

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

C. JOSEPH OUSEPH,
Complainant :
 :
v. : Docket No. E-8087
 :
AMERICAN CAN COMPANY,
Respondent :

HISTORY OF THE CASE

On November 12, 1974, Complainant C. Joseph Ouseph, filed a complaint with the Pennsylvania Human Relations Commission (Commission) alleging that the American Can Company, violated §5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §957 et seq. (the Act), by refusing to promote him from his position of Machine Operator to the level of a salaried/managerial employee because of his national origin/ancestry Indian. He further alleges that at least two native born Americans who were less qualified than he were promoted to managerial positions. The complaint was subsequently amended on January 27, 1976, to include the allegation that the unlawful discriminatory practice is of a continuing nature, that Respondent refuses to promote him to a white collar and/or salaried position within the Morrisville plant, and that despite making his concerns known to Respondent, other native born Americans were promoted in his stead.

An investigation into the allegations contained in the original and amended complaint was made by representatives of the Commission, and a determination was made that probable cause

existed to credit the allegation of the complaint. Thereupon, the Commission endeavored to eliminate the unlawful practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and a public hearing was convened pursuant to §9 of the Act. The Public Hearing convened on September 21, 1978, before Commissioners: Benjamin S. Lewenstein, Esquire, E. E. Smith and Alvin Echols, Jr. Esquire, William B. Churchill, Esquire served as legal advisors to the hearing panel. The Public Hearing was conducted at time(s) before two Hearing Commissioners' Counsel for the respective parties having stipulated that the hearing could be so held.

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FINDINGS OF FACT

1. The Complainant, C. Joseph Ouseph, of Asian-Indian national origin, began employment with Respondent, American Can Company on May 7, 1973. (N. T. 9)
2. The Complainant's interest in coming to work for the American Can Company was because he had heard that there were many promotional opportunities in that company. (N.T. 10)
3. The Complainant's present position with American Can Company is that of machine operator which is a factory position. (N. T. 10)
4. Complainant Ouseph was dissatisfied with his position as machine operator because it denied him the opportunity to use his education in his work. (N. T. 11)
5. The Complainant's educational background consists of a Masters Degree in Commerce from India and a Masters Degree in Industrial Relations from St. Francis College in Loretto, Pennsylvania. (N. T. 11)
6. The coordinator of employee relations, W. Raymond King, hired the Complainant as a factory worker. (N. T. 1)

7. The Complainant did not reveal his full educational qualifications when he made application to American Can (N.T. 13)

8. The Complainant submitted an application form through the personnel office on August 27, 1973, but did not identify the "type of work desired". (N.T. 14, 15)

9. The Complainant went to the personnel office at least seven (7) times to talk about his chances of being promoted or getting any other job other than that of factory worker. (N.T. 17)

10. The Complainant did not discuss his desire for another position with his supervisors or anyone other than Bascom King. (N.T. 34)

11. Andrew Connor, an American, began to work with the Respondent in June 1973 as machine operator and submitted an application for a salaried position on January 16, 1974. (N.T. 18, 58, C-5)

12. Stanley Harris, an American, was employed by Respondent company as supervisor over the Complainant beginning June 1974. (N. T. 19)

13. Prior to learning of the change employment situations of Mr. Harris and Mr. Connor, Complainant was unaware of the availability of the positions for which Mr. Harris and Mr. Connor were subsequently placed in. (N. T. 20, 21)

14. Mr. Ouseph filed a complaint against the Respondent, American Can Company, with the Pennsylvania Human Relations Commission on November 12, 1974 and amended said complaint on January 27, 1976. (N. T. 23, 25)

15. Complainant Ouseph's first complaint stated that he applied for a white collar managerial job. After being advised by the Human Relations Commission that managerial positions in the Morrisville plant included production workers, Mr. Ouseph amended his complaint accordingly. (N. T. 26)

16. Prior to working for the Respondent, American Can Company, the Complainant had worked at the G & J Manufacturing Company in Willow Grove, Pennsylvania and with the M.I. College, Kerela, India. Then he worked in the Nirmala College in Kerela, India. (N. T. 31)

17. The Complainant's most recent position prior to employment with American Can Company was as a knitter at True-Knit Industries in Croyden, Pennsylvania. (N. T. 31, ex. C-1).

