COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JUDITH D. MASTER, Complainant	:	
v.	:	Docket No. E-10375
DUQUESNE LIGHT COMPANY, Respondent	:	

FINDINGS OF FACT

1. Complainant herein is an adult individual named Judith D. Master, residing 801 Hackberry Drive, Monroeville, Pennsylvania 15146. (Admitted by Answer of Respondent).

2. Respondent herein is the Duquesne Light Company with its principal place of business at 435 Sixth Street, Pittsburgh, Pennsylvania 15219, an employer of more than four individuals within the County of Allegheny, Pennsylvania. (Admitted by Answer of Respondent).

3. On January 29, 1976, Complainant applied for employment with Respondent and was interviewed for the position of Order Typist on that same date. (Stipulation of Parties; N.T. 6,7).

4. Mr. Moran, Personnel Officer for Respondent, gave a typing test and aptitude test to Complainant and performed the interview. (Stipulation of parties, N.T. 13, 14, 40, 41).

5. Approximately one week later Complainant was informed by Mr. Moran that she was qualified for the position based on her high test scores and previous working ability. (N.T. 14).

6. Complainant was also informed that she would be hired for the position as Order Typist pending the results of a physical examination performed by Respondent's doctor. (N.T. 14).

7. Complainant was informed that such employment would commence with Respondent Company on February 11, 1976 if she passed the physical examination. (N.T. 14).

8. On February 10, 1976, Complainant underwent a physical examination from Dr. John Wain, Respondent's physician, for purposes of employment with Respondent Company. (Exh. C-1, N.T. 14).

9. Dr. Wain, a physician not certified in any medical specialty, was employed by Respondent from 1975 to March 1977. (Exh. R-3, p. 4, 14).

10. Respondent's medical examination form, signed by Dr. Wain, indicated that Complainant was rejected because of "vision, urine and B.P." (blood pressure). (Exh. R-3A).

11. Respondent based its refusal to employ Complainant for the position of an Order Typist on a combination of three reasons: Complainant had impaired vision; Complainant was judged to be an uncontrolled diabetic; and Complainant suffered from essential hypertension with an indication of even more serious pathological problems. (Respondent's Answer).

12. The Complainant was otherwise qualified for the position of Order Typist and, but for the results of the medical examination, would have been hired by the Respondent. (Stipulation of parties, N.T. 7).

13. Dr. Wain, Respondent's physician, as a matter of practice routinely rejected for clerical positions persons with hypertension or elevated blood pressure and found Complainant's blood pressure level of 168/120 to be unacceptable for employment with Respondent. (Exh. R-3, p. 21).

14. Dr. Locke, Respondent's Medical Director, also indicated that elevated blood pressure such as that manifested by Complainant was unacceptable for employment with Respondent. (N.T. 82).

15. Dr. Wain, Respondent's physician, as a matter of practice, routinely rejected for employment persons who in a dip-stick urinalysis showed elevated sugar levels in their urine specimens, and found Complainant's urine sugar level of 4+ to be unacceptable for employment with Respondent. (Exh. R-3, p. 18-19).

16. Dr. Locke, Respondent's Medical Director, confirmed that applicants such as Complainant whose urine samples showed elevated sugar levels were rejected for employment with Respondent. (N.T. 79).

17. Dr. Wain, Respondent's physician, as a matter of practice routinely rejected for employment persons with corrected vision below 20/40 in either eye. He found Complainant's vision to be L 20/30 and R 20/100 and

diagnosed her as unacceptable for employment with Respondent. (Exh. R-3, p. 20).

18. Dr. Wain's eye examination of Complainant involved reading a line of print at some distance from a wall with one eye covered, and did not test her ability to read printed materials of the kind which she would be required to read as an Order Typist. (Exh. R-3, p. 19).

19. Dr. Wain, Respondent's physician, determined that Complainant was an "uncontrolled diabetic", based upon his opinion that any diabetic whose urinalysis indicated a 2+ sugar level or above was "uncontrolled" and, therefore, rejected Complainant for employment with Respondent. (Exh. R-3, p. 19).

20. Dr. Wain, Respondent's physician, indicated that the dangers associated with the employment of an "uncontrolled diabetic" such as he claimed Complainant to be stemmed from the possible development at some time in the future of more serious symptoms of diabetes including diabetic coma. (Exh. R-3, p. 10).

21. Dr. Wain, Respondent's physician, indicated that both diabetes and hypertension were major diseases, and that persons suffering from either could be expected to have more absenteeism than those not so afflicted. (Exh. 3, p. 12, 34).

22. Dr. Wain, Respondent's physician, despite the Complainant's request that he do so, made no effort to contact Complainant's treating physician, Dr. Ralph Schmeltz,

in order to determine his opinion as to whether Complainant was medically able to perform the duties of an Order Typist for Respondent. (Exh. R-3, p. 25).

