COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN,
Complainant

vs.

DOCKET NO. E-10814

CRESCENT HILLS COAL COMPANY, INCORPORATED,
Respondent

FINDINGS OF FACTS

1. Complainant is an adult individual named Beverly A. Blackburn, residing at Box 175, Daisytown, Pennsylvania 15427 (admitted by Respondent).

2. Respondent is the Crescent Hills Coal Company, Incorporated with its principal place of business in Daisytown, Allegheny County, Pennsylvania, an employer of more than four individuals. (admitted by Respondent)

3. On May 25, 1976, Complainant applied for employment with Respondent and was interviewed for a laborers position at that time. (N.T. 14)

4. This oral interview was conducted by Melvin Peluchette, secretary of Crescent Hills Coal Company and superintendent of the Daisytown operation. (N.T. 26)

5. Respondent's method of filling positions is via word-of-mouth or walk-in. Respondent does not recruit. (N.T. 8)

6. Respondent reviews applications on file when an opening exists. (N.T. 9)

7. Complainant testified that she returned to the Crescent Hills Coal Company on two subsequent occasions to acquire about employment. (N.T. 28, 29)

8. Respondent discussed the type of work available with Respondent. (N.T. 14)

9. Respondent discussed heavy lifting with Complainant but did not ask her to demonstrate her capacity for heavy lifting. (N.T. 16)

10. Respondent does not require a demonstration of heavy lifting unless the applicant requests it. (N.T. 23)

11. Melvin Peluchette testified that if he were in doubt about a persons capability to lift heavy loads, he would ask them how much they could lift. (N.T. 23)

12. Melvin Peluchette asked Complainant during her interview what she thought she could lift. (N.T. 15)

13. Complainant advised she could lift 50 to 75 pounds. (N.T. 25)

14. Melvin Peluchette told Complainant he would call her if there was an opening. (N.T. 15, 95)

15. Respondent determined that Complainant was not the best qualified applicant for the position of laborer. (N.T. 18 vol. 1, 96, 97, Vol. II)

16. Respondent has never hired women as laborers. (N.T. 18)

17. Respondent's first criteria for employment as a mine laborer is mining experience. There is no written criteria. (N.T. 7, 10)

18. During the period of August 19, 1975 to September 12, 1977, Respondent hired 17 males, of whom nine had listed mechanical schooling or experience, or some mining experience. Eight had no mechanical school or training listed. Of these eight, at least one had an education comparable to Complainant's. (Complainant's Exhibit #40)

19. Complainant's cousin's husband's nephew was an experienced miner who held a miner's certificate. (N.T. 47)

20. Complainant testified that her uncle and cousin's husband's nephew were hired since her application (N.T. 37)

21. Complainant did not know the name of her cousin's husband's nephew. (N.T. 37)

22. Complainant testified, upon cross-examination, that she supposed, but was not certain, that her uncle Donald Vadella, was the same Donald Vadella who was a master mechanic at Respondent's mine. (N.T. 45)

23. Complainant testified, upon cross-examination, that she did not know her uncle's job position or work experience. (N.T. 46)

24. Complainant testified that her job as a school bus driver entailed lifting children who could not walk. She first testified that she and an aide lifted them. She subsequently testified she did this job without assistance. (N.T. 52, 53)

25. Complainant testified that she quit her job as a school bus driver because she had an automobile accident. She later said it was because she didn't want the responsibility of children. (N.T. 54-56)

26. Complainant did not list her laborer's experience as a road worker on the Crescent Hills Coal Company application. (N.T. 55)

27. Complainant vacillated in her testimony concerning the weight of the road paving roller she had operated. (N.T. 89)

28. Complainant's testimony changed concerning her brother's attempt to apply for employment with Respondent. (N.T. 102-106)

29. Complainant was inconsistent in her testimony concerning the occasions she visits Respondent's mine, viz; she testified these visits were the date of application; two weeks after filing her application, and again four weeks after filing. All were meetings with only Melvin Peluchette. In later testimony, she said her sister-in-law accompanied her on the third visit. Still later, she changed her testimony to state her sister-in-law accompanied her on her second visit. (N.T. 67-74)

30. Complainant testified that her brother, George, went to Respondent's mine and was refused an application. After the lunch recess, she returned and testified that he was given an application, but told there would be no further applications given out. (N.T. 102-107)

31. Complainant stated Melvin Peluchette would not hire women. He said this when alone with her on her third visit to the plant. Later, Complainant said the statement was made on the second visit, in the presence of her sister-in-

law. Finally, Complainant said Mr. Peluchette's statement was made on both subsequent visits. At no time prior to so testifying did Complainant advise her attorney that Mr. Peluchette had made this statement on two separate occasions.

32. Mary Shemansky, another female applicant was also inconsistent in her testimony concerning the occasions she had to visit Respondent. She testified she filed an application the same date as Complainant's brother, George. She stated she went to the plant only once more in July and alone. Then she testified that Complainant went with her in July on her second visit. Later on she testified she and the Complainant went to the mine on a third visit there. Next she testified Complainant went with her on her first visit. Next, she testified that when she filled out the application, Complainant was with her and her brother as well. She stated that Melvin Peluchette did not discuss anything with them while she was there.

She subsequently changed these statements again to state that she heard Melvin Peluchette say that he would not hire women. This was on the second visit. She was excused from testifying after she stated there were two visits but she could not remember the dates.

33. Stanley Williams, witness for Complainant, was brought into court at the January 8, 1980 hearing. He testified that he overheard Melvin Peluchette make the comment that Peluchette would never hire women and blacks. (N.T. 47)

34. Edward Roskevitch testified that Complainant asked him in October, 1976 if he could get her a job at Crescent Coal Company. He answered he was lucky to have one himself. She replied the coal company would pay if they did not give her a job. (N.T. 67)

35. Respondent has an unwritten policy of discriminating against females as a class by refusing to consider them for laborer positions in its mines.

36. Respondent's records indicate at least three other females who applied for employment as laborers. (Respondent Ex. E)

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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, § P.S. §959.

2. Complainant filed a timely complaint with the Pennsylvania Human Relations Commission alleging that Respondent had refused to hire her because of her sex, in violation of Section 5(a) of the Act 43 P.S. 955(a).

3. Complainant filed a proper amendment to her complaint alleging inter alia that Respondent had discriminated against her and all other similarly situated females as a class by refusing to hire them for positions in the mines in violation of 43 P.S. 955(a).

4. 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.

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

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

7. Section 5(a) of the Pennsylvania Human Relations Act makes it unlawful "for any employer because of the..... sex..... of any individual to refuse to hire or employ.... such individual or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is best able and most competent to perform the services required." 43 P.S. §955(a).

8. Complainant has the burden of establishing: (1) that she is a member of a protected class; (2) that she has applied for a position with Respondent for which she is qualified; (3) that she was rejected; and (4) that Respondent continued to seek and hire other applicants subsequent to its rejection of Complainant. McDonald-Douglas Corp. v. Green, 411 U.S. 792 93 S.Ct. 1817 (1973).

9. Complainant's own testimony, as well as supporting testimony, lacked credibility and candor with the result that she did not meet the standard of proof sufficient to sustain her case.

10. Complainant has failed to meet her burden that she applied for a position with Respondent for which she was qualified.

11. Complainant has not established a violation of sex based on discrimination pursuant to section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §955(a).

12. "Actions on behalf of a class may survive even though claims of individually named plaintiffs do not." Sosna v. Iowa, 419 U.S. 393 (1975).

13. Respondent's evidence that only a few females applied for employment as laborers does not rebut Complainant's showing of class-wide discrimination of females for a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." Commonwealth Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976).

14. Denial of relief on the ground that more class members "had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from minority groups." Id. at 365.

15. Once discrimination has been found, Respondent may be ordered to cease and desist from the discriminatory practice, hire, upgrade, and/or grant backpay. 43 P.S. Section 959

16. The PHRC may order relief for persons other than the named Complainant where, as here, the Complainant alleges that such other persons have been affected by the alleged discriminatory practice and such other persons entitled to relief may be described with specificity. Cmwlth. Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976).

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HISTORY OF THE CASE

On or about July 28, 1976, Complainant, Beverly A. Blackburn, filed a complaint with the Pennsylvania Human Relations Commission ("Commission"). The complaint alleged that the Respondent, Crescent Hills Coal Company, Incorporated 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 because of her sex, female. Further, the Complainant alleged that males have been hired since her application in March, 1976.

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 the allegations. Efforts to conciliate the matter, as mandated by §9 of the Act, were unsuccessful and the case proceeded

to a Public Hearing on October 23, 1979 before a Hearing Panel that consisted of John P. Wisniewski, Elizabeth M. Scott, and Doris A. Smith, Esquire. Marion M. Cowperthwait, Esquire, acted as Legal Advisor to the Hearing Panel; Ellen M. Doyle, Esquire appeared to prosecute the complaint; and Oliver M. Hormell, 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 on the basis of sex in violation of §5(a) of the Pennsylvania Human Relations Act, as amended, 43 P.S. 951, 955 (Supp. 1979-80) (Act). There is substantial disagreement regarding the events which precipated the filing of the complaint.

The Complainant, on May 25, 1976, applied for employment with Respondent and was interviewed for a laborer's position. The position involved a non-traditional job for females; working as a laborer in Respondent's coal mine. In the course of the interview, the issue of qualifications arose. The Respondent stated that the job required heavy lifting. The Complainant

never asked to demonstrate her ability to lift. However, she was asked what she thought she could lift. The Complainant stated 50 to 75 lbs. During the application process, the Complainant did not reveal to the Respondent those parts of her employment history which would reflect favorably upon her qualifications for the laborer's position.

After the initial interview, the Complainant's application was placed in a file from which the Respondent selected the persons who were hired as laborers. The Complainant made two subsequent visits to the Respondent to inquire about her chances for employment. After her initial interview, at least 17 males were hired as laborers. No female has ever been hired by the Respondent as a laborer.