18. Mr. Ouseph, referring to Exhibit C-1 circled the number identifying those prior employees which he did not wish to be contacted by the Respondent. (N. T. 32)

19. Mr. Ouseph believed that any position other than that of factory worker in the Morrisville plant was known as working for management and that such may include clerical workers or other office workers. (N. T. 37)

20. There are two (2) types of application forms for employment with American Can Company. One for hourly employees or production workers and another for salaried employees. (N. T. 42, 43)

21. In April, 1975, the Complainant met with Mr. Bowden in Greenwich, Connecticut, headquarters of American Can Company, for the purpose of ascertaining his interests in working for American Can Company including what kind of job he was looking for. (N. T. 36)

22. Said meeting was arranged by Field Investigator, for the Human Relations Commission, Mr. Gratman. (N. T. 102, 103)

23. Mr. Bowden wrote the Complainant a letter subsequent to the Greenwich meeting which the Complainant received. Said letter stated therein that it was believed that Mr. Ouseph had a communication problem and Mr. Bowden requested that he go to school and study English to improve his communication skills. Further, that it was possible to compensate Mr. Ouseph for that type of educational pursuit. (N. T. 37, 38, 39, 82, 83)

24. Mr. Ouseph did not pursue the suggestion made by Mr. Bowden in his letter of communication as set forth above and did not respond to Mr. Bowden. (N. T. 39)

25. Mr. Gratman, an investigator for the Human Relations Commission, was assigned to investigate the case of C. Joseph Ouseph v. American Can Company, at docket number E-8087, and conducted such investigation in the same and ordinary manner for which he usually conducts investigations for which he has been trained. (N. T. 55, 56)

26. The clerical, C-7, position did not require an engineering background, (N. T. 60), but did require skills relating to communications ability. (N. T. 61)

27. The position of clerical, C-7, was not required to be posted and would not be generally known within the Morrisville plant, and recommendations to fill the position would come from the foreman of the production workers. Mr. Ouseph was not considered for said clerk C-7 position. (N. T. 63)

28. Stanley Harris, an American, was hired to the Morrisville plant by the Respondent as a manufacturing trainee in June 1974. (N. T. 64)

29. There were no formal educational requirements for the manufacturing trainee position. (N. T. 67)

30. Of the thirty-nine (39) managerial employees at the American Can Company, two (2) are listed as Black Americans and two (2) as Spanish speaking. There are no Asian-Indians in salaried positions indicated. (N. T. 68)

31. No employees were allowed to bid on the position of clerk C-7. (N. T. 75, 76)

32. The qualifications for the clerk C-7 position included appearance, ability to communicate, and mechanical background. (N. T. 77)

33. Formal education was not a qualification for either of the two positions at issue which Mr. Ouseph was denied or otherwise not considered for. Formal education therefore, was not required in any of the three separate occasions where the qualifications for the two positions change. (N. T. 91, 92)

34. Mr. Raymond J. Buckley, general supervisor of employee relations of American Can Company at the Greenwich, Connecticut office, held that position for the period which has been covered by Mr. Ouseph's charge. (N. T. 106, 107)

35. At the time Mr. Connor was promoted to the clerical C-7 position at the Morrisville plant, Mr. Buckley was unaware of any interest or claim or application by Mr. Ouseph for that job or a clerical job in the Morrisville plant. (N. T. 108)

36. Mr. Ouseph did not send his application to Greenwich, Connecticut. (N. T. 78)

37. Mr. Harris was not hired by the Morrisville plant personnel office itself. (N. T. 109)

38. Mr. Connor was hired on a permanent basis in June 1971. (N. T. 111)

39. The Complainant's application for a salaried white collar position would have been the same application form filed by both Mr. Harris and Mr. Connor. (N. T. 112)

40. Salaried job vacancies within the Morrisville plant are not physically posted. According to the contract between the Respondent and the Union, United Steelworkers of America, such salaried positions are not represented by the Union and are not required therefore to be bid upon. (N. T. 113, 114, 115)

