

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**Renee Johnson
and
Jill Toomer,
Complainants**

v.

**City of Philadelphia, Philadelphia
Prison System,
Respondent**

PHRC CASE NO. 200207251

PHRC CASE NO. 200208664

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

FINAL ORDER

- Commissioner, 4 Deputy Commissioners and a representative from the Respondent's Human Resource Department (N.T. 105; R.E. 1).
19. Under the Rule of Two, the Promotional Board would review the work histories of the two available employees being compared from the eligibility list, and who had been certified to the department (R.E. 1).
 20. Generally, while a candidate's entire file was available to them, the Respondent's Promotional Board would review a summary of an employee's records that listed information about a candidate for a period of five years prior to an application for promotion (N.T. 110, 116; R.E. 1 at 41).
 21. Until December 31, 2002, Commissioner Costello, a Caucasian male, had the ultimate authority to promote a candidate from the 2002 Promotional Eligibility List (N.T. 32, 68, 106).
 22. Beginning in 2003, Commissioner Leon King had the authority to promote a candidate (N.T. 32, 68, 93).
 23. Costello confirmed that, prior to promotion decisions, he would look at an employee's entire employment record (N.T. 175).
 24. The Respondent does not have a written policy regarding lateness (R.E. 1)
 25. With respect to consideration of who to promote to a supervisory position, Costello identified a candidate's attendance record and disciplinary record as the number one and two factors in determining if someone is eligible for a promotion (N.T. 108, 111, 174)

40. On about October 22, 2002, Johnson was notified by Costello that she was not selected because she had been late 42 times in the prior three year period between 1999 and 2002 (N.T. 40-41).
41. Costello further stated that one of the requirements for the position of Correctional Lieutenant was to serve as a role model for those individuals under a Lieutenant's supervision (N.T. 40, 41; C.E. 14).
42. Utilizing the Rule of Two, Toomer was first compared with Nancy Gianetta, a white female (N.T. 73, 131-132; C.E. 10).
43. Toomer's Personal Profile summarizing her service history, performance reports, attendance records and disciplinary/commendation record portrayed Toomer's performance report as satisfactory between 1994 and 2002, with the exception of an unsatisfactory in attendance in 1997 (C.E. 28).
44. Between 1997 and 2002, Toomer had 90 sick days plus 16 days designated as "T", 54 occasions sick and 90 instances of being late (N.T. 60-63; C.E. 28).
45. In the five year period prior to being considered for promotion, 1998 through 2002, Toomer had 69 sick days plus 9 days designated as "T", 40 sick occasions, and 60 instances of being late (N.T. 87; C.E. 28).
46. In the five year period prior to being considered for promotion, Gianetta had 75 sick days plus 5 days FMLA, 59 occasions sick and zero lateness days (C.E. 61).

69. Two separate personal profiles were introduced regarding Darryl Watson, the individual who was the second individual to whom Toomer was compared: (1) a personal profile dated February 13, 1998, covering the period 1993-1997 for service history, performance reports, attendance records and disciplinary actions; and (2) a personal profile dated September 20, 2002, covering the period 1997-2002 for service history, performance reports and attendance (C.E. 63, 72).
70. Watson's September 20, 2002 personal profile indicated that, for the years 1997-2002, Watson had incurred 115 sick days, 52 sick occasions, and 8 instances of lateness (C.E. 72).
71. In the service history portion of Watson's September 20, 2002, personal profile, there is a notation indicating that Watson had been dismissed and later reinstated as a correctional officer (C.E. 72).
72. On November 28, 1988, Watson was dismissed from the Prison System effective November 28, 1988, after his arrest for DUI, controlled substance, drug, device cosmetic act, resisting arrest and simple assault charges, and subsequently reinstated on February 27, 1989 (C.E. 2 at #30, 63, 68).
73. Watson's February 13, 1998 personal profile indicated that for the period 1993-1997, Watson had incurred 103 total sick days, 73 sick occasions, and 26 instances of lateness (C.E. 63).

D. Other employees of similar qualifications with whom the Complainants were compared and who were not members of protected classes did receive promotions.

9. Johnson failed to established a *prima facie* case by a preponderance of the evidence.

10. Toomer established a *prima facie* case.

11. The Respondent articulated a legitimate non-discriminatory reason for failing to promote Toomer.

12. Toomer has shown that the Respondent's articulated reason is a pretext for sex based discrimination.

13. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC may issue a cease and desist order and may order such affirmative relief as in its judgment will effectuate the purposes of the PHRA.