The Complainant introduced evidence that a second female, Mary Shemansky, had filed an application for any type of employment, after the Complainant made her initial application. Shemansky was not hired as a laborer.

It appears, that at least facially, the Complainant's application was treated no differently than any other. As a policy, the Respondent makes no effort to recruit or solicit applications. Rather, knowledge of employment opportunities passes by word of mouth. Persons simply go to the Respondent, fill out applications and are interviewed. After the interviews, applications are placed in a file. As vacancies occur , the hiring officer selects the applicant he desires. At least for the position of laborer, the qualifications of those selected varied widely. Date of initial application has little bearing

on order of selection for hiring.

The Complainant introduced testimony that the Respondent's hiring officer twice stated that no woman would ever be hired to work in the mines. At the outset, it should be noted that the reason for the non-hire of the Complainant is at issue. For the Complainant to prevail, it must be demonstrated that the Respondent violated §5(a) 43 P.S. §955(a) of the Pennsylvania Human Relations Act which makes it unlawful:

> "For any employer because of the... sex...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or otherwise to discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required." [Emphasis added.]

Thus, the "best able" test is the threshold issue in this action. If it can be established that the Complainant was the best able and most competent applicant for the position, but others were hired, the Commission may then inquire whether the non-hire was the result of unlawful sex discrimination. In making this inquiry, the Commission may consider the issues raised in the record including, but not limited to:

(1) the Respondent's failure to formulate standards in qualifying applicants;

(2) the Respondent's failure to actively recruit or solicit applicants for employment as laborers;

(3) the existence of discriminatory attitudes within the Respondent's management towards females in non-traditional jobs.

Upon reviewing these and other factors, the Commission may determine that the Act was violated - but only if the threshold "best able" test was met. Upon a finding a violation of the Act, the Commission then must consider the issues of damages and other remedies.

II. LIABILITY ISSUES

A. LIABILITY TO THE NAMED COMPLAINANT

After a complete and final review of the record and consideration of the brief on behalf of the Complainant, it is the conclusion of the Commission that the Complainant has failed to sustain her burden of proof as required by law.

In employment discrimination cases brought under the Act, Pennsylvania has adopted the approach of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), an action brought under Title VII of the Civil Rights Act of 1964, 42 USCA 2000e et seq. General Electric Corporation v. Commonwealth Human Relations Commission, (469 Pa. 292, 365 A.2d 649 (1976).

In McDonnell-Douglas, the United States Supreme Court held that:

> ...a prima facie case of discrimination under Title VII is made out if the complainant establishes that he is a member of a protected minority, that he applied for a job for which he was qualified, that his application was rejected and that the employer continued to seek other

> applicants of equal qualification. 411 U.S. at 800, 93 S.Ct. at 1823, 36 L.Ed. 2d at 677.
>
> Once a complainant establishes these elements, the burden then shifts to the employer to justify his employe selections on the basis of job-related criteria which are necessary for the safety and efficiency of the enterprise. 411 U.S. at 802, 93 S.Ct. at 1824, 36 L. Ed. at 678. General Electric, 365 A.2d at 655-656. (emphasis added)

The Pennsylvania Human Relations Act specifically says the complainant is faced:

> "with the additional requirement that the complainant be the best able and most competent to perform the services required."

G.C. Murphy Company v. Commonwealth Human Relations Commission, 12 Pa. Cmwlth. 20, Pa. Cmwlth., 314 A.2d 356 at 358.

However, General Electric imposes no greater standard than Title VII so that the "best able and most competent" standard is not a pecularly higher test and should not be construed as such here or elsewhere. In General Electric, the burden was placed on the employer to show that the Complainant was not "best able and most competent." The Pennsylvania Supreme Court explained,

> "To cast the burden of establishing one's relative qualifications on the complainant would, in both objective and subjective situations, impose significant obstacles of time and expense which could serve to deter vigorous enforcement of the rights conferred by the statute. In the case where subjective standards have been employed, the burden of proving relative qualifications might well be an impossible one. In either event, however, effective enforcement of the PHRA seems best promoted by casting the burden on the employer to demonstrate that the female worker was not

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best qualified. Such a solution best advances the salutory purposes of the PHRA and is in accord with accepted notions of allocation of burden of proof:

> "If the existence of non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most earily." Barrett v. Otis Elevator Company, 431 Pa. 446, 452-453, 246 A.2d 668, 672 (1968). 365 A.2d at 657.

While General Electric places upon the employer the burden to disprove that the Complainant was best qualified, it does not relieve the Complainant of her initial burden of showing that she is qualified. This view is consistent with the "business necessity doctrine" formulated in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). In General Electric, the Pennsylvania Supreme Court explained the business necessity doctrine:

> [It] "protect(s) employers from having to select employees who do not meet their qualifications standards. In essence, it serves as a limitation upon the right of equal employment broadly bestowed upon the citizens of this Commonwealth by the PHRA." (365 A.2d at 649.)

The requirement of the Complainant to establish her qualifications as opposed to "best" qualifications has been continued in post General Electric case law interpreting McDonnell-Douglas:

> "The importance of McDonnell-Douglas lies, not in its specification of the discrete elements of proof there re-

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> quired, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidences adequate to create an inference that an employment decision was based on a discriminatory criterion under the Act."

International Brotherhood of Teamsters v. United States, 431 US 324, at 358, 97 S.Ct. 1843; 52 L.Ed.2d 396 (1977)

> "Under McDonnell-Douglas a title VII case is divided into three phases. First the plaintiff must demonstrate a prima facia case of discrimination. Then the defendant is called upon to articulate a legitimate non-discriminatory reason for its action. Finally, the plaintiff is afforded an opportunity to show that the proffered reason is in fact a pretext designed to cover what is actually an illegal discrimination."
>
> "This tripartite arrangement is a useful tool in analyzing these controversies, but it should not be construed so as to divide a single cause of action into three different cases. There are no hard and fast rules as to what evidence must be considered as constituting a prima facia case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the fact finder that there has been illegal discrimination always resides with the plaintiff."

Whack v. Peabody & Wind Engineering Co., 595 F.2d 190 (3rd Cir., 1979) at 193. (emphasis added) See Board of Trustees of Keene State College v. Sweeney, 439 US 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). (emphasis added)

Additionally, General Electric did not abrogate the previous requirement that a finding of "qualified" or "best able ... most competent" be supported by substantial evidence.

> "The burden is on the Commission to prove through substantial evidence a violation of the Act. Even if a respondent takes the risky tactic of presenting no evidence whatsoever, the Commission cannot utilize that failure to present any evidence as the basis for determining a violation." (J. Howard Brandt, Inc. v. Commonwealth Human Relations Commission, (15 Pa. Cmwlth 123, Pa. Cmwlth, 324 A.2d 840 (1974) at 845), a housing discrimination case.

The requirement that a finding be based on substantial evidence is derived from the Pennsylvania Administrative Agency Law, at 2 PCSA §704, which requires an appeals court to affirm an agency adjudication unless that "adjudication is not supported by substantial evidence." St. Andrews Development Co., Inc. v. Commonwealth Human Relations Commission, 10 Pa. Cmwlth 123, Pa. Cmwlth, 308 A.2d 623 (1973); Tomlinson Agency v. Commonwealth Human Relations Commission. 11 Pa. Cmwlth 227, Pa. Cmwlth, 312 A.2d 119 (1973). See also Wilkinsburg School District v. Human Relations Commission, 6 Pa. Cmwlth 378, 295 A.2d 609 (1972); Pennsylvania Human Relations Commission v. Chester School District 209 Pa. Super. 37, 224 A.2d 811 (1966).

The Administrative Agency Law is made applicable to proceedings of the Human Relations Commission at 2 PCSA §501. Substantial evidence has been defined as

> "...more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tomlinson at 312 A.2d 120. See A.P. Weaver and Sons v. Sanitary Water Board, 3 Pa. Cmwlth 499, 284 A.2d 515 (1971) citing. Consolidated Edison Co. v. NLRB, 305 US 197, 229, 59

S.Ct. 206, 217, 83 L.Ed.126 (1938).

Substantial evidence was further described in St. Andrews 308 A.2d at 625; quoting A.P. Weaver,284 A.2d at 515:

> [S]ubstantial evidence should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.

In determining whether the Complainant's allegations were supported by substantial evidence, the Commission weighed the credibility of her testimony. While there are no appellate court decisions on credibility as applied to the Act, the courts have upheld the exercise of broad discretion by Pennsylvania administrative agencies in weighing credibility.

Credibility of a witness has been defined as that quality "which renders his evidence worthy of belief." Jones v. Workmen's Compensation Appeal Board, (25 Pa. Cmwlth 546, Pa. Cmwlth, 360 A.2d 821 (1976) at 823, quoting Black's Law Dictionary, 440 (Revised Fourth Edition 1968).

"It is the responsibility of the referee to weigh the testimony and to accept it, or reject it, in whole or in part."

Jones at 360 A.2d 824 citing Workmen's Compensation Appeals Board v. Guzman, 18 Pa. Cmwlth 275, 334 A.2d 852 (1975). "The fact finder may reject the testimony of the claimant when it conflicts with the testimony of the employer, or even when it is uncontradicted." Affalter v. Commonwealth Unemployment Compensation Board of Review. Pa. Cmwlth 397 A.2d 863 (1979) at 865 citing Wardlow v. Unemployment Compensation of Review, 36 Pa. Cmwlth 477, 387 A.2d 1356 (1978). "Credibility of a witness and the weight given his testimony are matters for the compensation authorities who are not required to accept even uncontroverted testimony as true." Unemployment Compensation Board of Review v. Devictoria, Pa. Cmwlth. 353 A.2d 920 (1976) at 922 citing Edelman v. Unemployment Compensation Board of Review, 10 Pa. Cmwlth 275, 310 A.2d 707 (1973).

