

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**JOANN CARPER,
Complainant**

v.

**LAWRENCE COUNTY PRISON BOARD,
Respondent**

DOCKET NO. E-61268-D

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, JoAnn Carper (hereinafter "Carper"), a female, was forty-five years old in August 1991. (SF 1; CE 5.)
2. The Respondent, Lawrence County Prison Board (hereinafter "Prison Board"), is a seven-member board composed of the three county commissioners, the county sheriff, the district attorney, the president judge, and the county controller. (NT 270; SF 2.)
3. In or about August 1991, the Lawrence County Prison (hereinafter "Prison") had between 10 to 15 openings for the positions of full- and part-time corrections officers. (NT 243, 365.)
4. The Prison incarcerates both male and female prisoners, and typically the population consists of less than 10 percent female inmates. (NT 256, 381.)
5. In August 1991, John Rowley (hereinafter "Rowley") was the warden of the Prison. (NT 238.)
6. At the time, William Hall (hereinafter "Hall") was the assistant warden. (NT 339.)

* 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:

CE	Complainant's Exhibit
NT	Notes of Testimony
RE	Respondent's Exhibit
SF	Stipulations of Fact

7. The hiring process for corrections officers generally included:
 - a. the posting of job vacancies;
 - b. receipt and review of applications;
 - c. interviews of selected applicants;
 - d. submission of recommendations for hire to the Prison Board; and
 - e. Prison Board consideration of recommendations. (NT 239-240; CE 4.)
8. In or about August 1991, after a posting for corrections officer positions, approximately 200 to 300 applications were received by the Prison. (NT 277, 366.)
9. Approximately 75 percent of the applicants were male. (NT 366.)
10. Rowley reviewed the applications and significantly reduced their number for an initial 15-minute interview with himself and Hall. (NT 200, 226, 240.)
11. Rowley again reduced the number of applicants for a second interview. (NT 240.)
12. On or about August 7, 1991, Carper and others were given second interviews by Rowley and Hall. (NT 200, 222, 225, 240.)
13. Following the second interview of an applicant, Rowley and Hall reached a consensus regarding which applicants were considered to have the most potential to deal with inmates. (NT 240.)
14. Carper was found to be fully qualified for the position of corrections officer. (NT 247, 255.)
15. On August 7, 1991, Carper and two other applicants, Joseph Garasz (hereinafter "Garasz") and Sonia Richardson (hereinafter "Richardson"), were issued two uniform shirts and the Prison's "Code of Ethics." (NT 201, 205, 208, 212, 225; CE 8, 29.)

16. At the end of the county's fiscal year, financial concerns typically resulted in a hiring freeze. (NT 251.)
17. Coincidental to the interviews on August 7, 1991, a county-wide hiring freeze was implemented. (NT 271-272.)
18. Perceiving the personnel shortage at the Prison as creating a dangerous situation, Rowley appealed to the Prison Board to be permitted to hire corrections officers. (NT 243, 252, 273, 365.)
19. Corrections officers were working mandatory, multiple double shifts, and it was becoming a problem to retain staff. (NT 252, 365.)
20. The supervisor of the Prison's work release program had left. (NT 252, 253, 370.)
21. The Prison Board partially lifted the hiring freeze and approved the hiring of two corrections officers. (NT 264, 265.)
22. Rowley recommended the top two preferred applicants be hired: Gargas and Richardson. (NT 273-274.)
23. Carper's name was not submitted to the Prison Board in August 1991. (NT 368.)
24. Rowley recommended Gargas for hire in anticipation of assigning him to replace the supervisor of the work release program. (NT 253, 370.)
25. The Prison Board voted to hire both Gargas and Richardson. (NT 264, 265, 370.)
26. Richardson was hired as a part-time corrections officer. (NT 370.)
27. When hired, Richardson was twenty-one years old. (NT 385-386; CE 18.)
28. When hired, Gargas was twenty-two years old. (CE 9.)

29. As of January 1, 1992, a majority of the Prison Board was new. (NT 280.)
30. The three county commissioners and the county controller were new. (NT 249-280.)
31. The following individuals composed the Prison Board in January 1992:
- a. County Commissioner Charles H. Adamo (hereinafter "Commissioner Adamo");
 - b. County Commissioner Paul L. Tanner (hereinafter "Commissioner Tanner");
 - c. County Commissioner Vern L. Eppinger (hereinafter "Commissioner Eppinger");
 - d. President Judge Glen McCracken (hereinafter "Judge McCracken");
 - e. County Sheriff Robert Clark (hereinafter "Sheriff Clark");
 - f. District Attorney William Panella (hereinafter "Panella"); and
 - g. County Controller Richard N. Cini (hereinafter "Cini"). (CE 6, 18, 19, 20, 21, 22, 23, 24.)
32. In January 1992, the new Prison Board lifted the hiring freeze and instructed Rowley to submit applications for corrections officers for their consideration. (NT 261, 262, 371.)
33. A second posting seen by Carper prompted Carper to call the Prison. (NT 213.)
34. Carper spoke to Hall who instructed Carper that she had to be reinterviewed. (NT 213.)
35. Carper and others who had previously been interviewed in August 1991 were reinterviewed by Rowley and Hall. (NT 213, 214, 369.)

