

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**DAVID H. SMITH,
Complainant**

v.

**LE FEBURE,
A DE LA RUE COMPANY,
Respondent**

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DOCKET NO. E-57721-AD

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID H. SMITH, :
 :
 Complainant, :
 :
 v. : Docket No. E-57721
 :
 LEFEBURE, :
 A DE LA RUE COMPANY, :
 :
 Respondent :

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. The Complainant herein is David H. Smith, a male adult (hereinafter "Complainant").
2. The Respondent herein is LeFebure, A De La Rue Company (hereinafter "Respondent").
3. The Respondent is in the business of selling security equipment, cash handling equipment, electronic security devices and motor banking equipment to financial institutions nationwide.
4. The Respondent, at all times relevant to this case, has employed four or more persons within the Commonwealth of Pennsylvania.
5. On or about January 13, 1992, the Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission Docket No. E-57721. A copy of the complaint is attached hereto as Appendix

"A" and will be included as a docket entry in this case at time of hearing.

6. In correspondence dated September 20, 1993, Commission staff notified the Respondent that probable cause existed to credit the allegations contained in the above-referenced complaint.

7. In correspondence dated February 11, 1994 Commission staff notified the Respondent that it had amended its finding of probable cause.

8. Subsequent to the determination of probable cause, conciliation was attempted between the parties but proved to be unsuccessful.

9. In correspondence dated October 4, 1994, the Commission notified Respondent that a public hearing had been approved in this matter.

10. Complainant was hired by Respondent as a Regional Sales Manager in July 1981. At the time of hire, Complainant was 51 years of age.

11. Complainant remained as a Regional Sales Manager from his date of hire until October 1991.

12. As Regional Sales Manager in 1991, Complainant's base salary was \$52,500 a year.

13. On October 1, 1991, the Complainant became a National Accounts Manager.

14. As a National Accounts Manager, Complainant's base salary continued to be \$52,500 a year.

15. On August 1, 1992, Complainant's annual salary was \$25,000.

16. On December 31, 1992, the Complainant retired from Respondent's employ.

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

March 2, 1995
Date

Maureen L. Hogel
Maureen L. Hogel, Esquire
(Counsel for Respondent
LeFebure, a De La Rue Company)

March 1, 1995
Date

FINDINGS OF FACT *

1. The Complainant herein is David H. Smith (hereinafter "Smith"). (SF 1.)
2. The Respondent herein is LeFebure, a De La Rue Company (hereinafter "LeFebure"). (SF 2.)
3. LeFebure is in the business of selling security equipment, electronic security devices, alarm systems, bank doors, vault doors, safe deposit boxes, drive-in systems, and teller cash dispensing systems to financial institutions nationwide. (NT 46, 67; SF 3.)
4. In July 1981, LeFebure hired Smith as the regional manager in LeFebure's Philadelphia regional office. (NT 40, 116, 191; SF 10.)
5. As a regional manager, Smith trained, supervised, and worked with his five-to seven-member sales force, and also had some supervisory responsibility over a service department. (NT 46, 48.)

* The foregoing Stipulations of Fact are incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT	Notes of Testimony, Volume I, March 8, 1995
NT2	Notes of Testimony, Volume II, March 9, 1995
CE	Complainant's Exhibit
RE	Respondent's Exhibit
SF	Stipulations of Fact
CD	Cowan Deposition
WD	Wolmutt Deposition

6. In 1989, Smith's title was changed to regional sales manager, and his duties remained constant with the exception that Smith no longer had responsibilities regarding the service department. (NT 64, 89, 116, 191.)
7. Smith's performance as a regional manager and regional sales manager was consistently between above average and excellent. (NT 46; CE 1.)
8. LeFebure's sales force was comprised of sales engineers, national accounts managers (hereinafter "NAMs"), and a specialty sales force which sold only teller cash dispensers. (NT 39, 46, 65; NT2 73, 135, 153.)
9. Sales engineers were assigned a geographical territory in which LeFebure products were sold to financial institutions. (NT 65.)
10. Sales engineers work under a quota system and report to a regional sales manager. (NT 210.)
11. A NAM is salaried and reports to an area vice president. (NT 92, 195; NT2 73, 135.)
12. LeFebure first developed a specialty sales force in 1987. (NT2 153.)
13. Teller cash dispensers are also called cash handling systems (hereinafter "CHS equipment"), and are the sole product sold by the CHS product specialists who work out of an area's headquarters and cover an entire area. (NT 200; NT2 75, 153, 155.)
14. In 1991, LeFebure's sales were shrinking, particularly in the east: savings and loan institutions were in financial trouble and banks were closing at a rapid rate. (NT2 57-58; CD 5; WD 25.)
15. Approximately ninety percent of LeFebure's business is with financial institutions. (NT2 58.)

