor performance, was conceded by Ms. Martin to have nothing to do with Complainant's errors. (R. E. 12, N. T. 205)

21. Ms. Martin's testimony about Ms. Luciano's supposedly poor performance was not credible.

22. Ms. Martin never mentioned performance problems to Complainant. (N.T. 28-29)

23. Ms. Martin prepared personnel documents and a job description which indicated that Complainant performed both secretarial and bookkeeping duties. (C. E. 1, R. E. 4)

24. Ms. Martin's testimony that Ms. Luciano functioned solely, as a secretary was not credible.

25. Of the twenty-two persons whose employment was discontinued by Hansen in December of 1981, twenty were males connected with the Construction Department. (C.E. 4)

26. Of the twenty-two persons whose employment was discontinued in December of 1981, fourteen had been recalled by August of 1982. (C.E. 14)

27. Complainant was never contacted about returning to work at Hansen. (N.T. 27)

28. Respondent hired a bookkeeper and receptionist in April of 1982. (N.T. 159, R. E. 7)

29. Complainant was discharged because she opposed the practice of sexual harassment by A. J. Land.

30. Complainant earned \$225.00 weekly at the time of her termination from Hansen. (N.T. 36)

31. Complainant was unemployed between December 18, 1981 and March 8, 1982; during this period she received \$550.00 in Unemployment Compensation benefits. (N.T. 35)

32. On March 8, 1982 Complainant began to work at Jerro Industries at a salary of \$275.00 weekly. (N.T. 35-36)

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("Act").

2. Respondent is an employer within the meaning of the Act.

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

4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.

5. The Act protects opposition to practices which are reasonably believed to violate the Act.

6. Complainant has established a prima facie case by proving that:

- a) She opposed sexual harassment;
- b) Respondent knew of her opposition;
- c) Complainant was terminated under circumstances demonstrating a causal connection between her expression of opposition and her termination.

7. Respondent's explanations of its reason(s) for terminating Ms. Luciano have been proven by her to be pretextual.

8. Complainant was terminated because of her opposition to unlawful discriminatory practices.

9. Prevailing Complainants are entitled to relief which includes lost wages, with interest of six percent per annum.

OPINION

This case arises on a complaint filed by Maria Luciano ("Complainant") against Hansen Properties, Inc. ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about February 23, 1982, at Docket No. E-22214. Ms. Luciano alleged that Respondent discriminated against her on the basis of her sex, female, by sexually harassing her and by discharging her shortly after she testified at an Unemployment Compensation hearing on behalf of a former co-worker who had also complained of sexual harassment while employed by Hansen. It was claimed that Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act"), had been violated. Respondent filed two formal answers, one in March of 1982 and the second in June of 1983. Each denied any violation of the Act.

Commission staff conducted an investigation into the situation and found probable cause to credit the allegations of discrimination. The Commission and the parties then attempted to eliminate the alleged unlawful practices by conference, conciliation and persuasion. When these efforts were not successful, the case was approved for public hearing. The hearing was held on August 30, 1984 and November 6, 1984 in Norristown, Pennsylvania before Commissioner McGill, Chairperson of the hearing panel, and Commissioners Echols and Yiengst. The record was left open for additional testimony, which was obtained by deposition on February 20, 1985 and made a part of the record.

As noted, Ms. Luciano's complaint formally cited Section 5(a) of the Act. In her brief she argues that Respondent's conduct violated Section 5(d). Section 5(a) provides in relevant part:

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

Section 5(d) provides:

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.

Complainant correctly notes two factors in support of her argument that there is no unfairness in allowing her to proceed under the theory of a Section 5(d) violation. First, the factually detailed allegations of her complaint clearly recite that she was discharged shortly after testifying on behalf of the former co-worker. Second, in moving to dismiss at the conclusion of Ms. Luciano's case in chief, Respondent argued that she had failed to prove a prima facie case of retaliatory discharge. We also note that a substantial portion of Respondent's brief addresses the question of retaliatory discharge. In these circumstances there is absolutely no unfairness in allowing Complainant to pursue this theory.

The respective burdens of proof in cases brought under the Act are well established. Complainant bears the initial burden of making out a prima facie case. Should she carry this burden, Respondent must rebut the inference of discrimination thus created by setting forth through the introduction of admissible evidence the legitimate, non-discriminatory reason(s) for

its conduct. Complainant may still prevail by proving that the proffered reasons were pretextual. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); McDonnell-Douglas Corp. v. Green, 411 U. S. 792 (1973); General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649 (1976).