36. Rowley apologized to those who had to go through interviews again. (NT 235, 244.)

37. Rowley reinterviewed applicants to refresh his memory about applicants and to verify and update their information. (NT 261, 372.)

38. Between February 5, 1992 and February 11, 1992, Rowley submitted applicant packets with his recommendation for new-hires by the Prison Board regarding the following:

- a. February 5: Edward Daley, full-time;
- b. February 10: Thomas A. Younger, full-time;
- c. February 11: Carper, part-time;
- d. February 11: Corey Herbert, part-time;
- e. February 11: Steven Breitenstein, part-time;
- f. February 11: Jay Fish, part-time; and
- g. February 11: Andrew Hallowich, part-time. (CE 6, 19, 20, 21, 22, 23, 24).

39. The Prison Board approved and hired all of Rowley's recommendations for new-hire applicants except Carper. (CE 6, 19, 20, 21, 22, 23, 24.)

40. To be hired, a recommended applicant had to receive at least four "yes" votes by members of the Prison Board. (NT 242, 245, 372.)

41. Prison Board members could vote "yes", "no", or abstain from voting. (NT 242.)

42. Only three Prison Board members voted on Carper's application: Judge McCracken voted "yes"; Panella and Clark voted "no". (CE 6.)

43. The remaining four Prison Board members abstained from voting on Carper's application. (CE 6.)
44. Commissioner Adamo voted "yes" on the six male recommendations and abstained from voting on Carper's. (CE 6, 19-24.)
45. Cini voted "yes" on three of the six males recommended, and abstained on Carper and three males. (CE 6, 19-24.)
46. Panella voted "yes" on five of the six males recommended and voted "no" on one male and on Carper. (CE 6, 19-24.)
47. Sheriff Clark voted "yes" on the six males and "no" on Carper. (CE 6, 19-24.)
48. The ages of the six males hired in February 1992 were as follows:
 - a. Herbert: twenty-four years old;
 - b. Hallowich: twenty-seven years old;
 - c. Fish: twenty-three years old;
 - d. Breitenstein: twenty-four years old;
 - e. Daley: thirty-five years old; and
 - f. Younger: twenty-five years old. (CE 23; RE 4.)
49. Carper had completed Act 120 training and had worked as a police officer in the Borough of New Wilmington, Pennsylvania, from February 1980 through October 1986. (NT 199, 200, 215-216; CE 5.)
50. Carper had applied twice to become a police officer in New Wilmington. (NT 214.)
51. After her second application, Carper filed a sex-based discrimination claim which was settled by Carper's instatement as a police officer in New Wilmington in February 1980. (NT 215.)

52. At the time of Carper's instatement into the New Wilmington police department, Commissioner Adamo was a Pennsylvania State Police officer. (NT 136.)
53. As a state police officer, Commissioner Adamo fingerprinted Carper as part of a background check following Carper's hire at New Wilmington. (NT 136.)
54. At that time, Commissioner Adamo stated to Carper that she should have gone about getting hired another way. (NT 136.)
55. After not being called in February 1992, Carper had an occasion to speak with Commissioner Adamo during a chance encounter. (NT 212.)
56. Commissioner Adamo told Carper there was a hiring freeze, and just to be patient, it would be straightened out. (NT 213, 228-229, 230.)
57. In a statement forwarded to the PHRC on April 29, 1993, Commissioner Adamo indicated he did not vote on Carper's application "because [he was] a former state trooper, and applicant was a former township police officer." (CE 31.)
58. During an interview with a PHRC human relations representative (hereinafter "HRR") on July 29, 1993, Panella, who voted "no" on Carper, indicated that he did not know Carper, that he did not like the process being used, so that he often voted "no", but sometimes did vote "yes", and that he had not made any comparisons of the qualifications of those Rowley had recommended for hire. (NT 314.)
59. Panella also told the PHRC investigator, "Find out what happened in New Wilmington and then you'll have some idea of why the 'no' vote," and, "Why did she leave New Wilmington, that may be the reason." (NT 314, 319.)
60. In a statement forwarded to the PHRC on April 29, 1993, Panella indicated: "No specific recollection of the applicant. One of two explanation, was not satisfied

with qualifications or recommendations of applicant, or may have voted no because he and other board members were not satisfied with the system of distributing the applications on recommendations of the warden." (CE 31.)