Douglas, the United States Supreme Court held that a plaintiff may prove a *prima facie* case of discrimination in a failure-to-hire case by demonstrating:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants.

Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of a *prima facie* case will vary substantially according to the differing factual situation of each case. McDonnell Douglas, 411 U.S. at 802.

They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination: Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEB 1018 (6th Cir. 1987).

Therefore, in cases where there is an allegation of a failure to promote because of a combination of race and sex, the Complainants herein must show that:

- (1) The Complainants are members of two protected classes;
- (2) Complainants applied for and were qualified for promotion;
- (3) Complainants were denied promotions; and
- (4) that other employees with whom the Complainant's were compared had similar qualifications and who were not members of the Complainants' protected classes received promotions.

First and foremost is the evidence that shows Watson's disciplinary history. By any standard, Watson was a poor excuse for an employee that one would select to supervise others in a correctional setting. The instances of criminal charges and his reprimand for a violation of a general order clearly illustrate how much better a candidate Toomer was over Watson. Indeed, approximately one year before Watson was compared with Toomer, Watson had to be offered a year's personal leave to deal with pending criminal charges which included two counts of aggravated assault, simple assault, recklessly endangering another person and possession of an instrument of crime (C.E. 2 at 34).

Attempts to make comparisons to others who were on the 2002 Promotional Eligibility List are misplaced. In this case, the Respondent was bound by the Rule of Two which limits those to whom an individual may be compared. Here, the parties did not present sufficient information upon which a general extended evaluation of the comparison process could be made. For instance, the evidence that suggests that others on the list had records that were worse than the Complainants' records cannot be viewed in a vacuum. There would have to have been evidence showing that others not in the Complainants' combined protected classes were treated better during the selection process. Such comparative evidence was not presented. To simply present evidence suggesting that others with whom the Complainants were not compared had records that were worse than the Complainants falls short of the requisite showing.

return the Complainant to the position in which she would have been, absent the discriminatory practice. Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975). The purpose of the remedy under the Act is clearly two fold. The first purpose is to insure that the state's interest in eliminating the unlawful discriminatory practice is vindicated. The second purpose is focused on not only restoring the Complainants to their pre-injury states and make them whole but also to clearly discourage future unlawful discrimination. Williamsburg Community School District v. PA Human Relations Commission, 512 A.2d 1339 (1986)

First, the Respondent should be ordered to cease and desist from unlawfully discriminating against individuals because of their sex.

Next, Toomer should receive a back pay award and interest on the back pay award. Goetz v. Norristown Area School District, 328 A.2d 579 (1974) 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 damage. Green v. USX Corp, 46 FEP Cases 720 (3rd Cir. 1988)

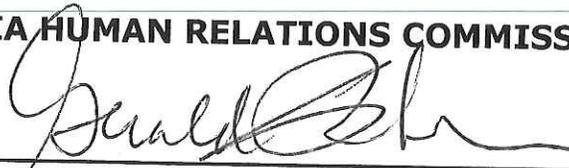
In order to properly calculate Toomer's back pay award, we must review her earnings from January 7, 2003, the date she was denied a

ORDERS

1. That the Respondent shall cease and desist from discriminating against the Complainants and other individuals because of their sex.
2. The Respondent shall pay Complainant Toomer the amount of \$31,256.08, which represents back pay as a full time Correctional Lieutenant from January 2003 through October 2006. This figure represents the difference in salary between a Correctional Lieutenant and Correctional Sergeant.
3. The Respondent shall pay Complainant Toomer interest at the rate of 6% annum from January 2003 through the date of payment.
4. That the Respondent shall provide training to its staff regarding the right of all employees to work in a non-discriminatory environment consistent with the provisions found in the Act.
5. That Johnson's case be dismissed.
6. That the Respondent shall report the means of compliance with this Final Order, in writing to Ryan Allen Hancock, Assistant Chief Counsel within thirty days of the date of this order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

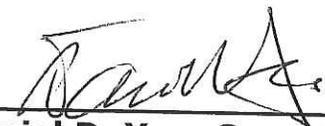
BY:



Gerald S. Robinson, Chairman

ATTEST:

By:



Daniel D. Yun, Secretary