16. Because of shrinking sales, LeFebure management decided it was necessary to reduce overhead and significantly downsize the field sales organization in line with the reduction in business experienced. (NT2 58; CD 5.)
17. Nationally, prior to the Fall of 1991, LeFebure was divided into four general areas of operation (Northeastern, Central, Southern and Western) in which there was a total of twenty regions. (NT 130; NT2 55, 65; RE 1.)
18. Effective October 1991, LeFebure's national operations went from four areas to three, and within the areas twenty regions were combined, resulting in nine regions remaining. (NT 130; NT2 57, 65, 108, 137, 220; RE 2.)
19. As a result of LeFebure's operational restructuring, numerous sales engineers and regional sales managers lost their jobs. (NT 137; NT2 66; CD 6, 23; WD 26.)
20. From his hire in 1981 until October 1991, Smith worked in LeFebure's Philadelphia region, located in the Northeast area. (NT 40, 116, 191.)
21. Prior to the substantial operational changes of October 1991, LeFebure evaluated the production of its sales engineers and the comparative production of area regional offices. (NT2 66-67; CD 13.)
22. One of the sales engineers Smith supervised in the Philadelphia regional office was Harold Nestle (hereinafter "Nestle"). (NT 65.)
23. On May 29, 1991, Mort Fleischer, Smith's direct supervisor and vice president of sales area Northeast, instructed Smith to terminate Nestle, effective May 31, 1991, because of LeFebure's reduction in business and because of Nestle's performance. (NT 68, 69, 71; CD 10.)

24. Smith disagreed that Nestle's performance merited his selection for termination. (NT 69, 71.)
25. On May 29, 1991, Smith also spoke with Roger Cowan, vice president of sales and marketing administration, who also told Smith to terminate Nestle because the evaluation of sales engineers revealed Nestle was a good candidate for termination. (NT 69; CD 11, 13, 23.)
26. On May 30, 1991, Smith terminated Nestle. (NT 71.)
27. Subsequent to Nestle's termination, Nestle filed an age-based complaint with the Pennsylvania Human Relations Commission (hereinafter ("PHRC") which was sent to LeFebure and received by Smith on November 4, 1991. (NT 73, 145.)
28. Smith called Donald Wolmutt, LeFebure's director of human resources (hereinafter "Wolmutt"), to get directions regarding what to do with the copy of Nestle's complaint that Smith received. (NT 73.)
29. Wolmutt advised Smith to send him the complaint. (NT 74; WD 21.)
30. Subsequently, on or about November 24, 1991, Wolmutt called Smith and asked Smith to discuss Nestle's termination with Wolmutt's assistant, Les Eggers (hereinafter "Eggers"). (NT 74.)
31. Smith spoke with Eggers, who requested that Smith put in writing his perceptions about Nestle's termination and expeditiously send it to him. (NT 75, 76.)
32. On November 27, 1991, Smith faxed his statement to Eggers. (NT 76; CE 4.)
33. In May 1991, Mylo Schultz (hereinafter "Schultz") was vice president and general manager of LeFebure's Central area. (NT2 55-56.)