61. Carper testified at her deposition that in May of 1994, while accompanying a female friend to Panella's office regarding Panella's representation of Carper's friend, Panella looked Carper in the face and said, "I want you to know, this is a man's world and things do not change." (RE 1.)

62. During an interview with a PHRC HRR on July 29, 1993, Sheriff Clark, who voted "no" on Carper, indicated that two New Wilmington police officers had told him "They had problems with [Carper] there." (NT 314; CE 31.)

63. Sheriff Clark also indicated that he had made no comparisons of the qualifications of the applicants recommended by Rowley. (NT 314.)

64. During an interview with a PHRC HRR on July 29, 1993, Cini, who did not vote on Carper's application, indicated that, "[Carper's] application didn't contain anything that [he] could make a decision on." (NT 315.)

65. When the Respondent submitted statements to the PHRC on April 29, 1993, Cini was listed as "Unavailable for statement." (CE 31.)

66. Neither Commissioner Eppinger nor Commissioner Tanner voted for any applicants in February 1992 because they had disagreements with the hiring process. (NT 250, 251, 315.)

67. Corrections officers are paid pursuant to a pay scale set by a collective bargaining agreement between Lawrence County and Laborers' District Council of Western Pennsylvania, Local Union 964. (CE 1, 2.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Carper is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. The Prison Board is an employer within the meaning of the PHRA.
5. Carper has met her initial burden of establishing a *prima facie* case of age discrimination by proving that:
 - a. she is a member of a protected class;
 - b. she applied for an open position for which she was qualified;
 - c. she was rejected; and
 - d. the position was awarded to an applicant with either equal or less qualifications than Carper's and who was younger than Carper.
6. The Prison Board articulated legitimate nondiscriminatory reasons for not hiring Carper in August, 1991.
7. Carper has not shown the Prison Board's reasons to be pretextual.
8. Carper has met her initial burden of establishing a *prima facie* case of sex discrimination in February, 1992, by proving that:
 - a. she belongs to a protected class;
 - b. she applied for a position for which she was qualified;
 - c. she was rejected; and

- d. the position was awarded to an applicant with either equal or less qualification than Carper's, and who is a male.
9. Carper has met her initial burden of establishing a *prima facie* case of retaliation in February, 1992, by proving that:
 - a. she filed a prior discrimination claim;
 - b. a member of the Prison Board knew of her claim;
 - c. subsequent to participation in the protected activity of filing a claim, she was denied a position; and
 - d. a retaliatory motive played a part in the denial of a position.
10. The Prison Board articulated several legitimate, nondiscriminatory reasons for refusing to hire Carper.
11. Carper has proven that a sufficient number of reasons offered by the Prison Board are Pretextual.
12. The PHRC has broad discretion in fashioning a remedy.
13. Carper is entitled to lost wages, plus six percent interest.

OPINION

Initially, this case arose on a complaint filed by JoAnn Carper (hereinafter "Carper") against the Lawrence County Prison Board (hereinafter "Prison Board") which alleged sex-based discriminatory refusals to hire/instate the Complainant as a corrections officer trainee. The first alleged refusal was in August 1991, and the second alleged refusal to hire occurred on February 25, 1992.

On or about December 13, 1993, Carper amended her complaint to add an allegation that she was not hired/institated in retaliation for having previously filed a claim of sexual harassment and discrimination. The age-based allegation arises from an Equal Employment Opportunity Commission (hereinafter "EEOC") charge filed on June 21, 1992, which was transmitted to the Pennsylvania Human Relations Commission (hereinafter "PHRC") by form 212 dated June 25, 1992, and received by the PHRC on June 29, 1992. The age- and sex-based allegations are claims under Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1995, PL 744, as amended, 43 PS §§951, *et seq.* (hereinafter "PHRA"). The alleged retaliation is a claim under Section 5(d) of the PHRA.

PHRC staff initially conducted an investigation and found probable cause to credit the allegations of sex-based disparate treatment and retaliation. The PHRC investigation of the age-based allegation and finding of probable cause occurred subsequently. On all of the allegations, the PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. These efforts were unsuccessful and eventually all of the allegations were approved for a public hearing.

The public hearing began on February 7, 1996, and continued through August 15, 1996. The public hearing was held in New Castle, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. The post-hearing brief on behalf of the complaint was received on October 2, 1996, and the Respondent's post-hearing brief was received on October 4, 1996.

Turning to the general issue arising from the substance of Carper's allegations, we note that the ultimate question for resolution here is whether the Prison Board's rejection of Carper to be a corrections officer violated the PHRA. Section 5(a) of the PHRA states in pertinent part:

It shall be an unlawful discriminatory practice. . . [f]or any employer because of the. . . age, sex. . . of any individual. . . to refuse to hire or employ. . . such individual. . . or to otherwise discriminate against such individual. . . with respect to. . . hire. . . if the individual. . . is the best able and most competent to perform the services required.