41. "Bidding" on salaried positions are made in the personnel office by reviewing applications of those persons who are considered. (N. T. 115)

42. The January 16, 1974 application of Andrew Connor indicated that he desired a clerical position, and that he began work for American Can Company from June 1971, to September 1971 and from July 1973 to an unstated date. (C-5)

43. The June 27, 1974, of Stanley Harris indicated that he desired to join the management team of a major medical manufacturing corporation. (C-7)

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Respondent :

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant, the Respondent, and the subject matter of the Complaint(s) in this action at docket number E-8087 as amended, pursuant to §9 of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.C.S. §959 (hereinafter the Act) in which the Complainant seeks for himself relief from discrimination in promotion and terms, conditions, and privileges of employment, which is made unlawful by §5(a) of the Act, 43 P.C.S. §955(a).

2. Respondent received proper notice of this complaint and proper notice and opportunity for public hearing as required by §9 of the Act, 43 P.C.S. §955.

3. Respondent is an "employer" within the meaning of §§4(b) and 5(a) of the Act 43 P.C.S §954(b) and §955(a).

4. Respondent did not consider the Complainant in making employment decisions for salaried white collar positions at its Morrisville, Pennsylvania plant because of a legitimate non-discriminatory reason - that the Respondent was unaware of Complainant's interest and specific desire for salaried white collar positions.

5. Respondent did not consider or reject the Complainant because of his qualifications for the position of clerk C-7 and/or Corporate Associate Program position because the Complainant did not make known his interests and qualifications to the Respondent through established application procedures of the Respondent.

6. The Respondent did not continue to seek applicants of Complainant's qualifications after becoming aware of Complainant's interest in the stated Clerk C-7 and/or the Corporate Associate Program positions because said positions were either filled prior to Respondent becoming aware of Complainant's interest or was filled from outside the Morrisville, Pennsylvania plant personnel office.

7. Complainant has failed to establish, by inference or otherwise, that he has suffered from disparate treatment, or that Respondent treated him differently than other employees of the company by its consideration of the Complainant for desired position within Respondent's company or that Complainant's national origin was a determining factor in violation of §5(a) of the Act, 43 P.C.S. §955(a).

8. There is no record of any discriminatory intent on the part of the Respondent company.

9. The Complainant has failed to prove by substantial evidence that the Respondent discriminated against him (Ouseph) because of his national origin in violation of §5(a), 43 P.C.S. §955(a) of the Act.

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RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, to wit, this 20th day of November,
1978, upon consideration of all the evidence presented at the
Public Hearing conducted September 21 1978, in the above-
captioned matter, and pursuant to the Findings of Fact, and
Conclusions of Law, the Hearing Commissioners recommend to the
entire Commission that an Order be entered dismissing the
complaint.

Benjamin S. Loewenstein, Esq.
Presiding Commissioner

Alvin E. Echols, Jr., Esq.
Commissioner

Everett E. Smith,
Commissioner

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Docket No. E-8087

COMMISSION'S DECISION

AND NOW, this 20th day of November, 1978,
upon consideration of the record in this case and upon considera-
tion of the Recommendation of the Hearing Commissioners, the
Pennsylvania Human Relations Commission hereby adopts the attached
History of the Case, Findings of Fact, Conclusions of Law and
Opinion and enters the attached Final Order.

Pennsylvania Human Relations
Commission

By

Joseph X. Yaffee
Joseph X. Yaffee, Esq.
Chairperson

TEST:

BY

Elizabeth M. Scott
Elizabeth M. Scott, Secretary

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O P I N I O N

The gravamen of the complaint, as amended, is that the Respondent, American Can Company (Company) has allegedly refused to promote the Complainant, C. Joseph Ouseph, who is of Asian-Indian national origin from his position of machine operator to a managerial or clerical position because of his national origin in violation of §5(a) of the Pennsylvania Human Relations Act (Act).