34. Schultz had no responsibility over either the Northeastern area or, more specifically, the Philadelphia region, until October 1991 when Schultz became the area vice president and general manager for "Area North," a newly created area upon LeFebure's restructuring. (NT2 55-58.)
35. Prior to Schultz becoming vice president and general manager for area North, he was instructed to reduce the number of regions in the newly created area. (NT2 65-66.)
36. Among other regions, Schultz closed the Philadelphia region. (NT2 66-67.)
37. Philadelphia was selected for closure after a comparison of the Philadelphia and Pittsburgh regions revealed that the Pittsburgh region was generating nearly twice the revenue of the Philadelphia region. (NT2 67, 138.)
38. In September 1991, Schultz advised Smith of the imminent closure of the Philadelphia region and offered Smith a newly created NAM position. (NT 80, 168; NT2 67.)
39. Smith accepted Schultz's offer and, effective October 1, 1991, Smith became one of three NAMs in area North. (NT 39; NT2 76.)
40. Schultz created a NAM position for Smith to enable Smith to remain a LeFebure employee and provide Smith with an opportunity. (NT2 110.)
41. In October 1991, the normal salary range for a NAM was between \$42,000 and \$48,000. (NT2 73, 135.)
42. When Smith began as a NAM, he kept the same salary and benefits he had as a regional manager: \$52,500, plus benefits. (NT 49, 82; NT2 74.)
43. In 1991, all of LeFebure's NAMs were expected to sell between \$1 to \$1.5 million per year. (NT2 78, 117.)

44. Schultz asked Smith to make a list of national accounts Smith believed should be assigned to him. (NT 95; NT2 76.)
45. Schultz reviewed Smith's proposed list of accounts with Sid Miller, the regional manager in the Pittsburgh region. (NT2 77.)
46. In October 1991, Smith's proposed list was approved, and the accounts were assigned to Smith. (NT 97; NT2 75, 77; CE 8.)
47. Shortly after Smith became a NAM, Schultz instructed Smith to develop a sales forecast for 1992 which was Smith's projection of his sales for 1992. (NT2 77.)
48. In a memo dated November 4, 1991, Smith submitted the following sales forecast:

<u>Product</u>	<u>High</u>	<u>Medium</u>	<u>Low</u>
SE	\$235,000	\$190,000	\$165,000
CHS	225,000	175,000	125,000
Service Contracts	60,000	46,000	35,650
Total	\$520,000	\$411,000	\$325,650

(CE 16.)

49. During a telephone conversation on December 26, 1991, Schultz advised Smith that his forecast was too low, and that in order for Smith's NAM position to be justified a revised forecast was necessary. (NT 98; NT2 78, 80, 119.)
50. By memo dated December 26, 1991, Smith submitted the following revised forecast:

<u>Product</u>	<u>Projection</u>
SE	\$ 661,000
CHS	375,000
Service Contracts	65,000
Total	\$1,101,000

(CE 16.)

51. Smith had to await Schultz's return from vacation on January 9, 1992 to be told whether Smith's revised forecast was acceptable to Schultz. (NT 136; NT2 79.)
52. On January 9, 1992, Smith called Schultz and was told he was still a NAM for as long as Schultz could keep Smith. (NT 203, 206; NT2 79, 81.)
53. On January 13, 1992, knowing he was still a NAM, Smith signed a PHRC complaint alleging he had been demoted to the position of sales person on December 26, 1991. (NT 141, 143.)
54. By memo dated February 14, 1992, Schultz advised Smith that CHS specialists were being assigned to certain accounts in order to make a focused effort to sell CHS equipment to those targeted accounts. (NT2 75, 90, 151; CE 9.)
55. The accounts affected had been the accounts of several NAMs, including Smith. (NT2 91; CE 9.)
56. Although NAMs were asked not to pursue CHS equipment sales with designated accounts, NAMs were instructed to concentrate on selling SE

equipment (security products) to those accounts. (NT 101, 133, 165, 183; NT2 90; CE 9.)

57. One of Smith's accounts for which CHS equipment sales responsibility was transferred to CHS specialists was Meridian Bank (hereinafter "Meridian").
58. Ken Dillon (hereinafter "Dillon"), a CHS specialist, had been working on selling CHS equipment to Meridian since approximately 1986-87. (NT2 93-94, 154, 169.)
59. Schultz had been approached by Dillon regarding Dillon's progress with Meridian and an imminent sale which could be jeopardized by interference by other LeFebure sales personnel. (NT2 96, 161.)
60. Dillon had done this with regard to accounts of other NAMs. (NT2 162, 175.)
61. In 1992, LeFebure sold approximately \$800,000 worth of CHS equipment to Meridian. (NT2 93-94, 159.)
62. Although not participating in the sale, both Smith and sales engineer Manzi received full memo credit for this sale. (NT2 95, 96.)
63. Generally, LeFebure kept records of sales in two ways: "memo credit" - a sale made by someone else with another individual sharing in the credit; and "originating sale credit" - sales made by an individual. (NT2 93, 133.)
64. LeFebure considered an individual's originating sales as the true measure of one's production. (NT2 133.)
65. In 1992, the Pittsburgh regional manager wrote to Schultz to suggest that Smith had too many accounts. (NT2 200, 202.)
66. Schultz adjusted Smith's accounts. (NT2 202.)