Section 5(d) states in pertinent part:

It shall be an unlawful discriminatory practice. . . [f]or any. . . employer to discriminate in any manner against any individual because such individual has. . . made a charge. . . under this act.

In this disparate treatment case, Carper alleges that the Prison Board treated her less favorably than others because of her sex, female, because of her age, and in retaliation for having filed a previous complaint. To prevail, Carper is required to prove that the Prison Board had a discriminatory intent or motive in failing to hire her. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently 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 n.8 (1981). Carper must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. *Id.* at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id.* It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In McDonnell Douglas, the U.S. 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 from persons of complainant's qualifications.

Id. at 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations

of each case. McDonnell Douglas, 411 U.S. at 802, n.13. 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 FEP 1018 (6th Cir. 1987).

Here, we must adapt the McDonnell Douglas test several times because this case involves three distinct allegations: (1) an alleged sex-based refusal to hire; (2) an alleged age-based refusal to hire; and (3) alleged retaliation because Carper had filed a prior complaint. To establish a *prima facie* case of either a sex-based refusal to hire, or an age-based refusal to hire, Carper must show:

1. that she is a member of a protected class;
2. that she applied for and was qualified for a position for which the Prison Board was seeking applicants;
3. that, despite her qualifications, Carper was denied the position; and
4. that the position was awarded to an applicant with either equal or less qualifications than Carper's, and who is either a different gender than Carper's, or younger than Carper.

PHRC v. Johnstown Redevelopment Authority, 527 Pa. 71 588 A.2d 497 (1991).

To establish a *prima facie* case of a retaliatory refusal to hire, Carper must show:

1. that she filed a prior claim of discrimination;
2. that a member of the Prison Board knew of the claim;

3. that subsequent to participation in protected activity, she was denied a position; and
4. that a retaliatory motive played a part in the denial of the position.

Wholey v. PHRC, 146 Pa. Commonwealth Ct. 702, 606 A.2d 928 (1992). See, also, Goodwin v. City of Pittsburgh, 21 FEP 1758 (WD Pa. 1979); and Brown v. Biglin, 22 FEP 228 (ED Pa. 1978).

Once Carper establishes a *prima facie* case, the burden shifts to the Prison Board to "articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 US at 802. The Prison Board must rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 US at 254, which must be "clear and reasonably specific," *Id.* at 285, and "legally sufficient to justify a judgment" for the Prison Board. *Id.* at 255. However, the Prison Board does not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 US 24, 25, 18 FEP 520 (1982).

If the Prison Board carries this burden of production, Carper must then satisfy a burden of persuasion and show that the legitimate reasons offered by the Prison Board were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 US at 804. This burden now merges with the burden of persuading us that she has been the victim of intentional discrimination. Burdine, 450 US at 256. The ultimate burden of persuading the trier of fact that the Prison Board intentionally discriminated against Carper remains at all times with Carper. *Id.* at 253.

During the public hearing, Carper was clear that she perceived that she had twice been discriminated against: Once in August 1991, and once in February

1992. Carper indicated that the alleged discrimination in August 1991 was age-based, while the February 1992 refusal to hire was sex-based. Looking to Carper's December 13, 1993 amended complaint, the alleged retaliation component appears to be confined to the February 1992 refusal to hire.

Even if Carper may have intended her retaliation allegation to have been directed at the circumstances surrounding the August 1991 refusal to hire, it is clear that Carper is unable to meet a critical element of the requisite *prima facie showing*. Since Carper's name was not recommended to the Prison Board in August 1991, we look at the hiring process up to the point of a recommendation. Here, there is undisputed testimony that neither Rowley nor Hall ever knew that Carper had filed a discrimination claim against her prior employer, the New Wilmington police department. Thus, Carper is unable to establish a *prima facie* case of retaliation with regard to the August 1991 denial of a corrections officer position.

We thus turn to Carper's age-based claim of a denied opportunity in August 1991, and find that Carper establishes a *prima facie* case. Clearly, Carper was within the protected age group, as she was forty-four years of age in August 1991. She applied for the position of corrections officer and was found qualified by Warden Rowley. Some question has been raised by the Prison Board regarding whether there were openings, however, it is clear that at least two individuals were hired; Gargasz and Richardson. Clearly, Carper was denied a position and the evidence establishes that she was at least as qualified as both Gargasz and Richardson. Furthermore, at the time they were hired, both Gargasz and Richardson were 22 years of age. Accordingly, Carper has succeeded in making out a *prima facie* case of an age-based refusal to hire in August, 1991.

In response, the Prison Board successfully articulated a legitimate nondiscriminatory reason for Carper not being hired. Generally, Rowley testified credibly that he had to nearly beg the Prison Board to partially lift a hiring freeze which would have otherwise prevented him from recommending to the Prison Board anyone for hire. In response to Rowley's pleadings, the Prison Board authorized two positions.