23. Dr. Schmeltz, Complainant's treating physician, is board certified in both Internal Medicine and Endocrinology and Metabolism. He has a private practice with a concentration in diabetes and is Director of the Endocrinology and Diabetes Clinic at the Falk Clinic, as well as serving as Assistant Professor of Medicine at the University of Pittsburgh. He also acts as the Employee Physician for Children's Hospital, performing that institution's pre-employment medical examinations. (Exh. C-3, p. 4-6).

24. Dr. Schmeltz has been Complainant's treating physician since 1973. (Exh. C-3, p. 7).

25. Dr. Schmeltz diagnosed Complainant as having maturity onset/insulin independent diabetes mellitus. (Exh. C-3, p. 8).

26. Diabetes mellitus is a condition which affects the ability of the pancreas to produce insulin. There are two kinds of diabetes mellitus:

a. Juvenile or insulin dependent: the pancreas in unable to produce <u>any</u> insulin making the diabetic person completely dependent on the injection or ingestion of insulin, and

b. Maturity onset or insulin independent: the pancreas is able to produce some but not a sufficient amount of insulin for the needs of the body.

(Exh. C-3, p. 9-10).

27. At all relevant times hereto, Complainant has regularly taken a hypoglycemic oral medication which encourages her pancreas' production of insulin. (Exh. C-3, p. 10).

28. Complainant's treating physician, a specialist in the field of diabetes,,does not use a per se rule based on a single urine sample to determine whether a person's diabetes is controlled. (Exh. C-3, pps. 4-16, 74-77).

29. Complainant's treating physician defines a well controlled diabetic as one who is not experiencing any of the short term symptoms of diabetes and is able to function effectively in his/her own lifestyle. The patient is controlled when the physician has brought the patient as metabolically close to normal parameters as is possible without inflicting psychophysical harm on the patient. (Exh. C-3, pps. 16, 53-54).

30. In the opinion of Complainant's treating physician, Complainant is a "controlled" diabetic. (Exh. C-3, p. 60).

31. Complainant has no medical history of a diabetic coma, ketoacidosis (insulin shock) or other severe complications of diabetes, such as retinopathy, nephropathy or neuropathy. (Exh. C-3, p. 16-20).

32. Complainant's treating physician sees no substantial likelihood that Complainant will suffer a coma or ketoacidosis (insulin shock) in the foreseeable future. (Exh. C-3, pp 16-17, 19-20).

33. At the time of her physical examination with Respondent Complainant's diabetes did not prevent her from cooking, cleaning house, driving, swimming, bowling, or being involved in any of her other daily activities. (N.T. 24-25).

34. During this same period of time the Complainant's diabetes did not interfere with her attending classes five days per week including a typing course, doing typing homework assignments, etc. (N.T. 24).

35. Complainant has never been hospitalized for her diabetes, except for research purposes. (N.T. 22).

36. Complainant's treating physician reviewed the job description for the position as Order Typist and determined that in his expert opinion, Complainant's diabetes would not interfere with her ability to perform the essential functions of an Order Typist as set out in Respondent's job description. (Exh. C-3, p. 14-15).

37. Complainant has high blood pressure. (Exh. C-3, p. 22).

38. Complainant has never been hospitalized because of her elevated blood pressure. (N.T. 23).

39. Complainant's elevated blood pressure has not in any way restricted her life activities. (N.T. 23).

40. Complainant's elevated blood pressure has not interfered with her cleaning house, cooking, driving, swimming, typing, or performing other daily life activities. (N.T. 23).

41. Complainant's treating physician reviewed the job description for the position of Order Typist and determined that in his expert opinion, Complainant's elevated blood pressure would not interfere with her ability to perform the essential functions of an Order Typist as set out in Respondent's job description. (Exh. C-3, p. 20).

42. On February 12, 1976, the day after Complainant's medical examination by Respondent's physician, Dr. Wain, Dr. Schmeltz examined Complainant and found corrected vision to be 20/20/ in both eyes. (Exh. R-2, reverse of p. 1).

43. Complainant's impaired vision did not prevent her from obtaining a valid Pennsylvania driver's license, performing routine household duties, participating in a variety of recreational activities or attending business school classes. (N.T. 24-25).

44. In the experience of Complainant's treating physician, Complainant's vision is corrected by glasses to 20/20 in both eyes. (Exh. C-3, p. 57).

45. Complainant's treating physician reviewed the job description for the position as Order Typist and determined that in his expert opinion, Complainant's vision would not interfere with her ability to perform the essential functions of an Order Typist as set out in Respondent's job description. (Exh. C-3, p. 20).