Upon careful review of the record, the Commission has determined that the testimony of the Complainant lacks sufficient credibility upon which to make a finding in her favor based on substantial evidence. The testimony of the Complainant is inconsistent and contradictory.

In claiming that her failure to be hired as a laborer constituted sex discrimination, the Complainant cited a relative later identified as Donald Vadella. The testimony of the Complainant on cross-examination puts the validity of her charge in question. Her inconsistent testimony erodes her credibility.

Q. Is this the same Donald Vadella who is a master mechanic at the mine?

A. I suppose he is

Q. That is not the same as a general laborer. You didn't want a job as a master mechanic, did you?

A. I heard that he was hired.

Q. You stated that this is one of the reasons you felt discriminated against, because he was hired and you weren't. Are you willing to state for the record that Mr. Vadella is a mechanic and therefore, extremely qualified?

Ms. Doyle: Let's find out if she knows.

The Witness: I didn't know that he was a mechanic. I just know he was hired by Crescent Coal Company. (NT 45-46, Vol. I)

The Complainant was inconsistent in her testimony about her job as a school bus driver (NT 52, 53, Vol. I). First she testified that she and an aide carried children who were unable to walk. Then she testified that this task was done without assistance. Later she was inconsistent on why she quit. First she testified that it was because of an automobile accident.

Q. You quit working there in 1975?

A. Yes, I did.

Q. Because you were in an automobile accident?

A. Yes

(NT 54, October 23, 1979)

Later, she changed her story:

Q. The reason for leaving employment with the intermediate unit you had indicated was because you were in a car accident.

A. Yes.

Q. If you were not hurt in that car accident, why would you leave?

A. They wouldn't accept my application for the following year.

Q. Why not?

A. Because I told them I felt that it was a responsibility in driving them kids.

Q. Then, your employment was not terminated because you were in an accident, but because you told them you didn't want to work?

A. I didn't say I didn't want to work. I told them I felt it was a responsibility not to drive those kids, and I felt ---

Q. This employment record asks you the reasons for leaving work, so what you are telling me now is that you didn't leave because you were in an accident, you left because you didn't think that you wanted to accept that responsibility, isn't that right?

A. That's right.

Q. That is the real reason you left?

A. It is a responsibility to drive somebody's else's kids. (NT 56-57, Vol. I)

The Complainant vacillated in her testimony concerning the weight of the road paving roller she had operated. (NT 89, Vol I)

The Complainant changed her testimony about her brother's attempt to apply for employment with the Respondent. (NT 102, 106, 107, 108, Vol. I)

The Complainant was inconsistent in her testimony concerning the occasions on which she visited the Respondent's mine.

First she testified that these visits were on the date of application, two weeks after filing her application and again four weeks after filing her application. All were meetings with only Melvin Peluchette. In later testimony, she said Mary Shemansky was present during the third visit. Still later the Complainant changed her testimony to say that Shermansky was present on the second visit. (NT 67-74, Vol. I). According to the Complainant, Melvin Peluchette said he would not hire women when they were alone on the third visit. Later the Complainant testified that the statement was made on the second visit in the presence of Shermansky. Finally, the Complainant testified that the statement was made on the second and third visits. At no time prior to so testifying, did the Complainant advise her attorney that Peluchette had made the statement on two separate occasions.

The credibility of the Complainant is further put into question by the confused and inconsistent testimony of Mary Shermansky (NT 117-135, Vol. I). Shermansky testified that she filed an application the same day as the Complainant's brother George. She stated that she went to the mine only once more in July. On that occasion she was alone. Later, Shermansky testified that the complainant went with her in July to the mine on her second visit. Still later, Shermansky testified that she and the Complainant went to the mine on a third visit. Next Shemansky testified that when she filled out the application, the Complainant and George were both present. She stated that Melvin Peluchette did not discuss anything with them while she was there. Shermansky subsequently changed these statements

again to state that during the second visit, she heard Peluchette say he would not hire women. The testimony of Complainant lacks credibility.

Her case is further weakened by her failure to disclose to the Respondent those job skills which would have reflected favorably upon her qualifications as a laborer. At the hearing, the Complainant offered her past employment as proof of her qualifications and hence the basis of her discrimination charge. Yet she admitted under cross-examination that she never listed these qualifications on her employment application. (NT 55-56, Vol. I).

By this very admission, it appears that the Complainant may have herself been responsible for her failure to have been selected for hiring.

The recent case of Holder v. Old Ben Coal Company, (22 EPD ¶30,623, 7th Cir. 1980) sheds light on the present action. In Holder, the Complainant sued a coal company for sex discrimination claiming she was passed over for an unskilled position in favor of several males who were hired. Remarkably, the Complainant in Holder failed to disclose all her job related skills on her employment application.

In Holder, the Court recognized that "unskilled" can be legitimately distinguished from "unqualified."

> A job categorized as unskilled, however, does not necessarily mean that certain qualifications or experience are not required or preferred for the

> ...o. Unskilled does not mea.. unqualified. "Unskilled" commonly means not skilled in some handicraft, or devoid of any technical training. Oxford English Dictionary (Compact ed. 1971). It need not mean lacking any useful experience qualification.
>
> No evidence was introduced to show that defendant applied the term 'unskilled' to mean a total lack of qualifications or experience. The record shows to the contrary that defendant did look for certain qualifications in reviewing applicants for unskilled positions. Defendant's personnel administrator testified that when defendant sought applicants for unskilled positions, it primarily sought persons who had operated mobile equipment or had worked with heavy equipment. The applications of several persons hired demonstrate that defendant also sought applicants who had welding or extensive truck driving or maintenance experience. The mine also sought employees in the unskilled category who appeared to be capable not only of menial tasks but also of filling in and assisting with other jobs as might be helpful when needed due to vacations, sickness or otherwise.
> (22 EPD at p. 14,321)

At the hearing, Peluchette, the Respondent's hiring officer, also distinguished unskilled from unqualified. Peluchette testified that he had five criteria for hiring persons as laborers - experience, education, technical knowledge, technical training and physical capacity. (NT 7, Vol I), (1979). He testified that job seekers were provided with an

> "application with their previous work and what type work they have done. Also, in our application, it states
>
> > 'List any mechanical equipment that you have operated.'
>
> (NT 11, Vol. I)

In the second hearing, Peluchette further explained the hiring process.

> "...I go through the applications. The ones that have anything on them that are more outstanding than others, those are the ones I select. [to interview]" (NT 124, Vol. II)

Peluchette explained the failure to offer a laborers position to the Complainant:

> "When I went through the applications looking for potential employees, I checked them off as to anything outstanding on there that would make anyone more qualified than another. I didn't find anything on her application to show that she happened to be outstanding or that she was more qualified for work than some of the other people I looked at."
> (NT 97, Vol. II)

Unfortunately, whether or not the Respondent violated the Act is not at issue, because the Complainant must first meet her burden of proof as to her initial qualifications. Albeit, she did not have to be "more" qualified than others, but this point is not reached.

By her own admission, the Claimant failed to list her relevant mechanical education and mechanical experience on her job application. (Complainant's Exhibit 40). She might, at least, have demonstrated minimum qualifications. In contrast, of the 17 males hired as laborers, (listed on Exhibit 40) nine listed some mechanical education, mechanical experience or both.

Clearly, the Complainant failed to establish her qualifications when she applied for the job. Claiming discrimination for not being hired after she neglected to submit some qualification reflects negatively on her credibility and good faith diligence

in pursuit of employment with Respondent.

It may very well be true that Complainant was passed over in favor of the other eight males on account of her sex. However, Pennsylvania law requires that the Complainant be "best able and most qualified" (as defined by General Electric) in order to establish a violation of the Act.

Her failure to submit her relevant qualifications saved Respondent from committing a deliberate violation of the Act as to her. Her failure to submit her relevant qualifications deprived her of the means of proving discrimination against her.

B. LIABILITY TO FEMALES AS A CLASS

However, testimony demonstrates that Respondent willfully discriminates against women as a class.

Respondent established sex-segregated procedures for review and comparison of female applicants to each other rather than to males. Respondent claims that it did not interview Mary Shermansky because "there were no positions available and because there was a female applicant (Beverly Blackburn) who, assuming she would have been qualified, because of the date of her application would have been given preference." (Complainant's Ex. No. 27) Testimony regarding the hiring order of similarly-situated males shows that the date-of-application preference, said to apply to females, did not apply to the male hires (Complainant's Ex. Nos. 7,9,10,11,17,18,38, and Respondent's Ex. A).

The Pennsylvania Supreme Court has stated that 43 P.S. Sec. 955(a) "entitles every female job applicant to have her qualifications for employment considered on an equal footing with those of a man." General Electric Corp. v. Cmwlth. Human Rel. Comm., 469 Pa. 292, 365 A.2d 649, 660 (1976). It was precisely this equality of opportunity which was denied actual and potential female applicants for laborer positions in Respondent's mines because Respondent refused to seriously consider them.

The Pennsylvania Supreme Court has recognized that one "intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose." Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 233 A.2d 290, 298 (1967). Yet in the instant case, Respondent was so smug in its discriminatory practices that it announced its policy of not hiring females, both to Complainant and in the presence of other employees. (N.T. 47, Vol. 11)

Examination of Merwin Markel, PHRC investigator, clearly evidences that females suffer disparate treatment as a result of Respondent's hiring practices. The disparate impact on females in Respondent's labor force is equally evident. Markel's testimony demonstrates that Respondent's employment procedures result in a cognizable deprivation to females as a class. (N.T. 115-140, Vol. II). In addition, this case involves applicants being chosen from a pool rather than being hired seriatim. In this kind of situation, a showing of discriminatory animus completes a class based prima facie case. King v. New Hampshire Dept. of Resources and Economic Development, 562 F.2d 80,83 (1st Cir. 1977). An unwritten policy of refusing to hire females as laborers also

completes a prima facie case of class-based discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Both elements are present here.