Rowley had already issued uniform shirts and given prison Codes of Conduct to Carper, Richardson, and Gargas. But the Prison Board had authorized only two to be hired. Rowley stated clearly that he recommended Richardson and Gargas because they were the top two applicants. It appears that Carper was next in line.

When Rowley's assertion that Richardson and Gargas were the top two applicants is weighed along with a general statistical showing that as of November, 1992, 12 of the 18 female employees at the prison were over 40, and 21 of all of the 51 employees were over 40, it is clear that Rowley did not allow age to be a factor in his selection for hiring recommendations. (N.T. 383-385) Quite the contrary, when the record is considered in the entirety, Rowley is found to be conscientious regarding principles of affirmative action.

Accordingly, the Prison Board successfully articulated a legitimate reason for not hiring Carper in August, 1991. Furthermore, Carper has not shown the articulated reason to be a pretext for unlawful discrimination.

We thus turn our attention to Carper's experience in February, 1992. We begin with the question of whether Carper has established a *prima facie* case with respect to either her sex-based claim, or her retaliation claim, or both. Regarding Carper's sex-based claim, Carper is a female and is thus a member of a protected

class. There is no question that Carper applied for an open position for which Carper was qualified. There is also no dispute that despite being qualified, Carper was denied the position of Corrections Officer.

The final element of a *prima facie* showing consists of two parts: that Carper had at least equal qualifications to those selected, and that those selected were males. Clearly, the six new hires between February 5, 1992, and February 11, 1992, were males. This leaves the issue of whether Carper was at least as qualified as any or all of the six males hired as Correction Officers.

The selection process utilized by the Prison Board had two distinct components: (1) applicant interviews and recommendations for hire by Rowley; and (2) Prison Board consideration of Rowley's recommendations. Here, Carper's superior qualifications are evident in the fact that in August, 1991, Carper was selected by Rowley as one of three applicants to whom to issue uniforms out of an applicant pool of between 200-300 applicants. Although not hired in August, 1991, it is apparent that Rowley had considered Carper the next in line to be recommended had Rowley been permitted to hire more than two Correction Officers at that time.

When the hiring freeze was lifted in January, 1992, the evidence shows that many of those who had been interviewed in August, 1991, were reinterviewed in January/February, 1992. Carper was among those reinterviewed. Out of 200-300 applicants, it is clear that Rowley found Carper's qualifications superior to all but two others in August, 1991. Many of these same persons, over which Rowley found Carper superior, were in the applicant pool again in 1992. Again, Rowley selected Carper to be recommended for a Correction Officer position. Under these

circumstances, Carper has sufficiently shown that she was at least equally qualified as the six males selected in February, 1992.

Accordingly, Carper has successfully established a *prima facie* case of sex discrimination. With respect to her retaliation claim, Carper offered evidence showing that she had filed a sex discrimination claim in 1980 against the Borough of New Wilmington police department. Further, Carper presented evidence from which an inference can be drawn that at least one and perhaps as many as three members of the Prison Board knew of Carper's previous claim.

At the time of Carper's case settlement generated instatement onto the New Wilmington police force, Commissioner Adamo, then state trooper Adamo, partially processed Carper. The record reveals un rebutted testimony that at the time, state trooper Adamo stated to Carper that she should have gone about getting hired another way.

A second Prison Board member, Panella, when asked by a PHRC investigator why Carper was not hired indicated, "find out what happened in New Wilmington and then you'll have some idea why the no vote." Panella also added, "why did she leave New Wilmington, that may be the reason." Without more, an inference can be drawn that Panella may have been aware of Carper's prior claim.

The third Prison Board member who may have known of Carper's prior claim is Sheriff Clark. Sheriff Clark indicated to a PHRC investigator that two New Wilmington police officers had told him "they had problems with [Carper] there.

At the very least, Carper has established that Commissioner Adamo knew of Carper's prior sex discrimination claim. This meets the second prong of the requisite *prima facie* showing.

Clearly, the third element of the *prima facie* requirement is met. Carper was denied a position as a Correction Officer after she participated in protected activity. Establishment of the fourth element must of necessity be by inferences drawn from other evidence. Of course, the best source of evidence of a Prison Board member's motivation is that member themselves. However, at the public hearing, no Prison Board member testified. What Carper must rely upon here is evidence which also is applicable to her responsibility to show pretext if the Prison Board can articulate legitimate nondiscriminatory reasons for their refusal to hire Carper.