67. Several of Smith's accounts reverted to sales engineers, and Smith was assigned other accounts. (NT 103, 156; NT2 90-91, 130, 204, 205; CE 19.)
68. One of LeFebure's sales engineers who testified, Michael Fine, indicated that his sales territory changed as many as five times in three months. (NT 220.)
69. In July 1992, Schultz made the decision that Smith's NAM position could no longer be justified. (NT 107, 134; NT2 97, 103-104.)
70. The other NAMs under Schultz had substantially higher 1992 originating sales than Smith:

Smith	\$119,988
McClarren	349,292
Hoobler	560,730

(NT2 99-100.)

71. Schultz offered Smith the choice of either becoming a sales engineer or remaining a NAM at a reduced salary. (NT2 103-104.)
72. Smith chose to remain a NAM and, effective August 1, 1992, his salary was reduced to \$25,000 per year, plus benefits. (NT 108; NT2 103-104; SF 15.)
73. On December 31, 1992, Smith retired from LeFebure's employ. (NT 109; SF 16.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act.
4. The Respondent is an employer within the meaning of the Act.
5. Complainant has made a *prima facie* case of retaliation by proving that:
 - a. he was engaged in protected opposition;
 - b. the Respondent was aware of it;
 - c. he suffered adverse employment consequences; and
 - d. there is a causal link between the protected opposition and the adverse employment consequences.
6. The Respondent offered evidence of legitimate, nondiscriminatory reasons for the employment consequences experienced by the Complainant.
7. The manager directly responsible for the challenged employment consequences was unaware of the Complainant's expression of opposition.
8. The Complainant failed to prove that the legitimate, nondiscriminatory reasons offered by the Respondent were pretextual.

OPINION

This case arises on a complaint filed by David H. Smith (hereinafter "Smith") against LeFebure, a De La Rue Company (hereinafter "LeFebure"), on or about January 13, 1991, at Docket No. E-57721-AD. In his complaint Smith generally alleged he was demoted, first on October 1, 1991, and then again on December 26, 1991. Smith alleged these demotions were both age-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA"), and in retaliation because Smith had opposed practices of alleged discrimination, in violation of Section 5(d) of the PHRA.

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated Smith's allegations, and at the conclusion of the investigation concluded that probable cause existed only with respect to Smith's claim of retaliation. The investigation determined that no cause existed to credit Smith's age-based claim.

Thereafter, the PHRC attempted to eliminate the alleged unlawful retaliation through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified the parties that it had approved a public hearing of Smith's retaliation allegations.

The public hearing was held on March 8 and 9, 1995, in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The case on behalf of the complaint was presented by PHRC staff attorney Pamela Darville. Maureen Hogel, Esquire, appeared on behalf of LeFebure. Following the public hearing, the parties were afforded an opportunity to submit briefs. The post-hearing brief on

behalf of the complaint was received on July 19, 1995, and the brief for LeFebure was received on September 1, 1995.

First, during the public hearing it became clear that Smith's claim that he was demoted on October 1, 1991 was strictly an age-based allegation. When questioned about his claims, Smith specifically indicated that the first alleged incident of retaliation occurred on December 26, 1991 (NT 158, 188, 198). Smith was clear that the earlier change in his status from regional manager to national accounts manager was allegedly done because of his age only. This left one count of alleged retaliation in the form of an alleged retaliatory demotion on December 26, 1991, from the position of national accounts manager to the position of sales person.

Herein lies the beginning of several significant problems with Smith's entire case. In actuality, Smith was not demoted on December 26, 1991. What occurred was that Smith was asked to revise a prior sales forecast which the area vice president and general manager Mylo Schultz (hereinafter "Schultz") told Smith was far too low. Smith was told that the forecast he submitted in November 1991 was insufficient to justify the national accounts manager (hereinafter "NAM") position which had been created for Smith effective October 1, 1991.