46. The salary scale for Order Typists employed by Respondent over the relevant period was as follows:

Effective Dates:

	Oct. 1, 1975	Oct. 1, 1976	Oct. 1, 1977	Oct. 1, 1978
0-1 yr.	641.00/mo.	695.00/mo.	746.00/mo.	798.00/mo.
1-2 yr.	695.00/mo.	754.00/mo.	809.00/mo.	865.00/mo.
2-3 yr.	742.00/mo.	804.00/mo.	863.00/mo.	923.00/mo.
3-4 yr.	777.00/mo.	842.00/mo.	904.00/mo.	967.00/mo.

(Stipulation of parties, N.T. 7-8).

47. At the time of her interview for the Order Typist position Complainant was informed by the Respondent's personnel officer, Mr. Moran, that normally Respondent hired its permanent employees from the temporary hires and that Complainant would be considered for transfer when the temporary position ended (N.T. 13, 103-104).

48. All of the Order Typists hired as temporary employees between January 1, 1976 and December 31, 1977 obtained permanent employment with Respondent. (Exh. C-4).

49. Complainant would have obtained permanent employment with Respondent as an Order Typist sometime after February 11, 1976. (Exh. C-4).

50. After her rejection by Respondent, Complainant was unable to obtain other employment until the end of May, 1976, at which time she was hired by Gordon's Furniture at a salary of $450.00 per month. (N.T. 26).

51. Complainant worked for six months for Gordon's Furniture, missing only a day of work for an interview for a higher paying job. (N.T. 26).

52. Complainant left Gordon's Furniture at the end of November, 1976, for a secretarial position at Sperry-Univac paying $139.00 per week. She was raised to $149.00 per week after three months and effective December, 1978 began earning $192.50 per week as a private secretary. (N.T. 27).

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Respondent	:	

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant and the Respondent and the subject matter of the Complaint under the Pennsylvania Human Relations Act, pursuant to Section 9 of the Pennsylvania Human Relations Act, 43 P.S. § 959.

2. Respondent received proper notice of this Complaint and proper notice and opportunity for public hearing as required by Section 9 of the Pennsylvania Human Relations Act, 43 P.S. § 959.

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

4. Complainant is an "individual" within the meaning of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. § 955(a).

5. Diabetes mellitus is a handicap or disability for purposes of § 5(a) of the Act, 43 P.S. § 954(a) in that it is a physical condition affecting the ability of the pancreas to produce insulin.

6. Hypertension or elevated blood pressure, a physiological condition affecting the cardiovascular system, is a handicap or disability for purposes of § 5(a) of the Act, 43 P.S. § 955(a).

7. Impaired vision is a handicap or disability for purposes of § 5(a) of the Act, 43 P.S. § 955(a).

8. A handicap or disability is job-related only when it substantially interferes with the individual's ability to perform the essential functions of the position sought. 43 P.S. 954(p).

9. Respondent has the burden of demonstrating that a handicap or disability which excludes an individual from employment is job-related. 43 P.S. 955(a).

10. Respondent's refusal to hire the Complainant because of her diabetes, high blood pressure and impaired vision constitutes an unlawful discriminatory practice in violation of § 5(a) of the Act, 43 P.S. § 955(a).

11. A prevailing Complainant in an action alleging a refusal to hire is entitled to an award of back pay. 43 P.S. § 959.

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HISTCRY OF THE CASE

On or about February 20, 1976 the Complainant, Judith D. Master, filed a complaint with the Pennsylvania Human Relations Commission (Commission). The Complainant alleged that the Respondent, Duquesne Light Company, violated § 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744 as amended, 43 P.S. § 951 et seq, by refusing to hire her due to the existence of non-job related disabilities. More specifically, the Complainant alleged that the failure to hire the Complainant resulted from the discovery, during the course of an employment physical examination conducted by the Respondent, that the Complainant suffered from diabetes, high blood pressure and an eye impairment.

An investigation of the allegations contained in the Complaint was conducted pursuant to § 9 of the Act and the investigation resulted in a Finding of Probable Cause to

credit those allegations. Efforts to conciliate the matter, as mandated by § 9 of the Act, were unsuccessful and the case proceeded to a Public Hearing on June 7, 1979 before a Hearing Panel that consisted of Commissioners: Elizabeth M. Scott, Chair, Mary Dennis Donovan, C.S.J. and Doris A. Smith, Esquire. Michael Hardiman, Esquire, acted as Legal Advisor to the Hearing Panel; Ellen M. Doyle, Esquire, appeared on behalf of the Complainant; and Arthur J. Greif, Esquire, appeared on behalf of the Respondent.

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OPINION

I. FACTUAL BACKGROUND AND ISSUE FORMULATION

This case involves a complaint of employment discrimination in violation of § 5(a) of the Pennsylvania Human Relations Act, as amended, 43 P.S. 951, 955 (Supp. 1979-80) (Act). There is no substantial disagreement regarding the events which precipated the filing of the complaint.