The first major source of other evidence which allows Carper to create an inference of discrimination is the manner in which persons were chosen for employment by the Prison Board. Not once, but twice, Carper was found by the consensus of Rowley and Hall to be fully competent in the skills necessary to the successful performance of the position of Correction Officer. Rowley and Hall assessed Carper and made the determination to recommend that she be hired. That assessment was made with the essential elements of the job of Corrections Officer in mind. Hall had even spoken with the New Wilmington police Chief to verify Carper's work record. No reference to problems was made during this record verification.

Conversely, Prison Board members appeared to have no guidelines at all regarding their review of recommended applicants. From the record in this matter, the criteria used by the Prison Board, if any, is elusive. Their selection device could be described as utterly subjective, calling for the total discretionary judgment of Prison Board members.

Here, the record supports that neither Panella nor Sheriff Clark ever compared Carper's qualifications with other applicants. Instead, Sheriff Clark is noted as asserting, in the most vague fashion, that two unidentified New Wilmington police officers told him they had problems with Carper. Panella also described in vague terms some aspect of Carper's earlier employment with the New Wilmington police department as the basis for his no vote.

Such vague assertions fall far short of indicating that Carper was given a fair consideration by either Panella or Sheriff Clark. By basing a selection decision on second hand information which lacks clarity and not comparing Carper's qualifications, an inference of discrimination arises.

Similarly, Cini's assertion that "[Carper's] application didn't contain anything that he could make a decision on", points to a poorly conceived selection process. The apparent deficient process which lacked safeguards also contributes to the conclusion that Carper has sufficiently raised an inference of discrimination in the form of retaliation.

Finally, we review the circumstances surrounding Commissioner Adamo's decision to abstain from voting on Carper's application. We begin with Commissioner Adamo's apparent mindset which was revealed when trooper Adamo expressed himself to Carper as he fingerprinted her for a background check at the time of Carper's instatement as a New Wilmington police officer. Then trooper Adamo told Carper that she should have gone about getting the job in another way.

As a Commissioner and Prison Board member in 1992, when Commissioner Adamo received Carper's recommendation for hire, he abstained from voting. Commissioner Adamo submits that he did so because he was a former state trooper

and Carper had been a New Wilmington police officer. This asserted rationale is inexplicable especially since Commissioner Adamo later told Carper, in effect, that a hiring freeze was what was holding up Carper's selection and to just be patient. This scenario also lends weight to the creation of an inference of discrimination.

Accordingly, Carper has sufficiently established a *prima facie* case for both a sex-based refusal to hire and a retaliatory refusal to hire. We thus turn to the Prison Board's articulated reasons why Carper was not selected.

Before recounting the Prison Board's articulated reasons for not hiring Carper, a fundamental observation is in order. Here, the Prison Board members were all men who subjectively evaluated recommended applicants. Of course, Carper is a female. In such a situation where no selector of applicants is a member of an applicant's protected class, the legitimacy and nondiscriminatory basis of articulated reasons for the decision may be subject to particularly close scrutiny. See, Page v. Bolger, 25 FEP 593 (5th Cir. 1981).

In this case, we find seven Prison Board members, six of whom are closely scrutinized because only Judge McCracken voted for Carper's hire. The articulated reasons of four of the remaining six are each different and will be discussed separately. The remaining two Prison Board members articulated reasons are the same.

Both Commissioner Tanner and Commissioner Eppinger articulate that they were newly appointed members of the Prison Board and disagreed with the selection process. Rowley and Hall supported this assertion by indicating that it was their understanding that new Commissioners had refused to vote for anyone.

Commissioner Adamo's articulated rationale for failing to vote on Carper's recommendation is that he was a former state trooper and Carper had been a police officer in New Wilmington. Cini simply articulated that he had no reason for not voting on Carper's application other than his assertion that Carper's application did not contain anything that he could make a decision on. Panella and Sheriff Clark's articulated reasons for voting against Carper both make a vague reference to problems Carper had at the New Wilmington police department.

Ostensibly, Commissioner Adamo's statement sufficiently articulates a legitimate nondiscriminatory reason why he abstained from voting on Carper's application. Commissioners Tanner and Eppinger's stated reason sufficiently articulates a legitimate nondiscriminatory rationale. However, neither Panella, nor Sheriff Clark, nor Cini's articulated reasons amount to more than general statements which are insufficient to meet the production burden of articulating a legitimate nondiscriminatory reason for not hiring Carper. See, International Brotherhood of Teamsters v. U. S., 431 U.S. 324, at 342 (1977). To rebut a presumption created by the establishment of a *prima facie* case, a Respondent is obliged to "clearly set forth, through the introduction of admissible evidence, the reasons for [a Complainant's] rejection." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, at 255 (1981). Neither Panella, nor Sheriff Clark, nor Cini have clearly articulated reasons for Carper's rejection.