Thus, the burden shifts to Respondent to articulate some legitimate, non-discriminatory reason for Respondent's failure to hire females. Id., McDonnell-Douglas Corp. v. Green, supra.

Respondent seeks to avoid liability in this case by showing that based on numbers alone, it is unlikely that any of the female applicants would have been hired. It has placed great weight on the fact that only a handful of females have applied as laborers over the past five years. Respondent, however, chooses to ignore the effects its no-female policy presumably has had on the number of females applicants, for a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." International Brotherhood of Teamsters v. United States, 431 U.S. at 365. The United States Supreme Court went on to state:

> "If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices -- by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of

> minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application." Id.

The same holds true for a policy of hiring only males as laborers.

The Court recognized that the most overtly discriminatory employers should not be allowed to escape liability simply "because the unlawful practices had been so successful as totally to deter job applications from minority groups." Id., In the instant case Respondent must be held responsible for the tiny numbers of females who have applied for employment as laborers.

III. CONCLUSION

The finding of the Commission rests on the lack of credibility of the Complainant, and upon the lack of substantial evidence upon which to conclude that she has met her burden of proof under the law. Absent the establishment of this burden, the threshold issue of "best able and most competent" does not come into play and the Commission need not look into the question of damages and other remedies as to the Complainant.

However, by this finding, the Commission in no way absolves the Respondent. It may well be true and should be true that somewhere in the Respondent's geographical workforce, there are women who are as qualified as the successful male applicants. It is expected that the Respondent will make a genuine effort to recruit from this workforce by advertisement and word of mouth.

Although the Complainant did not meet her burden of proof, the Commission determined by thorough review of the testimony that sex discrimination is rife in this industry and this company. The PHRA specifically provides that once discrimination has been found, Respondent may be ordered to cease and desist from the discriminatory practice, hire, upgrade, and grant backpay to prevailing persons. 43 P.S. Section 959.

The PHRC may order relief for persons other than the named Complainant where, as here, the Complainant alleges that such other persons have been affected by the alleged discriminatory practice. Having shown that Respondent illegally discriminated against females, the class members are entitled to an Order against Respondent requiring Respondent to: (1) cease and desist from refusing to hire females as laborers in its mines; (2) cease and desist from making derogatory and discriminatory comments to female applicants for such positions; and (3) devise and submit to the Commission within ninety (90) days of this Order, an Affirmative Action Plan to promote the hiring of women as laborers in its mines. The Affirmative Action Plan shall include, but not be limited to: (a) written job-related criteria; (b) a standardized written interview format, including any job-related tests to be conducted and scoring criteria for such tests; (c) procedures for active advertising and recruitment of females as laborers; (d) procedures for quarterly submission, for a five year period, of copies of all male and female applications; copies of all written interviews and designation of those who were hired with reasons for their hire.

RECOMMENDATION OF HEARING PANEL

AND NOW, this 29th day of September, 1980, in consideration of the entire record in this matter, including the Complaint, Stipulations, Exhibits, Record of the Hearing, and Briefs filed on behalf of Complainant and Respondent, the Hearing Panel recommends to the entire Commission that the enclosed findings of Fact, Conclusions of Law and Opinion be adopted and that an Order be entered dismissing the complaint.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOHN P. WISNIEWSKI, Chairperson

_____
DORIS A. SMITH, Esquire

_____
ELIZABETH M. SCOTT, Hearing Commissione

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN,
Complainant

v.

CRESCENT HILLS COAL COMPANY,
Respondent

DOCKET NO. E-10314

O R D E R

AND NOW, this 16th day of October, 1980, upon consideration of the Findings of Fact, Conclusions of Law, and Opinion 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. Respondent shall cease and desist from refusing to hire females as laborers in its mines;

2. Respondent shall cease and desist from making derogatory and discriminatory comments to female applicants for such positions;

3. Respondent shall devise and submit a proposed affirmative action plan to the Commission within ninety (90) days of the date of this Order. The proposed Affirmative Action Plan shall include, but not be limited to: (a) written job-related criteria; (b) a standardized written interview format

including any job-related tests to be conducted and scoring criteria for such tests; (c) procedures for active advertising and recruitment of females as laborers; (d) procedures for quarterly submission, for a five year period, of copies of all male and female applications; copies of all written interviews and designations of those who were hired with reasons for their hire; and

4. The complaint shall be dismissed to Beverly A. Blackburn.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

JOSEPH X. YAFFE, CHAIRPERSON
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

JOHN P. WISNIEWSKI, ASSISTANT SECRETARY
PENNSYLVANIA HUMAN RELATIONS COMMISSION

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT A. CULVER, Complainant	:	
v.	:	DOCKET NO. E-14582
INTERSTATE MOTOR FREIGHT SYSTEM, Respondent	:	

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the hearing panel that Respondent has terminated Complainant from employment due to a non-job related handicap or disability in violation of §5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the Panel's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted by the full Pennsylvania Human Relations Commission.

Everett E. Smith, Panel Chairperson — Date

Doris M. Leader, Commissioner — Date

Raquel Otero Yiengst, Commissioner — Date

6. Respondent reviews applications on file when an opening exists. (N.T. 9)

7. Complainant testified that she returned to the Crescent Hills Coal Company on two subsequent occasions to acquire about employment. (N.T. 28, 29)

8. Respondent discussed the type of work available with Respondent. (N.T. 14)

9. Respondent discussed heavy lifting with Complainant but did not ask her to demonstrate her capacity for heavy lifting. (N.T. 16)

10. Respondent does not require a demonstration of heavy lifting unless the applicant requests it. (N.T. 23)

11. Melvin Peluchette testified that if he were in doubt about a persons capability to lift heavy loads, he would ask them how much they could lift. (N.T. 23)

12. Melvin Peluchette asked Complainant during her interview what she thought she could lift. (N.T. 15)

13. Complainant advised she could lift 50 to 75 pounds. (N.T. 26)

14. Melvin Peluchette told Complainant he would call her if there was an opening. (N.T. 15, 95)

15. Respondent determined that Complainant was not the best qualified applicant for the position of laborer. (N.T. 18 vol. 1, 96, 97, Vol. II)

16. Respondent has never hired women as laborers. (N.T. 18)

17. Respondent's first criteria for employment as a mine laborer is mining experience. There is no written criteria. (N.T. 7, 10)

18. During the period of August 19, 1975 to September 12, 1977, Respondent hired 17 males, of whom nine had listed mechanical schooling or experience, or some mining experience. Eight had no mechanical school or training listed. Of these eight, at least one had an education comparable to Complainant's. (Complainant's Exhibit #40)

19. Complainant's cousin's husband's nephew was an experienced miner who held a miner's certificate. (N.T. 47)

20. Complainant testified that her uncle and cousin's husband's nephew were hired since her application (N.T. 37)

21. Complainant did not know the name of her cousin's husband's nephew. (N.T. 37)

22. Complainant testified, upon cross-examination, that she supposed, but was not certain, that her uncle Donald Vadella, was the same Donald Vadella who was a master mechanic at Respondent's mine. (N.T. 45)

23. Complainant testified, upon cross-examination, that she did not know her uncle's job position or work experience. (N.T. 46)

24. Complainant testified that her job as a school bus driver entailed lifting children who could not walk. She first testified that she and an aide lifted them. She subsequently testified she did this job without assistance. (N.T. 52, 53)

25. Complainant testified that she quit her job as a school bus driver because she had an automobile accident. She later said it was because she didn't want the responsibility of children. (N.T. 54-56)

26. Complainant did not list her laborer's experience as a road worker on the Crescent Hills Coal Company application. (N.T. 55)

27. Complainant vacillated in her testimony concerning the weight of the road paving roller she had operated. (N.T. 89)

28. Complainant's testimony changed concerning her brother's attempt to apply for employment with Respondent. (N.T. 102-106)

29. Complainant was inconsistent in her testimony concerning the occasions she visits Respondent's mine, viz; she testified these visits were the date of application; two weeks after filing her application, and again four weeks after filing. All were meetings with only Melvin Peluchette. In later testimony, she said her sister-in-law accompanied her on the third visit. Still later, she changed her testimony to state her sister-in-law accompanied her on her second visit. (N.T. 67-74)

30. Complainant testified that her brother, George, went to Respondent's mine and was refused an application. After the lunch recess, she returned and testified that he was given an application, but told there would be no further applications given out. (N.T. 102-107)

31. Complainant stated Melvin Peluchette would not hire women. He said this when alone with her on her third visit to the plant. Later, Complainant said the statement was made on the second visit, in the presence of her sister-in-

law. Finally, Complainant said Mr. Peluchette's statement was made on both subsequent visits. At no time prior to so testifying did Complainant advise her attorney that Mr. Peluchette had made this statement on two separate occasions.

32. Mary Shemansky, another female applicant was also inconsistent in her testimony concerning the occasions she had to visit Respondent. She testified she filed an application the same date as Complainant's brother, George. She stated she went to the plant only once more in July and alone. Then she testified that Complainant went with her in July on her second visit. Later on she testified she and the Complainant went to the mine on a third visit there. Next she testified Complainant went with her on her first visit. Next, she testified that when she filled out the application, Complainant was with her and her brother as well. She stated that Melvin Peluchette did not discuss anything with them while she was there.

She subsequently changed these statements again to state that she heard Melvin Peluchette say that he would not hire women. This was on the second visit. She was excused from testifying after she stated there were two visits but she could not remember the dates.