The Complainant, on January 29, 1976, applied for employment as a clerical worker with the Respondent. She was interviewed, had the available position (order typist) described to her and took several tests. Approximately one week

later she was notified that she was to report on February 10, 1976 for a physical examination to be conducted by the Respondent. The Complainant did appear for the physical examination and, during the course of that examination, the examining physician became aware that the Complainant had diabetes, an elevated blood pressure and an eye impairment. As a result of this examination the Complainant was not recommended for employment by the Respondent's medical staff and, therefore, was not hired by the Respondent.

At the outset it should be noted that the reason for the non-hire of the Complainant is not at issue. The parties to this action have stipulated to the fact that that Complainant was qualified for the position of Order Typist and that, but for the results of the medical examination, would have been hired.

What is at issue is the question of whether the refusal to hire, based as it was upon the existence of certain medical disorders, violates § 5(a) of the Act which reads in pertinent part:

> It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification;... (a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, or non-job related handicap or disability of any individual to refuse to hire or employ...such individual ... 43 P.S. § 955(a) (Supp. 1979-80).

A second issue, which must be considered only if a violation of § 5(a) is found, concerns the question of damages. This issue involves the classification of the position applied for by the Complainant as temporary and the argument offered by the Respondent that the Respondent's liability, if any,

should not extend beyond the period of time for which the temporary position was to be available. Further consideration of the damages issue will be reserved for subsequent discussion and the present focus will concern itself with whether § 5(a) of the Act was, in fact, violated.

II. LIABILITY ISSUES

The liability aspect of this case involves a discussion of two issues: (1) does the Complainant have a handicap or disability within the meaning of § 5(a) of the Act; and (2) if it is found that the Complainant does have such a handicap or disability, should it be considered as job related. With respect to the second issue, Respondent argues that the burden of proof regarding job relatedness rests with the Complainant.

An obvious initial step in addressing the first issue noted above is to define the phrase in question. The Act simply defines it as follows:

> The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a handicap or disability job related. 43 P.S. § 954 (p) (Supp. 1979-80).

No specific definition of the words "handicap" or "disability" are contained in the Act. Moreover, there has been no judicial determination by Pennsylvania Courts with regard to these words. While the Commission has adopted regulations which define a handicapped person as one who: (A) has a physical or mental impairment which substantially limits one or more major life activities; (B) has a record of such an impairment; or (C) is regarded as having such an impairment, 16 Pa. Code § 44.4(4) (i), these regulations did not become effective until September 1978 and, therefore, would not be applicable to the

case at bar. The fact that no specific definition was included; however, does not leave the Commission without a basis for applying a particular definition.

The Wisconsin Courts faced with a state fair employment code which, like Pennsylvania's statute, failed to define the word handicap adopted the standard dictionary definition of the word, "a disadvantage that makes achievement unusually difficult, esp.: a physical disability that limits the capacity to work". Chicago, M.St. P. & P.R. Co. v Wisc. State Dept. of I.L. & HR, 215 N.W. 2d 443, 446 (1974).

In the instant case, three separate medical disorders were listed by the Respondent as the reason for non-hire: (1) uncontrolled diabetes, (2) hypertension or elevated blood pressure, and (3) impaired vision. While the Complainant takes issue with the term "uncontrolled" with respect to the diabetes, she does not dispute the existence of diabetes or elevated blood pressure, nor does she argue that she has no eye impairment which affects her vision.

The Respondent, however, argues that while the Complainant has these conditions, she does not have a non-job related handicap because the conditions could be eliminated by the voluntary acts of the Complainant. It is the Respondent's position that with proper diet and medication the Complainant could control her diabetes and hypertension (in Respondent's opinion the eye impairment was directly related to the failure to control the diabetes). The Respondent concludes that legislative intent, as evidenced

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by the following statement made by Representative Novak in urging adoption of the amendment adding disability coverage to the Act, supports this proposition:

> These are people who want to work; they need to work and, more important, are capable of giving a full day's work for a full day's pay, and the thing that stands in their way is not their own shortcomings - those they can overcome - but the shortsightedness of a society that often refuses to recognize their "personhood".
>
> Legislative Journal, House, March 5, 1974, p. 3758. (Emphasis added).

and requires a finding that the Complainant's disorders are not covered.

After careful consideration of this argument it is the conclusion of the Commission that such a reading of the Act does not do justice to the essence of the amendment which, like the statute itself, is remedial in nature and should be liberally construed, 43 P.S. 962(a) (Supp. 1979-80); See Pennsylvania Human Rel. Com'n v. Chester Sch. Dist., 427 Pa. 157, 233 A.2d 290, 294 (1967).