A complete review of the evidence demonstrates that substantial evidence has not been presented to establish that Mr. Ouseph was refused promotion because of his national origin in violation of §5(a) of the Act. In identifying an appropriate analytical framework for the resolution of this case the Commission finds very persuasive the arguments presented in Respondent's post-hearing brief and hereby adopts it in part.

There is no substantial evidence that Mr. Ouseph was treated in a discriminatory or disparate manner because of his national origin, but was not considered for the two positions

because the Respondent was not advised of his interest in these positions and therefore had no opportunity to refuse or reject Mr. Ouseph on any basis. In International Brotherhood of Teamsters v. U.S., 431 U.S. 334, 335, N.15 (1977), disparate treatment was explained as follows:

"Disparate treatment such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"

The Supreme Court in MacDonnel Douglas Corporation v. Green, 41 U.S. 792 (1977) set forth the proper method of analysis for such cases under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000 e-2(a). Said analysis was held applicable to the Pennsylvania Human Relations Act in General Electric Corp. v. Pennsylvania Human Relations Commission, Pa. , 365 A. 2d 649 (1976). The court held in MacDonnel Douglas, infra., that a prima facie case of discrimination is made out if four factors are established by the complainant. They are:

1. That the complainant belongs to a protected class.
2. That he applied and was qualified for a job which the employer was seeking applicants.
3. That despite his qualifications he was rejected, and
4. That after his rejection the position remained open and the employer continued to seek applications from persons of the complainant's qualifications.

It is the opinion of this Commission that the Complainant has not overcome this initial burden in establishing a prima facie case. Therefore, the burden of proof would shift to the employer to establish a business necessity for the discriminatory treatment. See General Electric Corporation, supra. The Complainant argues that because he expressed his dissatisfaction with his present assigned duties to Mr. Bascom King and filed an application indicating his academic credentials, that the company was somehow obligated to seek out and consider Mr. Ouseph in filling positions for which he had never applied.

There is no support for Complainant's case when we apply the prima facie analysis to the instant case. Although it has not been disputed that the Complainant is of Asian-Indian national origin and is clearly a member of a protected class of the Pennsylvania Human Relations Act, the record is completely devoid of substantial evidence that would substantiate the Complainant clearly applied for a salaried position by virtue of his filling out an application in accordance alleged instructions by Mr. Bascom King and by making constant inquiries about such jobs to Bascom King. Mr. Ouseph did not disclose his desire for another position to his supervisors or anyone else except Mr. King. Nor did he indicate his desire on his application form which specifically requested this information.

The evidence therefore fails to show any disparate treatment which it may be inferred that the Respondent's conduct was based on a discriminatory motive. The evidence does however, demonstrate that the Complainant was treated substantially similar to other Morrisville employees of the Respondent who

were not recommended or invited to apply for the positions at issue and who did not receive any special career counseling. It is decidedly clear, that if we, arguendo assume that Mr. Bascom King failed through some neglect or inadvertence to communicate Mr. Ouseph's alleged desire for managerial position to other appropriate hiring personnel, there is evidence that such negligence or inadvertence was in any way due to bias against Mr. Ouseph because of his national origin.

Although academic credentials and specific qualifications were not necessary prerequisites for either of the two positions in question, the record does indicate that the Complainant may have lacked the necessary communication abilities required for the position of Clerk, C-7. Also, the Complainant's company seniority is irrelevant since seniority was not a determinative factor in filling non-bargaining unit positions.

The Complainant has failed to establish the prima facie prerequisite that he was rejected by the Respondent despite his qualifications. On the contrary, the evidence does support that the Complainant never properly advised the Respondent of his interest in the desired position. There exists no rational basis for concluding that the company should have noted and reviewed Mr. Ouseph's application since the application did not designate the type of work he was seeking. Mr. Connor and Mr. Harris, the two individuals selected for the positions at issue, had taken the initiative of filing applications for specific types of positions and consequently were considered and determined to be qualified for their respective positions.