Assuming *arguendo* that the reasons articulated by Panella, Sheriff Clark, and Cini do articulate legitimate nondiscriminatory reasons, Carper has shown their vague assertions to be pretextual. Additionally, Carper has shown Commissioner Adamo's articulated reason to be pretextual. With regard to the reasons articulated by

Commissioners Tanner and Eppinger, Carper has not shown that their stated reasons were pretextual.

Although the brief on behalf of the complaint asserts that Tanner voted for some of the men hired in February, 1992, the evidence shows that neither Tanner nor Eppinger voted on either Carper or any of the six males hired in February, 1992. Having voted for no one, their reasons have not been shown to be a pretext.

Regarding the remaining four Prison Board members, Carper can succeed in showing pretext either by direct persuasion that a discriminatory reason more likely motivated a decision or indirectly by showing that a proffered explanation is unworthy of credence. Burdine, 450 U.S. at 256. On this point, the four remaining Prison Board member motivations are discerned through a closely scrutinized inquiry.

Beginning with Commissioner Adamo's stated reason for abstaining, pretext is shown by Commissioner Adamo's later communication with Carper. Subsequent to Carper's rejection, Commissioner Adamo inaccurately instructed Carper that a hiring freeze was delaying her hire. In fact, Rowley testified that the new Prison Board told Rowley to make recommendations because they were lifting the hiring freeze of 1991. It is worth mention that Commissioner Adamo did not tell Carper that he had abstained from voting on her application because they had both been police officers. Instead, Commissioner Adamo constructed a story which was fundamentally inaccurate. This is considered as an attempt to mask his acting for an impermissible motivation behind a web of an afterthefact rationalization. As such, it is deemed pretextual.

Panella's articulated reason is shown to be pretextual by direct persuasion that a discriminatory reason more likely motivated his no vote. Two distinct factors lead

to this conclusion. First, in an April 29, 1993, statement to the PHRC, the reason stated for Panella's no vote is that Panella had no specific recollection of Carper and two explanations for the no vote are asserted: Panella was unsatisfied with Carper's qualifications or with the hiring process.

For Panella to assert that he was unsatisfied with Carper's qualifications in this statement and three months later tell a PHRC investigator that he did not even make a comparison of Carper's qualifications is telling. What is clear from this is that Panella totally excluded Carper from consideration. See, Helbling v. Unclaimed Salvage & Freight Co. Inc., 489 F.Supp. 956 (E.D. Pa. 1980).

The reason for not considering Carper is found in the second factor which shows Panella's motivation was discriminatory. At Carper's deposition, which was offered into evidence, Carper testified without rebuttal that Panella, in May, 1994, told Carper, "I want you to know, this is a man's world and things do not change." This uncontradicted testimony clearly allows the conclusion that Panella's motivations for voting no on Carper's application were discriminatory. In fact, the evidence establishes by a preponderance that Panella utilized an unlawful criterion and had determined not to hire a woman and therefore paid little or no attention to Carper's qualifications. See, Garza v. Brownsville School dist., 31 FEP 396 (S.D. Tex. 1981).

Like Panella, Sheriff Clark had also indicated that he had made no comparison of Carper's qualifications. Like Panella, this disregard for Carper's experience and qualifications is sufficiently persuasive and shows that a discriminatory reason more likely motivated Sheriff Clark's no vote.

Cini's assertion that Carper's application did not contain anything that he could make a decision on is simply unworthy of credence. Again, a consensus of both Rowley and Hall had found Carper totally qualified. Further, Carper's application contained information which revealed that Carper had been a police officer for over six years. To say that Carper's application did not contain anything upon which a decision could be made is simply unbelievable.

While general statistics offered by the Prison Board appear to be neutral on their face, a snapshot picture taken of the Prison Board's actions in February reveals a disparity which could be either sex-based discrimination or retaliation or a combination of both. Here, individual actions taken by four out of seven Prison Board members have been proven by a preponderance of the evidence to have been discriminatory. Accordingly, consideration of damages is appropriate.

Section 9(f)(1) of the PHRA generally outlines the remedies the PHRC is authorized to order. This section provides in pertinent part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to... hiring... with or without back pay...as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. S.Ct. 1973).

The first aspect we must consider regarding making Carper whole is the issue of the extent of financial losses suffered. When complainants prove an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co. Inc., 684 F.2d 1355, 29 FEP 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the complainant] would probably have earned..." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975), aff'd. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., Slip Op. at 41-42 (3rd Cir., Mar. 29, 1988).

In this case Carper submits that she should be completely reimbursed for lost wages based upon established wage rates through August 1996, adjusted by subtracting her interim earnings. Carper has not sought front pay in this instance.

Carper asserts that she made reasonable attempts at mitigation. Courts consistently hold that it is a respondent's burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. See Jackson v. Wakulla Springs & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Maine Human Rights Comm. v City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EPD 136,968 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort, and

it is a respondent, not a complainant, who has the burden of establishing that the complainant failed to make an honest, good faith effort to secure employment. Id. at 46,704.