Certainly, there can be no dispute that both diabetes and hypertension are recognized medical disorders. Moreover, while the parties differ regarding the nature and extent of the Complainant's vision impairment, it is clear that the results obtained during the eye examination conducted by the Respondent were considered in arriving at the decision not to hire. Given the above, the question becomes whether recognized medical disorders which are used as the basis

for not hiring a job applicant constitute a handicap or disability within the meaning of § 5(a) of the Act. When the issue is framed in this fashion it becomes clear that the Complainant does have a handicap or disability within the meaning of the Act. The Commission is confident that this conclusion finds support not only in the common sense definition advanced by the Wisconsin Courts, supra, but also in several decisions which considered types of disorders covered in particular Acts, see generally, Fraser Shipyards, Inc. v. DILHR, 13 FEP 1809 (Wisc. Cir. 1976) (diabetes covered); Milwaukee County v. Wis. Dept. of In. L&HR, 15 EPD 7995 (Wisc. Cir. 1977) (hypertension covered); Neeld v American Hockey League, 439 F.Supp. 459 (W.D. N.Y. 1977) (individual with sight in only one eye stated a claim under New York Human Rights Law); see also: Montgomery Ward & Co., Inc. v. Bureau of Labor, 15 EPD 7990 (Ore. 1977) (heart disease subsequent to successful surgery is a handicap); City of Wisconsin Rapids v. Wisc. DILHR, 15 EPD 7846 (Wisc. Cir. 1977) (heart murmur covered); Bucyrus-Erie, Co. v. DILHR, 13 EPD 11,580 (Wisc. Cir. 1977) (back disorder covered).

Having concluded that the Complainant, herein, does have a handicap or disability within the accepted sense of the word brings into focus consideration of the second issue before the Commission, namely, is the handicap or disability job related. Consideration of this issue also mandates consideration of the question of who has the burden of

proving job relatedness or lack thereof.

The Respondent, in a prehearing memorandum submitted to the Hearing Panel, argues that the burden of proving that the Complainant's physical condition is a non-job related handicap rests with the Complainant. The Respondent cites J. Howard Brandt, Inc. v. Com., Human Relations Commission, 15 Pa. Cmwlth. 123, 324 A.2d 840 (1974) and City of Philadelphia v. Pennsylvania Human Relations Commission, 4 Pa. Cmwlth. 506, 287 A.2d 703 (1972) in support of the proposition that the Complainant has the burden of proving the basic elements of a violation.

The Respondent also argues that both legislative intent, as manifested by the choice of the phrase "non-job related handicap" rather than, for example, "handicap or disability, unless such handicap or disability is shown to be job-related"; and accepted principles of statutory construction, which mandate that general words shall be construed to take their meanings and be restricted by preceding particular words, 1 P.S. § 1903(b) (Supp. 1979-80), require this conclusion. The Respondent insists that there is no reason to bifurcate the burden of proof regarding the existence and non-job relatedness of a disability or handicap between the Complainant and the Respondent.

While both cases cited by the Respondent do stand for the proposition that the burden rests with the Complainant to prove his/her case, Brandt, at 844 and Philadelphia at

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707, neither goes far enough in discussing the allocation of the burden of proof in a discrimination complaint. In Pennsylvania, that allocation has been discussed, in detail, by our Supreme Court in General Electric Corp. v. Cmwlth., Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976). In General Electric, the Court, citing McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed. 2d 668 (1973), reiterated the four classical elements necessary to establish a prima facie case:

1) Complainant is a member of a protected minority,

2) She/he applied for a job for which she/he was qualified,

3) The application was rejected, and

4) The employer continued to seek other applicants of equal qualifications. General Electric Corp., at 655.

If the Complainant establishes the elements listed above, the burden shifts to the Respondent to justify the employee selections on the basis of "job related criteria which are necessary for the safety and efficiency of the enterprise". Id. at 656.

The question before the Court in General Electric concerned who had the burden of proving that the Complainant was or was not the "best able and most competent" to perform the job in question, Id. at 654. The Court construed the above language as an expression of the business necessity doctrine first promulgated in Griggs v. Duke Power Company, 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed. 2d 158 (1971) the

purpose of which was to protect employers from having to select employees who did not meet their qualification standards, Id. at 656-657. Concluding that this defense served as a limitation upon the right to equal employment broadly bestowed by the Pennsylvania Human Relations Act, the Court stated:

> We believe that notions of fairness and common sense dictate that the burden of establishing such a limitation should fall upon the party in whose favor the limitation is designed to operate. General Electric, at 657.

The Commission is of the opinion that the compelling rationale found in General Electric is also at work here. Obviously, any employer has a right to insist upon qualified employees. In the context of a job applicant who has a handicap or disability an employer has the right to insist that such an applicant's disability will not prevent him or her from substantially performing the essential functions of the job. Essentially, as with the "best able" proviso, the non job related language acts as a limitation on the broad protection afforded the disabled under the Act. As such, and consistent with the decision reached in General Electric, the burden of establishing the job relatedness of the disability rightly rests with the employer.