33. Stanley Williams, witness for Complainant, was brought into court at the January 8, 1980 hearing. He testified that he overheard Melvin Peluchette make the comment that Peluchette would never hire women and blacks. (N.T. 47)

34. Edward Roskevitch testified that Complainant asked him in October, 1976 if he could get her a job at Crescent Coal Company. He answered he was lucky to have one himself. She replied the coal company would pay if they did not give her a job. (N.T. 67)

35. Respondent has an unwritten policy of discriminating against females as a class by refusing to consider them for laborer positions in its mines.

36. Respondent's records indicate at least three other females who applied for employment as laborers. (Respondent Ex. E)

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, 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, § P.S. §959.

2. Complainant filed a timely complaint with the Pennsylvania Human Relations Commission alleging that Respondent had refused to hire her because of her sex, in violation of Section 5(a) of the Act 43 P.S. 955(a).

3. Complainant filed a proper amendment to her complaint alleging inter alia that Respondent had discriminated against her and all other similarly situated females as a class by refusing to hire them for positions in the mines in violation of 43 P.S. 955(a).

10. Complainant has failed to meet her burden that she applied for a position with Respondent for which she was qualified.

11. Complainant has not established a violation of sex based on discrimination pursuant to section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §955(a).

12. "Actions on behalf of a class may survive even though claims of individually named plaintiffs do not." Sosna v. Iowa, 419 U.S. 393 (1975).

13. Respondent's evidence that only a few females applied for employment as laborers does not rebut Complainant's showing of class-wide discrimination of females for a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." Commonwealth Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976).

14. Denial of relief on the ground that more class members "had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from minority groups." Id. at 365.

15. Once discrimination has been found, Respondent may be ordered to cease and desist from the discriminatory practice, hire, upgrade, and/or grant backpay. 43 P.S. Section 959

4. 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.

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

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

7. Section 5(a) of the Pennsylvania Human Relations Act makes it unlawful "for any employer because of the..... sex..... of any individual to refuse to hire or employ.... such individual or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is best able and most competent to perform the services required." 43 P.S. §955(a).

8. Complainant has the burden of establishing: (1) that she is a member of a protected class; (2) that she has applied for a position with Respondent for which she is qualified; (3) that she was rejected; and (4) that Respondent continued to seek and hire other applicants subsequent to its rejection of Complainant. McDonald-Douglas Corp. v. Green, 411 U.S. 792 93 S.Ct. 1817 (1973).

9. Complainant's own testimony, as well as supporting testimony, lacked credibility and candor with the result that she did not meet the standard of proof sufficient to sustain her case.

16. The PHRC may order relief for persons other than the named Complainant where, as here, the Complainant alleges that such other persons have been affected by the alleged discriminatory practice and such other persons entitled to relief may be described with specificity. Cmwlth. Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976).

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, Respondent	:	

HISTORY OF THE CASE

On or about July 28, 1976, Complainant, Beverly A. Blackburn, filed a complaint with the Pennsylvania Human Relations Commission ("Commission"). The complaint alleged that the Respondent, Crescent Hills Coal Company, Incorporated 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 because of her sex, female. Further, the Complainant alleged that males have been hired since her application in March, 1976.

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 the allegations. Efforts to conciliate the matter, as mandated by §9 of the Act, were unsuccessful and the case proceeded

to a Public Hearing on October 23, 1979 before a Hearing Panel that consisted of John P. Wisniewski, Elizabeth M. Scott, and Doris A. Smith, Esquire. Marion M. Cowperthwait, Esquire, acted as Legal Advisor to the Hearing Panel; Ellen M. Doyle, Esquire appeared to prosecute the complaint; and Oliver N. Hormell, Esquire, appeared on behalf of the Respondent.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
v.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, Respondent	:	

OPINION

I. FACTUAL BACKGROUND AND ISSUE FORMULATION

This case involves a complaint of employment discrimination on the basis of sex in violation of §5(a) of the Pennsylvania Human Relations Act, as amended, 43 P.S. 951, 955 (Supp. 1979-80) (Act). There is substantial disagreement regarding the events which precipated the filing of the complaint.

The Complainant, on May 25, 1976, applied for employment with Respondent and was interviewed for a laborer's position. The position involved a non-traditional job for females; working as a laborer in Respondent's coal mine. In the course of the interview, the issue of qualifications arose. The Respondent stated that the job required heavy lifting. The Complainant was

never asked to demonstrate her ability to lift. However, she was asked what she thought she could lift. The Complainant stated 50 to 75 lbs. During the application process, the Complainant did not reveal to the Respondent those parts of her employment history which would reflect favorably upon her qualifications for the laborer's position.

After the initial interview, the Complainant's application was placed in a file from which the Respondent selected the persons who were hired as laborers. The Complainant made two subsequent visits to the Respondent to inquire about her chances for employment. After her initial interview, at least 17 males were hired as laborers. No female has ever been hired by the Respondent as a laborer.

The Complainant introduced evidence that a second female, Mary Shemansky, had filed an application for any type of employment, after the Complainant made her initial application. Shemansky was not hired as a laborer.

It appears, that at least facially, the Complainant's application was treated no differently than any other. As a policy, the Respondent makes no effort to recruit or solicit applications. Rather, knowledge of employment opportunities passes by word of mouth. Persons simply go to the Respondent, fill out applications and are interviewed. After the interviews, applications are placed in a file. As vacancies occur , the hiring officer selects the applicant he desires. At least for the position of laborer, the qualifications of those selected varied widely. Date of initial application has little bearing

on order of selection for hiring.

The Complainant introduced testimony that the Respondent's hiring officer twice stated that no woman would ever be hired to work in the mines. At the outset, it should be noted that the reason for the non-hire of the Complainant is at issue. For the Complainant to prevail, it must be demonstrated that the Respondent violated §5(a) 43 P.S. §955(a) of the Pennsylvania Human Relations Act which makes it unlawful:

> "For any employer because of the... sex...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or otherwise to discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required." [Emphasis added.]

Thus, the "best able" test is the threshold issue in this action. If it can be established that the Complainant was the best able and most competent applicant for the position, but others were hired, the Commission may then inquire whether the non-hire was the result of unlawful sex discrimination. In making this inquiry, the Commission may consider the issues raised in the record including, but not limited to:

(1) the Respondent's failure to formulate standards in qualifying applicants;

(2) the Respondent's failure to actively recruit or solicit applicants for employment as laborers;

(3) the existence of discriminatory attitudes within the Respondent's management towards females in non-traditional jobs.

Upon reviewing these and other factors, the Commission may determine that the Act was violated - but only if the threshold "best able" test was met. Upon a finding a violation of the Act, the Commission then must consider the issues of damages and other remedies.

II. LIABILITY ISSUES

A. LIABILITY TO THE NAMED COMPLAINANT

After a complete and final review of the record and consideration of the brief on behalf of the Complainant, it is the conclusion of the Commission that the Complainant has failed to sustain her burden of proof as required by law.

In employment discrimination cases brought under the Act, Pennsylvania has adopted the approach of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), an action brought under Title VII of the Civil Rights Act of 1964, 42 USCA 2000e et seq. General Electric Corporation v. Commonwealth Human Relations Commission, (469 Pa. 292, 365 A.2d 649 (1976).

In McDonnell-Douglas, the United States Supreme Court held that:

> ...a prima facie case of discrimination under Title VII is made out if the complainant establishes that he is a member of a protected minority, that he applied for a job for which he was qualified, that his application was rejected and that the employer continued to seek other

> applicants of equal qualification. 411 U.S. at 800, 93 S.Ct. at 1823, 36 L.Ed. 2d at 677.
>
> Once a complainant establishes these elements, the burden then shifts to the employer to justify his employe selections on the basis of job-related criteria which are necessary for the safety and efficiency of the enterprise. 411 U.S. at 802, 93 S.Ct. at 1824, 36 L. Ed. at 678. General Electric, 365 A.2d at 655-656. (emphasis added)

The Pennsylvania Human Relations Act specifically says the complainant is faced:

> "with the additional requirement that the complainant be the best able and most competent to perform the services required."

G.C. Murphy Company v. Commonwealth Human Relations Commission, 12 Pa. Cmwlth. 20, Pa. Cmwlth., 314 A.2d 356 at 358.

However, General Electric imposes no greater standard than Title VII so that the "best able and most competent" standard is not a pecularly higher test and should not be construed as such here or elsewhere. In General Electric, the burden was placed on the employer to show that the Complainant was not "best able and most competent." The Pennsylvania Supreme Court explained,

> "To cast the burden of establishing one's relative qualifications on the complainant would, in both objective and subjective situations, impose significant obstacles of time and expense which could serve to deter vigorous enforcement of the rights conferred by the statute. In the case where subjective standards have been employed, the burden of proving relative qualifications might well be an impossible one. In either event, however, effective enforcement of the PHRA seems best promoted by casting the burden on the employer to demonstrate that the female worker was not

best qualified. Such a solution best advances the salutory purposes of the PHRA and is in accord with accepted notions of allocation of burden of proof:

> "If the existence of non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most earily." Barrett v. Otis Elevator Company, 431 Pa. 446, 452-453, 246 A.2d 668, 672 (1968). 365 A.2d at 657.

While General Electric places upon the employer the burden to disprove that the Complainant was best qualified, it does not relieve the Complainant of her initial burden of showing that she is qualified. This view is consistent with the "business necessity doctrine" formulated in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). In General Electric, the Pennsylvania Supreme Court explained the business necessity doctrine:

> [It] "protect(s) employers from having to select employees who do not meet their qualifications standards. In essence, it serves as a limitation upon the right of equal employment broadly bestowed upon the citizens of this Commonwealth by the PHRA." (365 A.2d at 649.)

The requirement of the Complainant to establish her qualifications as opposed to "best" qualifications has been continued in post General Electric case law interpreting McDonnell-Douglas:

> "The importance of McDonnell-Douglas lies, not in its specification of the discrete elements of proof there re-

> quired, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidences adequate to create an inference that an employment decision was based on a discriminatory criterion under the Act."