Finally, the Complainant fails to establish the prerequisite prima facia factor that the position he applied for remained open after the Complainant's application was rejected. As we find that the Complainant did not make his desires known to the Respondent through his application form for the positions at issue we cannot therefore find that the Complainant was subsequently rejected on the basis on an application not previously filed. Therefore, we cannot similarly conclude, and the record does not support by substantial evidence that the positions which the Complainant allegedly applied for remain open after the Complainant was allegedly rejected for said positions.

The Complainant has therefore failed to establish its initial burden of presenting a prima facia case from which a finding of discriminatory motive may be reached. Nor has the Complainant overcome the Respondent's arguments that the Complainant was not discriminated against because of legitimate non-discriminatory reasons. The merits and efficiency of the Complainant's hiring and recruitment procedures were not at issue in the instant case. Nor at issue is the question of which applicant was the most qualified individual for the positions at issue. There is simply no substantial evidence within the record that the Respondent company improperly failed to consider the Complainant, Mr. Ouseph, for any available position within the company. Accordingly, we therefore enter judgment in accordance with the attached Final Order.

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Docket No. E-8087

FINAL ORDER

AND NOW, this 7th day of December, 1978,
pursuant to Section 9 of the Pennsylvania Human Relations Act,
43 P.S. §959 as amended the Pennsylvania Human Relations
Commission hereby

O R D E R S

that the Complaint in the above-docketed matter be dismissed.

Pennsylvania Human Relations
Commission

By Joseph X. Yaffee
Joseph X. Yaffee, Esq.
Chairperson

ATTEST:

By Elizabeth M. Scott
Elizabeth M. Scott
Secretary

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An investigation into the allegations contained in the original and amended complaint was made by representatives of the Commission, and a determination was made that probable cause

existed to credit the allegation of the complaint. Thereupon, the Commission endeavored to eliminate the unlawful practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and a public hearing was convened pursuant to §9 of the Act. The Public Hearing convened on September 21, 1978, before Commissioners: Benjamin S. Loewenstein, Esquire, E. E. Smith and Alvin Echols, Jr. Esquire, William B. Churchill, Esquire served as legal advisors to the hearing panel. The Public Hearing was conducted at time(s) before two Hearing Commissioners' Counsel for the respective parties having stipulated that the hearing could be so held.

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5. The Complainant's educational background consists of a Masters Degree in Commerce from India and a Masters Degree in Industrial Relations from St. Francis College in Loretto, Pennsylvania. (N. T. 11)
6. The coordinator of employee relations, W. Bascom King hired the Complainant as a factory worker. (N. T. 11)

7. The Complainant did not reveal his full educational qualifications when he made application to American Can (N.T. 13)

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Complainant :
v. : Docket No. E-8087
AMERICAN CAN COMPANY, :
Respondent :

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant, the Respondent, and the subject matter of the Complaint(s) in this action at docket number E-8087 as amended, pursuant to §9 of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.C.S. §959 (hereinafter the Act) in which the Complainant seeks for himself relief from discrimination in promotion and terms, conditions, and privileges of employment, which is made unlawful by §5(a) of the Act, 43 P.C.S. §955(a).

2. Respondent received proper notice of this complaint and proper notice and opportunity for public hearing as required by §9 of the Act, 43 P.C.S. §955.

3. Respondent is an "employer" within the meaning of §§4(b) and 5(a) of the Act 43 P.C.S §954(b) and §955(a).

4. Respondent did not consider the Complainant in making employment decisions for salaried white collar positions at its Morrisville, Pennsylvania plant because of a legitimate non-discriminatory reason - that the Respondent was unaware of Complainant's interest and specific desire for salaried white collar positions.

5. Respondent did not consider or reject the Complainant because of his qualifications for the position of clerk C-7 and/or Corporate Associate Program position because the Complainant did not make known his interests and qualifications to the Respondent through established application procedures of the Respondent.

6. The Respondent did not continue to seek applicants of Complainant's qualifications after becoming aware of Complainant's interest in the stated Clerk C-7 and/or the Corporate Associate Program positions because said positions were either filled prior to Respondent becoming aware of Complainant's interest or was filled from outside the Morrisville, Pennsylvania plant personnel office.