The Prison Board made no effort to argue that Carper failed to mitigate her damages. Regarding whether Carper mitigated her damages, the evidence shows that for a short period following Carper's rejection, Carper worked several jobs where she earned wages of \$2,901.06. Carper then started a business which suffered losses.

Numerous federal cases have held that part-time work, even in another field, satisfies the requirement to mitigate. See, e.g., Donnelly v. Yellow Freight System, Inc., 50 EPD §38,972 (7th Cir. 1989); Wheeler v. Snyder Buick, supra; Sprogis v. United Airlines, Inc., 10 EPD §10,307 (7th Cir. 1975).

We now turn to the question of the amount of Carper's financial loss. On the question of lost wages, the first occasion of Carper's discriminatory denial of a correction officer position occurred on or about February 11, 1992. On that date three males were hired as part-time correction officers: Hallowich, Breitenstein, and Fish. Fish and Breitenstein were subsequently hired as full-time corrections officers on April 8, 1992, and Hallowich became full-time on June 18, 1992. The evidence shows that a part-time officer could work anywhere between 0 and 32 hours per week.

Since the prison was in such demand for correction officers at the time, the lost wages between February 11, 1992, and April 8, 1992, for a part-time correction officer will be calculated based upon a maximum 32 hour work week. This is calculated as follows:

February 11, 1992 - April 8, 1992	
32 hrs per week @ \$7.00 per hr =	\$1,792.00
\$224 per week x 8 weeks =	

As of April 8, 1992, the calculations will reflect a full-time correction officer's wages. These calculations are as follows:

April 8, 1992 - December 31, 1992	
38 hrs per week @ \$7.00 per hr =	\$10,640.00
46 wks @ \$280.00 =	
January 1, 1993 - February 11, 1993	
40 hrs per week @ \$7.50 per hr =	\$1,800.00
6 wks @ \$300.00 =	
February 11, 1993 - December 31, 1993	
40 hrs per week @ \$8.50 per hr =	\$15,640.00
46 wks @ \$340.00 =	
January 1, 1994 - February 11, 1994	
40 hrs per week @ \$8.76 per hr =	\$2,100.00
6 weeks @ \$350.00 =	
February 11, 1994 - December 31, 1994	
40 hrs per week @ \$10.30 per hr =	\$18,952.00
46 wks @ \$412.00 =	
January 1, 1995 - February 11, 1995	
40 hrs per week @ \$10.61 per hr =	\$2,546.40
6 weeks @ \$424.40 =	
February 11, 1995 - December 31, 1995	
40 hrs per week @ \$11.40 per hr =	\$20,976.00
46 wks @ \$456.00 =	
January 1, 1996 - February 11, 1996	
40 hrs per week @ \$11.74 per hr =	\$2,820.00
6 weeks @ \$470.00 =	
February 11, 1996 - January 27, 1997	
40 hrs per week @ \$12.30 per hr =	\$24,600.00
50 wks @ \$492.00 =	
Total	\$101,866.40

When Carper's interim wages of \$2,901.06 are deducted, the total approximated wages lost and amount awarded in back pay is calculated as \$98,965.34.

Finally, the PHRC is authorized to award interest on the back pay award at the rate of six percent per annum. Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975).

Accordingly, relief is ordered as described with specificity in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOANN CARPER,
Complainant

v.

LAWRENCE COUNTY PRISON BOARD,
Respondent

DOCKET NO. E-61268-D

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Carper has proven discrimination in violation of Sections 5(a) and 5(d) of the PHRA. 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.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN REALTIONS COMMISSION

JOANN CARPER,
Complainant

v.

LAWRENCE COUNTY PRISON BOARD,
Respondent

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DOCKET NO. E-61268-D

FINAL ORDER

AND NOW, this 27th day of January, 1997, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

O R D E R S

1. That the Prison Board shall cease and desist from both sex-based discrimination and retaliation with regard to hiring.
2. That the Prison Board shall pay to Carper within 30 days of the effective date of this Order the lump sum of \$98,965.34, which amount represents

back pay lost for the period between February 11, 1992 and the date of the adjudication of this matter.

3. That the Prison Board shall pay additional interest of six percent per annum on the back pay award, calculated from February 11, 1992 until payment is made.

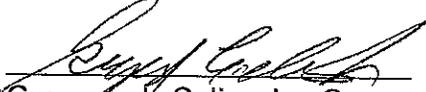
4. That the Prison Board shall offer Carper instatement into the next available position of Correction Officer.

5. That within 30 days of the effective date of this Order, the Prison Board shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Katherine Fein, Esquire, in the Commission's Pittsburgh regional office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Robert Johnson Smith, Chairperson

ATTEST:


Gregory J. Celia, Jr., Secretary