International Brotherhood of Teamsters v. United States, 431 US 324, at 358, 97 S.Ct. 1843; 52 L.Ed.2d 396 (1977)

> "Under McDonnell-Douglas a title VII case is divided into three phases. First the plaintiff must demonstrate a prima facia case of discrimination. Then the defendant is called upon to articulate a legitimate non-discriminatory reason for its action. Finally, the plaintiff is afforded an opportunity to show that the proffered reason is in fact a pretext designed to cover what is actually an illegal discrimination."
>
> "This tripartite arrangement is a useful tool in analyzing these controversies, but it should not be construed so as to divide a single cause of action into three different cases. There are no hard and fast rules as to what evidence must be considered as constituting a prima facia case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the fact finder that there has been illegal discrimination always resides with the plaintiff."

Whack v. Peabody & Wind Engineering Co., 595 F.2d 190 (3rd Cir., 1979) at 193. (emphasis added) See Board of Trustees of Keene State College v. Sweeney, 439 US 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). (emphasis added)

Additionally, General Electric did not abrogate the previous requirement that a finding of "qualified" or "best able and most competent" be supported by substantial evidence.

> "The burden is on the Commission to prove through substantial evidence a violation of the Act. Even if a respondent takes the risky tactic of presenting no evidence whatsoever, the Commission cannot utilize that failure to present any evidence as the basis for determining a violation." (J. Howard Brandt, Inc. v. Commonwealth Human Relations Commission, (15 Pa. Cmwlth 123, Pa. Cmwlth, 324 A.2d 840 (1974) at 845), a housing discrimination case.

The requirement that a finding be based on substantial evidence is derived from the Pennsylvania Administrative Agency Law, at 2 PCSA §704, which requires an appeals court to affirm an agency adjudication unless that "adjudication is not supported by substantial evidence." St. Andrews Development Co., Inc. v. Commonwealth Human Relations Commission, 10 Pa. Cmwlth 123, Pa. Cmwlth, 308 A.2d 623 (1973); Tomlinson Agency v. Commonwealth Human Relations Commission. 11 Pa. Cmwlth 227, Pa. Cmwlth, 312 A.2d 119 (1973). See also Wilkinsburg School District v. Human Relations Commission, 6 Pa. Cmwlth 378, 295 A.2d 609 (1972); Pennsylvania Human Relations Commission v. Chester School District 209 Pa. Super. 37, 224 A.2d 811 (1966).

The Administrative Agency Law is made applicable to proceedings of the Human Relations Commission at 2 PCSA §501. Substantial evidence has been defined as

> "...more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tomlinson at 312 A.2d 120. See A.P. Weaver and Sons v. Sanitary Water Board, 3 Pa. Cmwlth 499, 284 A.2d 515 (1971) citing. Consolidated Edison Co. v. NLRB, 305 US 197, 229, 59

S.Ct. 206, 217, 83 L.Ed.126 (1938).

Substantial evidence was further described in St. Andrews 308 A.2d at 625; quoting A.P. Weaver,284 A.2d at 515:

> [S]ubstantial evidence should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.

In determining whether the Complainant's allegations were supported by substantial evidence, the Commission weighed the credibility of her testimony. While there are no appellate court decisions on credibility as applied to the Act, the courts have upheld the exercise of broad discretion by Pennsylvania administrative agencies in weighing credibility.

Credibility of a witness has been defined as that quality "which renders his evidence worthy of belief." Jones v. Workmen's Compensation Appeal Board, (25 Pa. Cmwlth 546, Pa. Cmwlth, 360 A.2d 821 (1976) at 823, quoting Black's Law Dictionary, 440 (Revised Fourth Edition 1968).

"It is the responsibility of the referee to weigh the testimony and to accept it, or reject it, in whole or in part."

Jones at 360 A.2d 824 citing Workmen's Compensation Appeals Board v. Guzman, 18 Pa. Cmwlth 275, 334 A.2d 852 (1975). "The fact finder may reject the testimony of the claimant when it conflicts with the testimony of the employer, or even when it is uncontradicted." Affalter v. Commonwealth Unemployment Compensation Board of Review. Pa. Cmwlth 397 A.2d 863 (1979) at 865 citing Wardlow v. Unemployment Compensation of Review, 36 Pa. Cmwlth 477, 387 A.2d 1356 (1978). "Credibility of a witness and the weight given his testimony are matters for the compensation authorities who are not required to accept even uncontroverted testimony as true." Unemployment Compensation Board of Review v. Devictoria, Pa. Cmwlth. 353 A.2d 920 (1976) at 922 citing Edelman v. Unemployment Compensation Board of Review, 10 Pa. Cmwlth 275, 310 A.2d 707 (1973).

Upon careful review of the record, the Commission has determined that the testimony of the Complainant lacks sufficient credibility upon which to make a finding in her favor based on substantial evidence. The testimony of the Complainant is inconsistent and contradictory.

In claiming that her failure to be hired as a laborer constituted sex discrimination, the Complainant cited a relative later identified as Donald Vadella. The testimony of the Complainant on cross-examination puts the validity of her charge in question. Her inconsistent testimony erodes her credibility.

Q. Is this the same Donald Vadella who is a master mechanic at the mine?

A. I suppose he is

Q. That is not the same as a general laborer. You didn't want a job as a master mechanic, did you?

A. I heard that he was hired.

Q. You stated that this is one of the reasons you felt discriminated against, because he was hired and you weren't. Are you willing to state for the record that Mr. Vadella is a mechanic and therefore, extremely qualified?

Ms. Doyle: Let's find out if she knows.

The Witness: I didn't know that he was a mechanic. I just know he was hired by Crescent Coal Company. (NT 45-46, Vol. I)

The Complainant was inconsistent in her testimony about her job as a school bus driver (NT 52, 53, Vol. I). First she testified that she and an aide carried children who were unable to walk. Then she testified that this task was done without assistance. Later she was inconsistent on why she quit. First she testified that it was because of an automobile accident.

Q. You quit working there in 1975?

A. Yes, I did.

Q. Because you were in an automobile accident?

A. Yes

(NT 54, October 23, 1979)

Later, she changed her story:

Q. The reason for leaving employment with the intermediate unit you had indicated was because you were in a car accident.

A. Yes.

Q. If you were not hurt in that car accident, why would you leave?

A. They wouldn't accept my application for the following year.

Q. Why not?

A. Because I told them I felt that it was a responsibility in driving them kids.

Q. Then, your employment was not terminated because you were in an accident, but because you told them you didn't want to work?

A. I didn't say I didn't want to work. I told them I felt it was a responsibility not to drive those kids, and I felt ---

Q. This employment record asks you the reasons for leaving work, so what you are telling me now is that you didn't leave because you were in an accident, you left because you didn't think that you wanted to accept that responsibility, isn't that right?

A. That's right.

Q. That is the real reason you left?

A. It is a responsibility to drive somebody's else's kids. (NT 56-57, Vol. I)

The Complainant vacillated in her testimony concerning the weight of the road paving roller she had operated. (NT 89, Vol I)

The Complainant changed her testimony about her brother's attempt to apply for employment with the Respondent. (NT 102, 106, 107, 108, Vol. I)

The Complainant was inconsistent in her testimony concerning the occasions on which she visited the Respondent's mine.

First she testified that these visits were on the date of application, two weeks after filing her application and again four weeks after filing her application. All were meetings with only Melvin Peluchette. In later testimony, she said Mary Shemansky was present during the third visit. Still later the Complainant changed her testimony to say that Shermansky was present on the second visit. (NT 67-74, Vol. I). According to the Complainant, Melvin Peluchette said he would not hire women when they were alone on the third visit. Later the Complainant testified that the statement was made on the second visit in the presence of Shermansky. Finally, the Complainant testified that the statement was made on the second and third visits. At no time prior to so testifying, did the Complainant advise her attorney that Peluchette had made the statement on two separate occasions.

The credibility of the Complainant is further put into question by the confused and inconsistent testimony of Mary Shermansky (NT 117-135, Vol. I). Shermansky testified that she filed an application the same day as the Complainant's brother George. She stated that she went to the mine only once more in July. On that occasion she was alone. Later, Shermansky testified that the complainant went with her in July to the mine on her second visit. Still later, Shermansky testified that she and the Complainant went to the mine on a third visit. Next Shemansky testified that when she filled out the application, the Complainant and George were both present. She stated that Melvin Peluchette did not discuss anything with them while she was there. Shermansky subsequently changed these statements

again to state that during the second visit, she heard Peluchette say he would not hire women. The testimony of Complainant lacks credibility.

Her case is further weakened by her failure to disclose to the Respondent those job skills which would have reflected favorably upon her qualifications as a laborer. At the hearing, the Complainant offered her past employment as proof of her qualifications and hence the basis of her discrimination charge. Yet she admitted under cross-examination that she never listed these qualifications on her employment application. (NT 55-56, Vol. I).

By this very admission, it appears that the Complainant may have herself been responsible for her failure to have been selected for hiring.

The recent case of Holder v. Old Ben Coal Company, (22 EPD ¶30,623, 7th Cir. 1980) sheds light on the present action. In Holder, the Complainant sued a coal company for sex discrimination claiming she was passed over for an unskilled position in favor of several males who were hired. Remarkably, the Complainant in Holder failed to disclose all her job related skills on her employment application.

In Holder, the Court recognized that "unskilled" can be legitimately distinguished from "unqualified."