Smith testified that between December 26, 1991 and January 9, 1992, he was uncertain regarding his status. Smith had submitted a revised sales forecast on December 26, 1991, but Schultz was away on vacation until January 9, 1992.

Clearly, on January 9, 1992, when Smith called Schultz to inquire regarding his status, Smith learned that he was still a NAM. His new forecast was acceptable to Schultz, and Smith had not been demoted.

It is more than disconcerting that Smith would execute a PHRC complaint four days later, which alleged that he had been demoted on December 26, 1991. Smith clearly knew he had not been demoted. In effect, that part of Smith's PHRC complaint is a blatant fabrication. This factor weighs heavily on the issue of Smith's credibility, as there are several glaring contradictions in the testimony offered by Smith and several witnesses for LeFebure.

Normally, this case might end right here except for a rather unusual set of circumstances. During the presentation of the Complainant's case at public hearing, it appeared that the Complainant was attempting to prove incidents of alleged retaliation which were beyond the scope of the limited allegations in his complaint. At the end of the first day of public hearing, the permanent hearing examiner noted his concern regarding the scope of the allegations present, and that it appeared the Complainant was attempting to assert a case well beyond the scope of the alleged December 26, 1991 demotion.

At the beginning of the second day of the public hearing, the PHRC staff attorney suggested that an attempt was being made to present a pattern of alleged retaliation for the period 1992. In fact, just before the case on behalf of the complaint rested, Attorney Darville moved to amend the complaint (NT2 7-9). In effect, Attorney Darville asked that the complaint be amended to include the following alleged acts of retaliation:

1. the removal of Smith's ability to sell cash handling systems (hereinafter "CHS equipment") to several accounts;
2. the significant reduction in Smith's salary; and

3. the assignment of three accounts to Smith with which he was unfamiliar.

Both at public hearing and in its brief, LeFebure strenuously objected to permitting an amendment to the complaint. LeFebure's basic argument against allowing an amendment was that LeFebure would be left without notice of the allegations and therefore be left unprepared to defend such allegations (NT2 14-15).

Regarding amendments to complaints, we are guided by the PHRA and applicable regulations. First, the PHRA's pronouncements on amending a complaint are found in Section 9 of the Act. Section 9(c) states in pertinent part, ". . .The Commission or the Complainant shall have the power reasonably and fairly to amend any complaint. . ." A recent amendment of the PHRA also added a phrase to Section 9(a). This new phrase of Section 9(a) states, ". . .Commission representatives shall not modify the substance of the complaint. . ."

Here, there are two obvious questions:

1. Does the motion to amend made by a PHRC regional staff attorney amount to an attempt by a "Commission representative" to modify the substance of the complaint? and,
2. Assuming, *arguendo*, the motion is viewed as the Complainant moving to amend the complaint, would the motion be reasonable and fair?

On the issues of reasonableness and fairness, the post-hearing brief on behalf of the complaint generally submits that the Respondent had notice of the additional allegations of retaliation because the Respondent had received the September 20, 1993 PHRC finding of probable cause and a February 11, 1994 amended finding of probable cause (CE 11 and 12). The post-hearing brief on behalf of the complaint

argues that a combination of the finding of probable cause and the amended finding provide "more than sufficient notice of the additional findings of retaliation. . .", and "reasonable certainty of the nature of these findings. . ."

It is interesting to note that the post-hearing brief on behalf of the complaint does not point to any specific finding as being a finding which provides "reasonable certainty" of the Respondent being accused of retaliation in the form of:

1. removing Smith's ability to sell CHS equipment to certain accounts;
2. reduction of Smith's salary; or
3. assigning Smith three accounts with which Smith was unfamiliar.

Perhaps no specific references were attempted because a review of Complainant's exhibits 11 and 12 reveal there is no mention at all regarding either the alleged removal of Smith's ability to sell CHS equipment or the alleged assignment of three unfamiliar accounts. There is some reference to the alleged salary reduction in August 1992, however, not once is there a specific indication that the alleged salary reduction is intended as an assertion of an incident of alleged retaliation. One can only wonder why, if there was a perception that the Complainant intended to assert such a claim against the Respondent, the complaint was not amended at the time of the issuance of the finding of probable cause. Instead, the motion to amend awaits the completion of the presentation of evidence on the Complainant's case at the public hearing. The post-hearing brief on behalf of the complaint's argument that the finding of probable cause and an amended finding afford the Respondent proper due process is rejected.