The McDonnell-Douglas decision set out the elements of a prima facie case of refusal to hire; in so doing it noted that differing factual settings would call for variation in the elements. 411 U.S. at 802, n. 13. Pennsylvania courts have similarly recognized the need for flexibility. Reed v. Miller Printing Equipment Division, 75 Pa. Cmwlth. 360, 462 A.2d 292 (1983). In this case the parties argue and we agree that Complainant will establish a prima facie case if she proves that: she engaged in protected activity; the activity was known to her employer; and she suffered an adverse employment consequence subsequent to such activity which was causally connected with the activity. Burrus v. United Telephone Co., 683 F.2d 339 (10th Cir. 1982).

Section 5(d) by its terms protects two types of activity: opposition to practices forbidden by the Act, and participation in any of the procedures established by the Act, such as filing a complaint or testifying at a Commission hearing. Respondent's argument that testifying at an Unemployment Compensation hearing is not protected participation ignores that protection afforded to oppositon to practices forbidden by the Act. The protection extended to opposition does not require that the opposition be expressed in the course of a proceeding under the Act. And it

is the opposition portion of the Section which Complainant claims has been violated.

That Section by its terms protects opposition to "... practice(s) forbidden by ..." the Act. We agree with Complainant, and with the many authorities she cites, that this language should be construed so as to protect opposition to practices which are reasonably believed to be unlawful. Love v. RE/MAX of America, Inc., 738 F.2d 383 (10th Cir. 1984). The alternative, requiring that the practice opposed in fact violate the Act, would force those invoking the Section's protection to first make correct legal decisions about the nature of the practice involved. We do not think that the Act requires so much.

Guided by these considerations, we find that Ms. Luciano has met her burden of establishing a prima facie case.

Ms. Luciano was hired by Hansen Properties as a secretary/bookkeeper on June 26, 1981. She worked in the accounting department and was at first supervised by A. J. Land, Hansen's controller, for whom she performed secretarial duties. Her credible testimony established that Mr. Land regularly and frequently commented upon her appearance and clothing, told her to leave her boyfriend, put his arm around her, asked her to work late when there was no work for her to do, and on one occasion put his hand on her crotch. She (correctly) characterized this behavior as sexual harassment, and testified credibly that the behavior continued unabated until early December of 1981 in spite of her complaints to Respondent's president, Bud Hansen, and office manager, Darlene Martin.

Ms. Luciano also discussed Mr. Land's behavior with Norma Evangelista, a bookkeeper at Hansen who was also harassed by him. Ms. Evangelista resigned in August of 1981, apparently because of Mr. Land's behavior. Early in December of 1981, Ms. Luciano testified at Ms. Evangelista's Unemployment Compensation hearing, in spite of pressure from Respondent not to do so; her testimony was that Mr. Land had sexually harassed her. On December 17, 1981, only days after the Unemployment Compensation hearing, she was told by Ms. Martin to find other employment.

Ms. Luciano has thus made out a prima facie case. She engaged in the protected activity of expressing opposition to sexual harassment, conduct forbidden by the Act. See Guidelines on Sexual Harassment, Pennsylvania Bulletin, Vol. 11, No. 5, January 31, 1981. Her opposition was expressed both in her complaints to Ms. Martin and Mr. Hansen and in her testimony at Ms. Evangelista's hearing, and was of course known to Respondent. She suffered an adverse employment consequence shortly after being advised not to testify and nevertheless doing so. We, therefore, turn to Respondent's explanation of events.

Respondent in fact offers a variety of explanations for its conduct. It is claimed that Ms. Luciano was a secretary, not a secretary/bookkeeper; that she was laid off, not terminated; that the lay off was the result of a financial crisis being experienced by Hansen; and that Complainant's performance was unsatisfactory and would have led to her discharge even in the absence of a financial crisis. Unsatisfactory performance would of course be a legitimate, non-discriminatory reason for

a discharge, as would lay off due to a financial crisis. However, a close review of the record convinces us that Complainant's characterization of these reasons as pretextual is correct.

Initially we note that Respondent's explanations of its conduct have not been consistent. In the initial answer to the complaint, unsatisfactory performance was not cited. Likewise, in both a letter to the Department of Labor (R.E. 14) and the form completed by Darlene Martin in response to Complainant's application for Unemployment Compensation (R.E. 15), only cash flow problems were mentioned as having caused her unemployment, even though one of the reasons which could have been checked on the form was "Unsatisfactory Performance". Yet in its second answer to the complaint, Respondent stated that Complainant's performance was unsatisfactory and would have led to her dismissal had there not been a cash flow problem. Had her performance truly been so unsatisfactory, we feel sure that Respondent would not have kept that information to itself for so long.

At hearing, Respondent continued to press unsatisfactory performance as a major factor in its decision to end Ms. Luciano's employment. Ms. Martin, who supervised Ms. Luciano after September of 1981, testified to frequent errors which interfered with the efficiency of the department. Her testimony was not credible: a memorandum authored by Ms. Martin, admitted as Respondent's Exhibit 12, was described by Ms. Martin as an attempt to call Ms. Land's attention to these errors; yet on cross examination Ms. Martin admitted that the errors referred to were actually made by the author of the document which was given Ms.