> A job categorized as unskilled, however, does not necessarily mean that certain qualifications or experience are not required or preferred for the

> job. Unskilled does not mean unqualified. "Unskilled" commonly means not skilled in some handicraft, or devoid of any technical training. Oxford English Dictionary (Compact ed. 1971). It need not mean lacking any useful experience qualification.
>
> No evidence was introduced to show that defendant applied the term 'unskilled' to mean a total lack of qualifications or experience. The record shows to the contrary that defendant did look for certain qualifications in reviewing applicants for unskilled positions. Defendant's personnel administrator testified that when defendant sought applicants for unskilled positions, it primarily sought persons who had operated mobile equipment or had worked with heavy equipment. The applications of several persons hired demonstrate that defendant also sought applicants who had welding or extensive truck driving or maintenance experience. The mine also sought employees in the unskilled category who appeared to be capable not only of menial tasks but also of filling in and assisting with other jobs as might be helpful when needed due to vacations, sickness or otherwise.
> (22 EPD at p. 14,321)

At the hearing, Peluchette, the Respondent's hiring officer, also distinguished unskilled from unqualified. Peluchette testified that he had five criteria for hiring persons as laborers - experience, education, technical knowledge, technical training and physical capacity. (NT 7, Vol I), (1979). He testified that job seekers were provided with an

> "application with their previous work and what type work they have done. Also, in our application, it states
>
> 'List any mechanical equipment that you have operated.'
>
> (NT 11, Vol. I)

In the second hearing, Peluchette further explained the hiring process.

> "...I go through the applications. The ones that have anything on them that are more outstanding than others, those are the ones I select. [to interview]" (NT 124, Vol. II)

Peluchette explained the failure to offer a laborers position to the Complainant:

> "When I went through the applications looking for potential employees, I checked them off as to anything outstanding on there that would make anyone more qualified than another. I didn't find anything on her application to show that she happened to be outstanding or that she was more qualified for work than some of the other people I looked at."
> (NT 97, Vol. II)

Unfortunately, whether or not the Respondent violated the Act is not at issue, because the Complainant must first meet her burden of proof as to her initial qualifications. Albeit, she did not have to be "more" qualified than others, but this point is not reached.

By her own admission, the Claimant failed to list her relevant mechanical education and mechanical experience on her job application. (Complainant's Exhibit 40). She might, at least, have demonstrated minimum qualifications. In contrast, of the 17 males hired as laborers, (listed on Exhibit 40) nine listed some mechanical education, mechanical experience or both.

Clearly, the Complainant failed to establish her qualifications when she applied for the job. Claiming discrimination for not being hired after she neglected to submit some qualifications reflects negatively on her credibility and good faith diligence

in pursuit of employment with Respondent.

It may very well be true that Complainant was passed over in favor of the other eight males on account of her sex. However, Pennsylvania law requires that the Complainant be "best able and most qualified" (as defined by General Electric) in order to establish a violation of the Act.

Her failure to submit her relevant qualifications saved Respondent from committing a deliberate violation of the Act as to her. Her failure to submit her relevant qualifications deprived her of the means of proving discrimination against her.

B. LIABILITY TO FEMALES AS A CLASS

However, testimony demonstrates that Respondent willfully discriminates against women as a class.

Respondent established sex-segregated procedures for review and comparison of female applicants to each other rather than to males. Respondent claims that it did not interview Mary Shermansky because "there were no positions available and because there was a female applicant (Beverly Blackburn) who, assuming she would have been qualified, because of the date of her application would have been given preference." (Complainant's Ex. No. 27) Testimony regarding the hiring order of similarly-situated males shows that the date-of-application preference, said to apply to females, did not apply to the male hires (Complainant's Ex. Nos. 7,9,10,11,17,18,38, and Respondent's Ex. A).

The Pennsylvania Supreme Court has stated that 43 P.S. Sec. 955(a) "entitles every female job applicant to have her qualifications for employment considered on an equal footing with those of a man." General Electric Corp. v. Cmwlth. Human Rel. Comm., 469 Pa. 292, 365 A.2d 649, 660 (1976). It was precisely this equality of opportunity which was denied actual and potential female applicants for laborer positions in Respondent's mines because Respondent refused to seriously consider them.

The Pennsylvania Supreme Court has recognized that one "intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose." Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 233 A.2d 290, 298 (1967). Yet in the instant case, Respondent was so smug in its discriminatory practices that it announced its policy of not hiring females, both to Complainant and in the presence of other employees. (N.T. 47, Vol. 11)

Examination of Merwin Markel, PHRC investigator, clearly evidences that females suffer disparate treatment as a result of Respondent's hiring practices. The disparate impact on females in Respondent's labor force is equally evident. Markel's testimony demonstrates that Respondent's employment procedures result in a cognizable deprivation to females as a class. (N.T. 115-140, Vol. II). In addition, this case involves applicants being chosen from a pool rather than being hired seriatim. In this kind of situation, a showing of discriminatory animus completes a class based prima facie case. King v. New Hampshire Dept. of Resources and Economic Development, 562 F.2d 80,83 (1st Cir. 1977). An unwritten policy of refusing to hire females as laborers also

completes a prima facie case of class-based discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Both elements are present here.

Thus, the burden shifts to Respondent to articulate some legitimate, non-discriminatory reason for Respondent's failure to hire females. Id., McDonnell-Douglas Corp. v. Green, supra.

Respondent seeks to avoid liability in this case by showing that based on numbers alone, it is unlikely that any of the female applicants would have been hired. It has placed great weight on the fact that only a handful of females have applied as laborers over the past five years. Respondent, however, chooses to ignore the effects its no-female policy presumably has had on the number of females applicants, for a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." International Brotherhood of Teamsters v. United States, 431 U.S. at 365. The United States Supreme Court went on to state:

> "If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices -- by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of

> minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application." Id.

The same holds true for a policy of hiring only males as laborers.

The Court recognized that the most overtly discriminatory employers should not be allowed to escape liability simply "because the unlawful practices had been so successful as totally to deter job applications from minority groups." Id.,
In the instant case Respondent must be held responsible for the tiny numbers of females who have applied for employment as laborers.

III. CONCLUSION

The finding of the Commission rests on the lack of credibility of the Complainant, and upon the lack of substantial evidence upon which to conclude that she has met her burden of proof under the law. Absent the establishment of this burden, the threshold issue of "best able and most competent" does not come into play and the Commission need not look into the question of damages and other remedies as to the Complainant.

However, by this finding, the Commission in no way absolves the Respondent. It may well be true and should be true that somewhere in the Respondent's geographical workforce, there are women who are as qualified as the successful male applicants. It is expected that the Respondent will make a genuine effort to recruit from this workforce by advertisement and word of mouth.

Although the Complainant did not meet her burden of proof, the Commission determined by thorough review of the testimony that sex discrimination is rife in this industry and this company. The PHRA specifically provides that once discrimination has been found, Respondent may be ordered to cease and desist from the discriminatory practice, hire, upgrade, and grant backpay to prevailing persons. 43 P.S. Section 959.

The PHRC may order relief for persons other than the named Complainant where, as here, the Complainant alleges that such other persons have been affected by the alleged discriminatory practice. Having shown that Respondent illegally discriminated against females, the class members are entitled to an Order against Respondent requiring Respondent to: (1) cease and desist from refusing to hire females as laborers in its mines; (2) cease and desist from making derogatory and discriminatory comments to female applicants for such positions; and (3) devise and submit to the Commission within ninety (90) days of this Order, an Affirmative Action Plan to promote the hiring of women as laborers in its mines. The Affirmative Action Plan shall include, but not be limited to: (a) written job-related criteria; (b) a standardized written interview format, including any job-related tests to be conducted and scoring criteria for such tests; (c) procedures for active advertising and recruitment of females as laborers; (d) procedures for quarterly submission, for a five year period, of copies of all male and female applications; copies of all written interviews and designation of those who were hired with reasons for their hire.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
v.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, Respondent	:	

O R D E R

AND NOW, this 16th day of October, 1980, upon consideration of the Findings of Fact, Conclusions of Law, and Opinion 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. Respondent shall cease and desist from refusing to hire females as laborers in its mines;

2. Respondent shall cease and desist from making derogatory and discriminatory comments to female applicants for such positions;

3. Respondent shall devise and submit a proposed affirmative action plan to the Commission within ninety (90) days of the date of this Order. The proposed Affirmative Action Plan shall include, but not be limited to: (a) written job-related criteria; (b) a standardized written interview format

including any job-related tests to be conducted and scoring criteria for such tests; (c) procedures for active advertising and recruitment of females as laborers; (d) procedures for quarterly submission, for a five year period, of copies of all male and female applications; copies of all written interviews and designations of those who were hired with reasons for their hire; and

4. The complaint shall be dismissed to Beverly A. Blackburn.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

JOSEPH X. YAFFE, CHAIRPERSON
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

JOHN P. WISNIEWSKI, ASSISTANT SECRETARY
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RECOMMENDATION OF HEARING PANEL

AND NOW, this 29th day of September, 1980, in consideration of the entire record in this matter, including the Complaint, Stipulations, Exhibits, Record of the Hearing, and Briefs filed on behalf of Complainant and Respondent, the Hearing Panel recommends to the entire Commission that the enclosed findings of Fact, Conclusions of Law and Opinion be adopted and that an Order be entered dismissing the complaint.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: John P. Wisniewski
JOHN P. WISNIEWSKI, Chairperson

Doris A. Smith
DORIS A. SMITH, Esquire

Elizabeth M. Scott
ELIZABETH M. SCOTT, Hearing Commissioner

File

Chairperson
JOSEPH X. YAFFE
Vice Chairperson
DORIS M. LEADER
Secretary
ELIZABETH M. SCOTT
Executive Director
HOMER C. FLOYD

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION
101 South Second Street, Suite 300
P.O. Box 3145
Harrisburg, Pennsylvania 17105-3145
Telephone: (717) 787-4410

Commissioners
RITA CLARK
MARY DENNIS DONOVAN, C.S.J.
ALVIN E. ECHOLS, JR.
BENJAMIN S. LOEWENSTEIN
THOMAS C. McGILL, JR.
ROBERT JOHNSON SMITH
JOHN P. WISNIEWSKI
RAQUEL OTERO de YLNGST

Reply to:
P.O. Box 3145
Harrisburg, PA 17105-3145

November 24, 1982

Oliver N. Hormell, Esquire
423 Third Street
California, Pennsylvania 15419

Re: Docket No. E-10814D, Beverly A. Blackburn
Vs. Crescent Hills Coal Company, Inc.