The above conclusion finds support not only in the philosophical underpinnings of Human Rights legislation, but also on a pragmatic level. As stated in General Electric:

> The employer has far easier access to the facts which must be established in order to prove the relative qualifications of

> [their] employees....Where employment decisions have been based upon the employer's subjective assessments, it is the employer alone who can articulate the rationale behind his decisions. Id. at 657.

In the instant case, clearly, the employer/Respondent was better able to evaluate the job requirements for the position for which the Complainant applied and to determine how, if at all, certain disabilities might affect the ability of the Complainant to perform the duties in question. Because of the relative ease with which the Respondent could justify its decision, and the relative difficulty surrounding an attempt by the Complainant to show non-job relatedness, the burden of supporting the defense offered by the Respondent rests with the Respondent.

Having cast an affirmative obligation upon the Respondent to justify the otherwise discriminatory act, the Commission must conclude that the Respondent failed to meet its burden.

While concluding that the Respondent bears the burden of establishing job relatedness, the Commission notes that the Complainant offered substantial evidence regarding her job capabilities. In testimony before the Hearing Panel the Complainant testified to being enrolled in business school immediately prior to seeking employment with the Respondent and to attending lectures, taking notes, typing homework assignments, and more. She also testified to participating in a variety of sporting activities as well

as performing all of the duties involved in home maintenance and childcare. The Complainant has a valid Pennsylvania driver's license and, in fact, drove to and from the job interview and subsequent physical examination performed by the Respondent.

The Complainant also testified to employment obtained subsequent to rejection by the Respondent. She has performed a variety of clerical duties for the two employers that she has worked for and there was no evidence presented which would indicate that she missed any work as a result of the disorders for which the Respondent refused to hire her. The Complainant is presently employed as a private secretary having been promoted from the position of general secretary.

The reasons outlined by the Respondent that formed the basis for their decision to not hire the Complainant are contained in paragraph three of their Answer. In essence, these reasons focus upon a risk that the Complainant could become lightheaded or dizzy at any time; that she was more likely to suffer a diabetic coma or insulin shock as well as lesser complications; that she was more likely to be absent from work because of her problems; and that her vision was too poor to permit her to efficiently perform the duties of her job.

Regarding all of the above, the Respondent was able to produce objective evidence which related only to dizziness

and lightheadedness. This evidence, in the form of medical records obtained from the Complainant's private physician show that, indeed, the Complainant had, on occasion, complained of being lightheaded and dizzy. The Complainant testified, and there was no evidence to contradict, that she had never suffered a diabetic coma nor insulin shock. Moreover, while the Complainant had several lengthy periods of absence from her subsequent employment, there was no evidence which linked these absences to the disorders relied upon by the Respondent. The Complainant's work and school history prior to seeking employment with the Respondent and her subsequent employment offer sufficient rebuttal to any claim that the Complainant's medical disorders would prevent her from efficiently performing the duties of the job in question.

Of course, the crux of the Respondent's argument rests in the concept of increased risk. That is to say, the Respondent believes that the Complainant was more likely than others to suffer from some or all of the above complications notwithstanding her relatively trouble free history. It is with this "increased risk" theory that the Commission has the most difficulty. The Respondent's defense is both open ended and literally strewn with indefinite qualifiers when discussing the possibility of future pathological problems.

For example, in the deposition taken of Dr. John C. Wain, who examined the Complainant for the Respondent on February 10, 1976, Doctor Wain states that while it was possible that the Complainant could become dizzy on the job, he could not say for certain that she would. In fact, Doctor Wain's statement was, "...this woman eventually will probably have problems", (see Wain's deposition, p. 30, line 24). Again, during the hearing, when counsel for Respondent was questioning Dr. L. G. Locke, the Medical Manager of Respondent, the doctor, in concluding that the Complainant was medically unfit for employment, stated "With these problems...it leaves one with a chance that she could suffer illnesses as an employee; could suffer some dizzy spells...", (N.T. p. 76, line 5).

The Respondent offered no evidence to support the proposition that the Complainant was presently incapable of performing the specific job duties of the position for which she applied. Also, Respondent offered no factual evidence, apart from an opinion based upon experience, as the basis for concluding that the Complainant's absentee rate might be higher. Clearly, the burden placed on the Respondent requires more support than this.

In Fraser Shipyards, Inc. v. DILHR, supra, the court was faced with an argument that diabetics could not function as welders because some diabetics could be a substantial hazard to themselves or their fellow employees. The advocacy

of this type of position, said the court, was exactly what the Wisconsin fair employment legislation was designed to overcome. Moreover, since the employer had failed to show that diabetics could not perform the job or that they had ever blacked out as a result of the disease, the Court found discrimination. The Court also stated, "...over generalization with respect to a potentially disabling disease such as diabetes is not permissible". Id. at 1810.