Luciano to type. No other written evidence of Complainant's supposedly poor performance was produced. Ms. Martin also admitted that she never mentioned poor performance to Ms. Luciano at the time of terminating her employment.

Nor was Ms. Martin credible in her testimony that Complainant functioned solely as a secretary. Though extremely inconsistent about this, she conceded that the position was advertised as a secretary/bookkeeper job, that personnel records which she herself prepared described the position as either secretary/bookkeeper or secretary/bookkeeper, and that she assisted the Complainant in October of 1981 in preparing a job description which listed both secretarial and bookkeeping duties.

Finally, we consider the question of Respondent's financial problems and their impact, if any, on the Complainant's employment. Complainant does not dispute that Respondent in December of 1981 was experiencing a short-term financial problem of some kind. She does dispute Respondent's argument that she was only one of a number of employees who were let go for fiscal reasons in December of 1981.

Initially, we note that Respondent discontinued the employment of twenty-two (22) persons in December of 1981. Twenty-one of them were male, and twenty were connected with the "outdoor" (Construction or lawn) portion of Respondent's operation. Of the twenty-two, fourteen (14) had been recalled by August of 1982. Complainant was never contacted about returning to Respondent's employ, even though after her discharge Respondent hired a bookkeeper (P.Bowen), assigned some of Complainant's

duties to a receptionist, Michelle Kornacki, and hired a new receptionist in April of 1982 when Ms. Kornacki was reassigned as secretary to the Accounting Department. As Complainant argues, Respondent's characterization of its action as a lay-off is inconsistent with both its failure to recall her and its claim that her performance was completely unsatisfactory.

If Respondent argues that it did not re-employ her because of poor performance, that in its turn is inconsistent with both characterizing its action as a lay off and failing to mention poor performance until some sixteen months after the fact.

In summary, we are persuaded by Complainant that Respondent's proffered reasons for ending her employment were pretextual and that she was in fact discharged because of her opposition to practices which violated the Act. Following such a finding we are empowered by Section 9 of the Act to award relief which includes lost wages. Complainant's uncontested evidence was that she earned \$225.00^{weekly}/at Hansen, was unemployed between December 18, 1981 and March 7, 1982, received \$550.00 in Unemployment Compensation during this period, and began to earn \$275.00 weekly at her new job. We, therefore, decide that she is entitled to an award of \$1,925.00, plus interest of 6% per annum, Goetz vs. Norristown Area School District, 16 Pa. Cmwlt. 389, 328 A.2d 579 (1974), and direct entry of the final order which follows.

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICES
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIA LUCIANO,
COMPLAINANT

v.

HANSEN PROPERTIES, INC.,
RESPONDENT

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DOCKET NO. E-22214

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, the Hearing Panel concludes that the Respondent violated Section 5 of the Pennsylvania Human Relations Act, and therefore, recommends that the foregoing findings of fact, conclusions of law, and opinion be adopted and ratified by the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Act.

Thomas L. McGill / eec
THOMAS L. MCGILL, JR., CHAIRPERSON
HEARING PANEL

Alvin E. Echols / eec
ALVIN E. ECHOLS, JR.
HEARING COMMISSIONER

Raquel Otero de Yiengst / eec
RAQUEL OTERO DE YIENGST
HEARING COMMISSIONER

COMMONWEALTH OF PENNSYLVANIA
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MARIA LUCIANO,
COMPLAINANT

v.

HANSEN PROPERTIES, INC.,
RESPONDENT

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DOCKET NO. E-22214

FINAL ORDER

AND NOW, this 27th day of September, 1985,
the Pennsylvania Human Relations Commission hereby adopts the
foregoing Findings of Fact, Conclusions of Law, and Opinion, in
accordance with the Recommendation of the Hearing Panel, pursuant
to Section 9 of the Pennsylvania Human Relations Act, and there-
fore

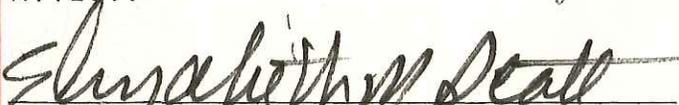
O R D E R S

1. Respondent shall cease and desist from discriminat-
ing against persons who oppose discriminatory practices; and
2. Respondent shall pay to Complainant the lump sum of
\$1,975.00 within thirty (30) days of the effective date of this
Order, plus interest of six percent per annum calculated from the
date of termination until the date of payment; and
3. Respondent shall provide to the Commission satisfac-
tory written proof of compliance with the above terms within
thirty (30) days of the effective date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 
JOSEPH X. YAFFE, CHAIRPERSON

ATTEST:


ELIZABETH M. SCOTT, SECRETARY