The issue of whether to allow the amendment to the complaint does not end here, however. In the "General Rules of Administrative Practice and Procedure" at

1 Pa. Code §35.49, there is reference to situations similar to the one presented here.

1 Pa. Code §35.49(a) states:

(a) When, at a hearing, issues not raised by the pleadings are introduced by express or implied consent of the parties, they shall be treated as if they had been raised in the pleadings. The amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these new issues may be made upon motion of a participant at any time during the hearing. If evidence upon the new issues is objected to on the ground that it is not within the pleadings, the agency head or the presiding officer may allow the pleadings to be amended and the evidence to be received, when it appears that the presentation of the merits of the proceeding will be served thereby without prejudicing the public interest or the rights of any participant. When in the discretion of the agency head or the presiding officer, a continuance is necessary in order to enable the objecting participant to meet the new issues and evidence, a continuance may be granted by the agency head or the presiding officer, as provided in § 31.15 (relating to the extensions of time).

Of course, the first part of this provision does not apply here, as LeFebure strenuously objected to the attempted raising of new issues. However, this provision does afford a degree of discretion to the permanent hearing examiner to decide whether to allow an amendment. The questions to be evaluated are:

1. does it appear the presentation of the merits of the proceeding will be served?
2. will the public interest be prejudiced? and
3. will there be prejudice to the rights of a party?

Here, the totality of the circumstances reveals that the public interest would be best served by allowing the amendment and reviewing the merits of the additional allegations. Furthermore, it is abundantly clear that, in the final analysis, the Respondent's rights will not be prejudiced.

Generally, prohibited retaliation can take a myriad of forms. Here the alleged retaliatory manipulation of employment conditions spans over half of a year and alleges a demotion, account and assignment manipulation and a reduction in salary. In Pennsylvania, Section 5(d) of the PHRA is the source of protection against retaliation for those who oppose what they perceive to be discrimination. Section 5(d) states in pertinent part:

It shall be an unlawful discriminatory practice. . . for 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.

Of the two clauses found in this provision, the opposition clause is applicable to Smith's allegations.

Determination of whether Smith can prove a case of retaliation will require an application of the law to the specific facts present here. Accordingly, an inquiry must begin with what burden must be met.

As a general rule, Smith has the burden of demonstrating by a preponderance of the evidence that LeFebure's actions amount to unlawful retaliation. Initially, Smith must demonstrate a *prima facie* case. If Smith meets this initial burden, the burden of production shifts to LeFebure to articulate legitimate, nondiscriminatory reasons for the alleged actions. If LeFebure articulates a legitimate, nondiscriminatory reason for each alleged act of retaliation, Smith must then demonstrate that the reasons assigned by LeFebure for its actions are pretextual.

In order to demonstrate a *prima facie* case of retaliation, Smith must show:

1. that he engaged in protected opposition;
2. that LeFebure was aware of it;

3. that, subsequent to the protected opposition, he experienced an adverse employment consequence; and

4. that there is a causal connection between the protected opposition and the adverse employment consequence.

Consumers Motor Mart v. PHRC, 108 Pa. Commonwealth Ct. 59, 529 A.2d 571 (1987); Wholey v. PHRC, 146 Pa. Commonwealth Ct. 702, 606 A.2d 982 (1992).

Applying the facts present in this case to what Smith must show, we find that Smith has shown that he did oppose the termination of Nestle. Smith's opposition was both verbal and in writing, and referenced Smith's concern regarding Nestle's age.

LeFebure argues that Smith's opposition was not sufficiently clear to amount to an opposition with respect to a practice forbidden by the PHRA. LeFebure refers to Smith's testimony where Smith indicated to Cowan on May 29, 1991 that, "There is no reason to terminate [Nestle] for performance and I have a feeling that Mr. Nestle is going to become upset, because of his age." (NT 69.) LeFebure also points to Smith's November 27, 1991 memo to Eggers in which Smith indicates that he "told [Fleischer] he should rethink [Nestle's] termination due to [Nestle's] age. . ." (CE 4.) LeFebure submits that Smith's expressions of opposition do not amount to proof that Smith objected to what Smith perceived as age discrimination.