In two other Wisconsin cases its courts have had the opportunity to consider arguments focusing on a higher rate of absenteeism and ability to perform in the future. In the first, Chrysler Outboard Corp. v. Wisc. DILHR, 13 EPD 11,526 (Wisc. Cir. 1976) the court stated:

> ...the petitioner based its decisions on the risk of future absenteeism and the higher insurance costs. Neither of these factors constitute a legal basis for discriminating against the complainant. The statute is written in the present tense. The petitioner's contention that the complainant may at some future date be unable to perform the duties of the job is immaterial. Id. at p. 6884.

Likewise, in City of Wisconsin Rapids v. Wisc. DILHR, supra, the court stated that merely because a physical disorder may affect a person's ability to work at some indefinite point in the future should not deprive such person of equal opportunity to obtain gainful employment in the present, Id. at p. 6227.

The generalizations and presumptive conclusions that the courts in Wisconsin were loath to accept are of the same character as those offered by the Respondent herein.

It is uncontradicted that the Complainant, as a result of her medical disorders, may, at some future point in time, suffer from some type of medical complication. However, neither the nature, extent nor likelihood of these possible complications can presently be determined. Nonetheless, the Respondent would deny employment to the Complainant based upon this possibility. And, the Respondent is willing to take this action without any hard data to support its various premises and without even taking the minimal step of contacting the Complainant's personal physician to obtain additional information prior to evaluating the Complainant's present physical status and ability to perform the duties of the job in question.

The clear weight of the evidence supports a finding that the Complainant was capable of performing the essential functions of the job for which she applied. Moreover, the Respondent has failed to convince the Commission that the possibility of future absenteeism or future inability to perform the job are sufficient to permit the Respondent to commit an otherwise discriminatory act.

III. DAMAGES ISSUE

As indicated previously, a finding of discrimination leads to a consideration of the issue of damages. In this regard, it should be noted that the Respondent does not question the right of the Commission to award back pay subsequent to a finding of discrimination; however, the

Respondent does take issue with the extent of the award sought by the Complainant.

The position of the Respondent is that the Complainant, but for her medical disorders, would have been hired into a temporary position due to expire on May 15, 1976. Conceding that the Complainant would have been considered for a permanent position at the end of the temporary period, the Respondent, nonetheless, argues that consideration of two factors would have prevented retention of the Complainant in this case.

The first factor that would have been considered by the Respondent was job performance. In this regard, the Respondent introduced evidence, by virtue of the testimony of Doctor Schmeltz and the Complainant's medical records, which showed that the Complainant was hospitalized for a one week period in March, 1976. This absence, argues the Respondent, would have counted heavily against the Complainant in considering transfer into a permanent position. While the Respondent offers this as a factor that would have been considered, the Respondent failed to show that consideration of this factor ever resulted in the non transfer of a temporary employee. The Respondent did introduce evidence (exhibit #5) which reveals that nine of eighteen temporary employees hired between January, 1976 and July, 1976 were not given permanent positions; yet, no reason for the non-retention has been provided. Thus, there is no

objective evidence to support the Respondent's contention that a one week absence would have resulted in the non-transfer of the Complainant to a permanent position upon expiration of the temporary position.

The second factor considered by the Respondent in these situations is the availability of a permanent position for which the temporary employee is qualified at the time that the temporary position ends. In this regard the Respondent's Manpower Planning Manager has testified that no employee was either hired during the month of May nor was any temporary employee transferred into a permanent position for which the Complainant would have been qualified. The fact that no one was hired or transferred during the month of May, argues the Respondent, indicates that the Complainant would not have been retained beyond the May 15, 1976 date.

The Commission, however, is of the opinion that there is other, more persuasive evidence regarding the possibility of retention. Evidence introduced during the hearing (Complainant's exhibit #4) shows that seven individuals were hired as Order Typists, in temporary positions, during the period running from January 1, 1976 to December 31, 1977. Moreover, all seven of these individuals were transferred into permanent positions at the end of their temporary period of employment. Of these, three were hired shortly after the Complainant's temporary position was scheduled to end (Adamosky on 6/1/76, Boyle and Wurtzer on 6/7/76). The clear inference to be drawn from this is that the Respondent continued to need Order Typists during the period of time that the Complainant would

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have been eligible for transfer. The Commission believes that this evidence offers sufficient support for reaching the conclusion that the Complainant would have been transferred into a permanent position. Obviously, having reached this conclusion, the Commission is of the opinion that the back pay award should encompass more than the amount that would have been earned between February 11, 1976 and May 15, 1976.