7. Complainant has failed to establish, by inference or otherwise, that he has suffered from disparate treatment, or that Respondent treated him differently than other employees of the company by its consideration of the Complainant for desired position within Respondent's company or that Complainant's national origin was a determining factor in violation of §5(a) of the Act, 43 P.C.S. §955(a).

8. There is no record of any discriminatory intent on the part of the Respondent company.

9. The Complainant has failed to prove by substantial evidence that the Respondent discriminated against him (Ouseph) because of his national origin in violation of §5(a), 43 P.C.S. §955(a) of the Act.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN REALTIONS
COMMISSION

C. JOSEPH OUSEPH,
Complainant

v.


AMERICAN CAN COMPANY,
Respondent

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Docket No. E-8087

RECOMMENDATION OF HEARING COMMISSIONERS

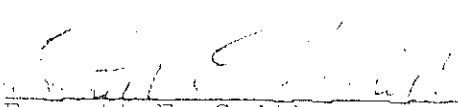
AND NOW, to wit, this 20th day of November,
1978, upon consideration of all the evidence presented at the
Public Hearing conducted September 21 1978, in the above-
captioned matter, and pursuant to the Findings of Fact, and
Conclusions of Law, the Hearing Commissioners recommend to the
entire Commission that an Order be entered dismissing the
complaint.



Benjamin S. Loewenstein, Esq.
Presiding Commissioner



Alvin E. Echols, Jr., Esq.
Commissioner



Everett E. Smith,
Commissioner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

C. JOSEPH OUSEPH,
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v.

AMERICAN CAN COMPANY,
Respondent

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Docket No. E-8087

COMMISSION'S DECISION

AND NOW, this 20th day of November, 1978,
upon consideration of the record in this case and upon considera-
tion of the Recommendation of the Hearing Commissioners, the
Pennsylvania Human Relations Commission hereby adopts the attached
History of the Case, Findings of Fact, Conclusions of Law and
Opinion and enters the attached Final Order.

Pennsylvania Human Relations
Commission

By

Joseph X. Yaffee
Joseph X. Yaffee, Esq.
Chairperson

ATTEST:

By

Elizabeth M. Scott
Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

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Respondent :

O P I N I O N

The gravamen of the complaint, as amended, is that the Respondent, American Can Company (Company) has allegedly refused to promote the Complainant, C. Joseph Ouseph, who is of Asian-Indian national origin from his position of machine operator to a managerial or clerical position because of his national origin in violation of §5(a) of the Pennsylvania Human Relations Act (Act).

A complete review of the evidence demonstrates that substantial evidence has not been presented to establish that Mr. Ouseph was refused promotion because of his national origin in violation of §5(a) of the Act. In identifying an appropriate analytical framework for the resolution of this case the Commission finds very persuasive the arguments presented in Respondent's post-hearing brief and hereby adopts it in part.

There is no substantial evidence that Mr. Ouseph was treated in a discriminatory or disparate manner because of his national origin, but was not considered for the two positions.

because the Respondent was not advised of his interest in these positions and therefore had no opportunity to refuse or reject Mr. Ouseph on any basis. In International Brotherhood of Teamsters v. U.S., 431 U.S. 334, 335, N.15 (1977), disparate treatment was explained as follows:

"Disparate treatment such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"

The Supreme Court in MacDonnel Douglas Corporation v. Green, 41 U.S. 792 (1977) set forth the proper method of analysis for such cases under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000 e-2(a). Said analysis was held applicable to the Pennsylvania Human Relations Act in General Electric Corp. v. Pennsylvania Human Relations Commission, Pa. , 365 A. 2d 649 (1976). The court held in MacDonnel Douglas, infra., that a prima facie case of discrimination is made out if four factors are established by the complainant. They are:

1. That the complainant belongs to a protected class.
2. That he applied and was qualified for a job which the employer was seeking applicants.
3. That despite his qualifications he was rejected, and
4. That after his rejection the position remained open and the employer continued to seek applications from persons of the complainant's qualifications.