It has been said that the burden of establishing a *prima facie* case should not be onerous. Here, the nature of Smith's opposition sufficiently referenced Nestle's age to qualify as an opposition to a practice perceived to have been discriminatory.

LeFebure also contests the second required element of the *prima facie* showing. LeFebure argues that since Smith was not clear that his opposition

reflected a belief that Nestle's termination was age-based discrimination, LeFebure was unaware Smith had made such an expression of opposition. Once again, this position is rejected. Members of LeFebure management were aware of Smith's opposition.

The issue of whether Schultz was aware of Smith's opposition will be reserved for the next stage of the pattern of proof. Respondents may rebut a claim of retaliation either by asserting the alleged actions were based on legitimate, non-discriminatory reasons, or by showing that relevant management personnel were unaware of the protected opposition until after the alleged actions occurred. See EEOC v. Lear Siegler, Inc., 22 FEP 1548 (E.D. Mich. 1980), citing Brown v. Ralston Purina Co., 15 FEP 362 (6th Cir. 1977).

Regarding the third element of the requisite *prima facie* showing, LeFebure's brief correctly notes that Smith failed to establish that he experienced any retaliatory adverse employment consequences either in October 1991 or on December 26, 1991. Smith specifically abandoned the October 1991 demotion allegation regarding retaliation. Smith testified that he believed the October 1991 change of status was age-based rather than retaliation.

Regarding the alleged adverse action on December 26, 1991, Smith's testimony is clear that when he signed the complaint on January 13, 1992, Smith knew that he had not been demoted on December 26, 1991. In fact, Smith suffered no adverse employment consequence on December 26, 1991.

Turning to the three new allegations added by the motion to amend made at the conclusion of the Complainant's case at the public hearing, Smith does establish he suffered adverse employment consequences. There is no dispute that Smith's

ability to sell CHS equipment to several accounts was removed in February 1992, and that Smith was assigned three new accounts with which Smith was unfamiliar. Equally clear is the fact that Smith's salary was reduced in the Summer of 1992. Accordingly, Smith has established the third element of his *prima facie* case with respect to the three additional allegations only.

Regarding the fourth element of the requisite *prima facie* showing, causation can be inferred where the expression of opposition and the occurrence of adverse employment actions occur within close proximity in time. Wholey v. PHRC, 146 Pa. Commonwealth Ct. 702, 606 A.2d 982 (1992). Here, the actions alleged occurred soon enough after Smith's opposition to justify an inference of a retaliatory motive. Accordingly, Smith's *prima facie* showing is complete with respect to the three additional alleged actions.

Interestingly, the brief on behalf of the complaint concedes that LeFebure has articulated legitimate, nondiscriminatory reasons for its actions. First, LeFebure submits that the removal of the opportunity to make CHS equipment sales from several of Smith's accounts was a sound and legitimate business decision. Since approximately 1987, LeFebure had a specialized sales force which sold only CHS equipment and which had been pursuing the sale of CHS equipment to those accounts. Additionally, CHS equipment specialists had focused on one account, Meridian Bank, for almost four years. Smith was asked to focus his attention on the sale of SE equipment to those accounts while the targeted accounts were approached by CHS equipment specialists.

Regarding the Meridian account, CHS equipment specialists were successful in selling Meridian over \$800,000 worth of CHS equipment. Prior to this sale, the

CHS equipment specialists had asked Schultz to take Smith's opportunity to attempt to sell CHS equipment away regarding Meridian, so as not to jeopardize what was expected to be the imminent major sale.

The uncontested testimony of a CHS specialist was that this practice was not restricted to Smith's accounts. Instead, the removal of the opportunity to sell CHS equipment to certain accounts affected the accounts of other NAMs under Schultz's supervision in addition to Smith.

In combination with the removal of the opportunity of selling CHS equipment to several accounts, LeFebure modified Smith's list of accounts by giving Smith three large accounts. Smith's amendment to his complaint alleges that the assignment of these accounts was retaliatory.

Considered as a whole, the record is quite clear that after the October 1991 major reorganization, everyone's accounts were in a state of flux. Sales engineer Fine testified that his sales territory had been changed as much as five times within three months.

Also, there is uncontroverted evidence that sales engineers in the newly created Pittsburgh region were displeased with the number of accounts assigned to Smith. The evidence reveals that Schultz and regional sales manager Miller discussed the need to reconsider Smith's accounts in order to more equitably distribute available work among sales engineers in the newly created Pittsburgh region.