The Commission is aware, of course, that any Complainant entitled to back pay should receive an amount that will restore that individual to the economic position that he/she would have been in but for the unlawful discriminatory act. Also, the Commission is cognizant of the fact that the method used to calculate a back pay award need only be reasonable and realistic, not exact. As stated in Pettway v. American Cast Iron Pipe Co., 494 F 2d 211 (5th Cir. 1974):

> Therefore, in computing a back pay award two principles are lucid: (1) unrealistic exactitude is not required, (2) uncertainties in determining what an employee would have earned but for the discrimination, should be resolved against the discriminating employer. Id., at 260-261.

Based upon the foregoing considerations, and in the absence of convincing evidence that supports Respondent's position that the Complainant would have been discharged at the end of her temporary period of hire, the Commission concludes that the Complainant is entitled to a back pay award from February 11, 1976 to the present based upon what she would have earned as an order typist less the wages actually earned during that period. In deciding upon the use of the order typist position rather than some other clerical position,

the Commission considered two factors. First, while the evidence discloses that a number of order typists were transferred into other positions, the Respondent has not, by way of alternative argument, indicated that the Complainant would have been retained in a position other than order typist. Second, as discussed above, exacture is not required in awarding damages. The position of order typist is an entry level position and the position for which the Complainant had been interviewed. It is reasonable to conclude, therefore, that this position represents a reasonable and realistic measure to use in assessing damages. Obviously, the result of the above is to deny Respondent's motion for a directed verdict regarding the issue of damages.

IV. CONCLUSION

The Complainant was denied employment with the Respondent as an order typist because of certain medical disorders. These disorders, which the Commission has determined constitute disabilities within the meaning of the Pennsylvania Human Relations Act, have not been shown to be job related in the sense that they would have prevented the Complainant from preforming the essential functions of the position of order typist. Thus, the Respondent's refusal to hire the Complainant, based upon existence of these non job related disabilities, constitutes an unlawful discriminatory practice in violation of § 5(a) of the Act, 43 P.S. 955(a) (Supp. 1979-80).

Having established that the Act was violated leads immediately to a consideration of entitlement to damages. Section 9 of the Act clearly permits an award of back pay in appropriate cases, 43 P.S. 959 (Supp. 1979-80) and in this

instance the Commission has determined that the Complainant is entitled to receive damages which equal the difference between what she would have earned as an order typist and what she actually earned from February 11, 1976 to the present, plus interest.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JUDITH D. MASTER, Complainant	:	
v.	:	Docket No. E-10375
DUQUESNE LIGHT COMPANY, Respondent	:	

RECOMMENDATION OF HEARING COMMISSIONERS

AND NOW, to wit, this 24th day of September, 1979, upon consideration of all the evidence presented at the public hearing 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 against the Respondent holding that the Respondent violated § 5(a) of the Pennsylvania Human Relations Act and providing for appropriate relief.

Elizabeth M. Scott, Presiding Commissioner

Mary Dennis Donovan, C.S.J. Commissioner

Doris A. Smith, Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JUDITH D. MASTER,	:	
Complainant	:	
v.	:	Docket No. E-10375
DUQUESNE LIGHT COMPANY,	:	
Respondent	:	

COMMISSION'S DECISION

AND NOW, to wit, this 21st day of September, 1979, upon the recommendation of the Public Hearing Commissioners and upon all the evidence at the Public Hearing of this case, and upon consideration of the Findings of Fact and Conclusions of Law, the Pennsylvania Human Relations Commission finds and determines that the Respondent engaged in an unlawful discriminatory practice in violation of § 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. § 955(a) (Supp. 1979-1980) in that Respondent refused to hire the Complainant for an available position as an Order Typist because the Complainant has a non-job related handicap or disability.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Joseph X. Yaffe, Chairperson

ATTEST:

Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JUDITH D. MASTER, Complainant	:	DOCKET NO. E-10375
v.	:	
DUQUESNE LIGHT COMPANY, Respondent	:	

ORDER

AND NOW, to wit, this 24th day of September, 1979, upon consideration of the Findings of Fact, Conclusions of Law, and Commission's Decision, and pursuant to the provisions of Section 9 of the Pennsylvania Human Relations Act, as amended, the Pennsylvania Human Relations Commission hereby

O R D E R S:

1. That Respondent shall cease and desist from refusing to hire handicapped or disabled individuals unless the Respondent demonstrates that the handicap or disability substantially interferes with the ability of the individual to perform the essential functions of the particular position applied for.

2. That Respondent shall pay Complainant back pay in the amount that she would have received as an Order Typist based on the salary scale for Order Typist from February 11, 1976 up to the present minus what Complainant actually earned

during that period. Such back pay shall include interest at a rate of six percent per year.

3. Respondent shall submit proof of payment of back pay to Complainant to the Commission staff within forty-five days of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
Joseph X. Yaffe, Chairperson

ATTEST:

_____
Elizabeth M. Scott, Secretary