It is the opinion of this Commission that the Complainant has not overcome this initial burden in establishing a prima facie case. Therefore, the burden of proof would shift to the employer to establish a business necessity for the discriminatory treatment. See General Electric Corporation, supra. The Complainant argues that because he expressed his dissatisfaction with his present assigned duties to Mr. Bascom King and filed an application indicating his academic credentials, that the company was somehow obligated to seek out and consider Mr. Ouseph in filling positions for which he had never applied.

There is no support for Complainant's case when we apply the prima facie analysis to the instant case. Although it has not been disputed that the Complainant is of Asian-Indian national origin and is clearly a member of a protected class of the Pennsylvania Human Relations Act, the record is completely devoid of substantial evidence that would substantiate the Complainant clearly applied for a salaried position by virtue of his filling out an application in accordance alleged instructions by Mr. Bascom King and by making constant inquiries about such jobs to Bascom King. Mr. Ouseph did not disclose his desire for another position to his supervisors or anyone else except Mr. King. Nor did he indicate his desire on his application form which specifically requested this information.

The evidence therefore fails to show any disparate treatment which it may be inferred that the Respondent's conduct was based on a discriminatory motive. The evidence does however, demonstrate that the Complainant was treated substantially similar to other Morrisville employees of the Respondent who

were not recommended or invited to apply for the positions at issue and who did not receive any special career counseling. It is decidedly clear, that if we, arguendo assume that Mr. Bascom King failed through some neglect or inadvertence to communicate Mr. Ouseph's alleged desire for managerial position to other appropriate hiring personnel, there is evidence that such negligence or inadvertence was in any way due to bias against Mr. Ouseph because of his national origin.

Although academic credentials and specific qualifications were not necessary prerequisites for either of the two positions in question, the record does indicate that the Complainant may have lacked the necessary communication abilities required for the position of Clerk, C-7. Also, the Complainant's company seniority is irrelevant since seniority was not a determinative factor in filling non-bargaining unit positions.

The Complainant has failed to establish the prima facie prerequisite that he was rejected by the Respondent despite his qualifications. On the contrary, the evidence does support that the Complainant never properly advised the Respondent of his interest in the desired position. There exists no rational basis for concluding that the company should have noted and reviewed Mr. Ouseph's application since the application did not designate the type of work he was seeking. Mr. Connor and Mr. Harris, the two individuals selected for the positions at issue, had taken the initiative of filing applications for specific types of positions and consequently were considered and determined to be qualified for their respective positions.

Finally, the Complainant fails to establish the prerequisite prima facie factor that the position he applied for remained open after the Complainant's application was rejected. As we find that the Complainant did not make his desires known to the Respondent through his application form for the positions at issue we cannot therefore find that the Complainant was subsequently rejected on the basis on an application not previously filed. Therefore, we cannot similarly conclude, and the record does not support by substantial evidence that the positions which the Complainant allegedly applied for remain open after the Complainant was allegedly rejected for said positions.

The Complainant has therefore failed to establish its initial burden of presenting a prima facie case from which a finding of discriminatory motive may be reached. Nor has the Complainant overcome the Respondent's arguments that the Complainant was not discriminated against because of legitimate non-discriminatory reasons. The merits and efficiency of the Complainant's hiring and recruitment procedures were not at issue in the instant case. Nor at issue is the question of which applicant was the most qualified individual for the positions at issue. There is simply no substantial evidence within the record that the Respondent company improperly failed to consider the Complainant, Mr. Ouseph, for any available position within the company. Accordingly, we therefore enter judgment in accordance with the attached Final Order.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
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AMERICAN CAN COMPANY,
Respondent

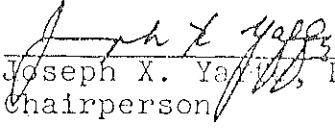
FINAL ORDER

AND NOW, this 7th day of December, 1978,
pursuant to Section 9 of the Pennsylvania Human Relations Act,
43 P.S. §959 as amended the Pennsylvania Human Relations
Commission hereby


O R D E R S

that the Complaint in the above-docketed matter be dismissed.

Pennsylvania Human Relations
Commission

By 
Joseph X. Yaffee, Esq.
Chairperson

ATTEST

By 
Elizabeth M. Scott
Secretary