Regarding the reduction in Smith's salary, LeFebure submits that the salary reduction directly resulted from Smith's poor originating sales performance. Smith's second sales forecast estimated \$1.1 million of sales for 1992. By July 1992, Smith

had sold only about one-tenth of his estimate. When compared to the other two NAMs under Schultz's supervision, Smith's originating sales were significantly lower. Accordingly, LeFebure asserts that the reduction of Smith's salary was both reasonable and proper.

Beyond having produced legitimate, nondiscriminatory reasons for its actions, LeFebure also offered evidence that Schultz, the relevant management person who, acting alone, directly made the decisions which affected Smith, was unaware of Smith's opposition until shortly before the public hearing.

LeFebure submits that until the Fall of 1991, Schultz was the vice president and general manager of LeFebure's area central and had no responsibility for LeFebure's northeastern area or, specifically, for LeFebure's Philadelphia region. Smith's initial May 1991 expression of opposition to Nestle's termination was made not to Schultz, but to Fleischer, vice president of the northeastern area, and Cowan, vice president of sales and marketing support.

When Nestle's complaint was received by Smith, Smith forwarded the complaint to LeFebure's director of human resources, Wolmutt, at LeFebure's headquarters in Cedar Rapids, Iowa. Wolmutt discussed Smith's opposition with Smith and instructed Smith to prepare a written memorandum to Eggers, a personnel administrator who worked for Wolmutt.

LeFebure submits that it was not until long after Smith's employment at LeFebure ended that Schultz was made aware of either Smith's memorandum to Eggers or Smith's earlier verbal opposition to Nestle's termination. LeFebure asserts that while Schultz knew of Nestle's PHRC complaint, Schultz was not aware of Smith's asserted opposition.

On this issue, Smith testified that on December 26, 1991, Schultz told Smith that Smith's November 27, 1991 memo to Eggers had cost LeFebure a lot of money and forced LeFebure to return Nestle to work. Schultz specifically denied ever making such a statement to Smith.

Of course, this poses a specific question of which testimony is credible. Schultz's testimony that he was unaware of Smith's opposition is totally supported by both Wolmutter's and Cowan's testimony.

Smith's uncorroborated testimony when stacked up against that of Schultz, Cowan, and Wolmutter is simply not credible. Smith's credibility was irreparably damaged when he signed a PHRC complaint alleging that on December 26, 1991 he was demoted to the position of salesperson with no salary, knowing that he had not been demoted.

Additionally, in Smith's PHRC complaint he had alleged that those retained as regional managers in October 1991 were "well below 45 years of age." At the public hearing Smith admitted he did not know the age of those retained as regional managers.

Smith's blatant misrepresentation of the facts demonstrates sufficient rationale to assign no credibility to Smith's testimony regarding those instances where Smith's testimony differs from LeFebure witnesses whose testimony has not been shown to lack credibility.

Standing alone, Schultz's demonstrated lack of knowledge of Smith's opposition is enough to support LeFebure's position that Schultz's actions bore no retaliatory animus whatsoever. However, here, even had Schultz known of Smith's

expression of opposition, Smith's attempt to offer evidence that LeFebure's articulation of legitimate, nondiscriminatory reasons were pretextual was insufficient.

From the moment Smith's status changed from that of regional sales manager to NAM, LeFebure attempted to keep Smith. Smith's problems were his own doing. Other NAMs to whom similar actions were occurring appear to have made the best of a severe situation. On the other hand, Smith appears to have taken the approach that the proverbial half-filled glass offered to him was half-empty, rather than half-full.

Accordingly, the complaint in this matter should be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**DAVID H. SMITH,
Complainant**

v.

**LE FEBURE,
A DE LA RUE COMPANY,
Respondent**

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DOCKET NO. E-57721-AD

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(d) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, 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.

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID H. SMITH,
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LE FEBURE,
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DOCKET NO. E-57721-AD

FINAL ORDER

AND NOW, this 12th day of December, 1995, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, 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 hereby is, dismissed.

By: Robert Johnson Smith
Robert Johnson Smith, Chairperson

Attest:
Gregory J. Celia, Jr.
Gregory J. Celia, Jr., Secretary