Dear Mr. Hormell:

Enclosed is a copy of the Conciliation Agreement in the above named case which was approved by the Commission at its November 19, 1982, Commission meeting.

If the terms of this Conciliation Agreement have not been completely complied with your client has thirty (30) days from the date of the Agreement to notify the Commission, in writing, as to their compliance. Please include any and all documentation that they may have to verify their implementation of the terms of the Order. This material and all additional required material should be directed to the attention of G. Thompson Bell III, Assistant General Counsel, at the Commission's Harrisburg Regional Office, 3405 North Sixth Street, Harrisburg, Pennsylvania 17110.

Thank you for your cooperation and efforts in bringing this matter to a successful conclusion.

Very truly yours,

Homer C. Floyd
Executive Director

HCF:jpg:F2B

Enclosure

cc: G. Thompson Bell III
Assistant General Counsel

Chairperson
JEROME X. YAFFE
Vice Chairperson
DORIS M. LEADER
Secretary
ELIZABETH M. SCOTT
Executive Director
HOMER C. FLOYD

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ROBERT JOHNSON SMITH
JOHN P. WISNIEWSKI
RAQUEL OTERO de YLLNGST

Reply to:
P.O. Box 3145
Harrisburg, PA 17105-3145

November 24, 1982

Beverly A. Blackburn-Wright
Box 175
Daisytown, Pennsylvania 15427

Re: Docket No. E-10814D, Beverly A. Blackburn
Vs. Crescent Hills Coal Company, Inc.
EEOC File #034-61815-0

Dear Ms. Wright:

Enclosed for your information and files is a copy of the Conciliation Agreement in the above named case which was approved by the Commission at its November 19, 1982, Commission meeting.

Kindly contact G. Thompson Bell III, Assistant General Counsel, at the Commission's Harrisburg Regional Office, 3405 North Sixth Street, Harrisburg, Pennsylvania 17110, regarding the respondent(s) carrying out the terms of the Agreement as outlined in Appendix B.

Thank you for your cooperation during the course of the investigation and conciliation of this case.

Very truly yours,

Homer C. Floyd
Executive Director

HCF:jpg:F1

Enclosure

cc: G. Thompson Bell III, Assistant General Counsel
Katherine H. Fein, Esquire

PA-551 12-67

COMMONWEALTH OF PENNSYLVANIA

November 15, 1982

SUBJECT: Conciliation Agreement in Blackburn v. Crescent Hills Coal Company. E-10814

TO: ALL COMMISSIONERS

FROM: G. Thompson Bell, Assistant General Counsel
Harrisburg Regional Office

GTB

Attached please find a Conciliation Agreement in the above referenced case for your consideration at the November 19, 1982 Commission Meeting. I just received the Agreement today, so I was unable to have it included with the compliance report.

lwr

cc: Homer C. Floyd
Howard L. Tucker, Jr.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BEVERLY A. BLACKBURN	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

NOTICE

You are hereby advised that the attached Conciliation Agreement/Consent Order and Decree must be executed by either the President or Vice President of the Corporation/Company and witnessed by the Secretary or Treasurer. Any other execution or signature will result in a delay in processing the Order and may result in the Commission's refusal to ratify this Agreement.

In the case of individuals, your signature must be witnessed by another person who knows your identity.

Additionally, please be sure to fill in the date of execution over your signature(s).

Finally, the acknowledgement (identity, intention, and waiver of hearing) under your signature must be notarized.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BEVERLY A. BLACKBURN	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

CONCILIATION AGREEMENT

WHEREAS, on the 5th day of August, 1976, a verified Complaint was filed with the Pennsylvania Human Relations Commission ("Commission") against: CRESCENT HILLS COAL COMPANY, INCORPORATED, ("Respondent(s)") by: BEVERLY A. BLACKBURN ("Complainant(s)"). This Complaint alleged that Respondent(s) had violated Section(s) 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq., as amended ("Act"), in that Respondent(s) committed or caused to be committed certain acts set out in said Complaint and now contained in Appendix "A," hereof; and

WHEREAS, Respondent(s) do(es) not admit any violation of the Act but wish(es) to avoid litigation; and

WHEREAS, Commission finds that the settlement terms, as set forth in Appendix "B" hereof, are reasonable under the circumstances and finds further that the public interest will be served by settlement of the case; and

WHEREAS, Respondent(s) for the reasons set forth above do(es) hereby waive all rights to the issuance of a Final Order following a public hearing under Section 9 of the Act and the Regulations promulgated by the Commission, and do(es) hereby consent to the entry of this Conciliation Agreement as a Consent Order and Decree of the Commission, which shall have the same force and effect as a Commission Order and Decree following a public hearing by the Commission and shall be enforceable as such under Section 10 of the Act:

NOW, THEREFORE, Respondent(s) and Commission hereby agree to be legally bound as follows:

1. The foregoing preambles shall be included herein as if fully set forth.

2. The Respondent(s) admit(s) the jurisdiction of the Commission in this matter and hereby waive(s) all objections thereto.

3. All appendices annexed hereto are incorporated into this Agreement as integral parts hereof, as if fully set forth.

4. The term "Respondent(s)" as used herein shall include all agents, servants and employees of the Respondent(s) named above, in addition to the principal(s).

5. The execution and implementation of this Agreement shall not constitute any waiver of powers and duties conferred

upon the Commission, nor shall this Agreement be deemed a declaration of policy or precedent by the Commission. This Agreement shall in no way affect the intake, processing, adjudication or disposition of future Complainants involving the Respondent(s), except that the Respondent(s) may in the course of any proceedings, refer to this Agreement and to its (their) performance thereunder to the extent relevant to such proceedings.

6. Respondent(s) understands its (their) obligation to fully comply with all of the provisions of the Act and the Regulations promulgated by the Commission and shall fully comply with each of the terms of settlement set forth in Appendix "B" hereof.

7. It is expressly understood by the Respondent(s) that any violation or infraction of the terms and conditions set forth hereby by Respondent(s) shall constitute a violation of an Order of the Commission pursuant to Section 11 of the Act.

8. The relationship between Complainant(s) and Respondent(s) shall be subject to and defined by Appendix "C" if attached hereto.

9. If any portion of this Agreement, or the application thereof to any person or circumstance, should for any reason be adjudged by any court of competent jurisdiction to be invalid or unenforceable, in whole or in part, such judgment shall not affect, impair or invalidate any other portion of this Agreement.

10. Commission and Respondent(s) being duly authorized enter into this Agreement with the intent to be legally bound hereby. This Agreement shall become final when approved and ratified by the Commission; and thereafter shall be binding upon and inure to the benefit of each of the parties hereto, and each of their respective heirs, successors and assigns, effective immediately from the date of such approval. If not so approved and ratified, it shall be null and void from its inception.

IN WITNESS WHEREOF, the undersigned being duly authorized to do so, has executed the foregoing on the 9th day of November, 1982.

By the Respondent(s):
CRESCENT HILLS COAL COMPANY, INC.

Andrew A. Anthony
Name: Andrew A. Anthony
Title: Vice President

11/9/82
Date

Sam Romano
Name: Sam Romano
Title: Secretary

ATTEST:

Name:
Title:

COMMONWEALTH OF PENNSYLVANIA)
) SS
COUNTY OF WASHINGTON)

On the 9th day of November, 1982, each of the persons who have signed their names above personally appeared before me and, if not already known to me, satisfactorily proved identity as the persons whose names are signed above. Each of them signed this Agreement freely and with full intent to be legally bound thereby, and clearly understanding that they are waiving their rights to a hearing by signing this Agreement.

In testimony whereof, I have hereunto set my hand and seal on the day last above written.

Debora Rose Belcastro
Notary Public

DEBORA ROSE BELCASTRO, NOTARY PUBLIC
SOUTH STRABANE TWP., WASHINGTON COUNTY
MY COMMISSION EXPIRES JAN. 23, 1984
Member, Pennsylvania Association of Notaries

My Commission Expires:

Recommended for approval by the Commission

Homer C. Floyd, Executive Director
Pennsylvania Human Relations Commission

Approved and ratified at a meeting of the Pennsylvania Human Relations Commission on the 19th day of November, 1982.

Joseph X. Yaffe, Chairperson
Pennsylvania Human Relations Commission

ATTEST:

Elizabeth M. Scott
Elizabeth M. Scott, Secretary
Pennsylvania Human Relations Commission

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BEVERLY A. BLACKBURN	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

COMPLAINANT(S) ALLEGATIONS

Complainant alleged that, on or about July 28, 1976, and continuing thereafter, the Respondent refused to hire her for a job in the mine, although males have been hired since Complainant applied. She further alleged that Respondent's refusal to hire her discriminated against her because of her sex, female.

Complainant's Amended Complaint alleged that Respondent refused to hire her or any other similarly situated females on account of their sex and relied on word-of-mouth referrals, which discouraged employment of females.

COMMONWEALTH OF PENNSYLVANIA
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BEVERLY A. BLACKBURN	:	
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CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

TERMS OF SETTLEMENT

Respondent shall pay to Beverly Blackburn Wright (previously known as Beverly A. Blackburn) or on her behalf, the total sum of Twenty-five Thousand Six Hundred Dollars ($25,600.00) as compensatory or liquidated damages in connection with any alleged injury or violation of her civil rights, in full satisfaction of her claims under federal, state, and common law, including, without limitation, counsel fees and expenses.

Appendix "B"

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BEVERLY A. BLACKBURN	:	
vs.	:	DOCKET NO. E-10814 EEOC NO. 034-618150
CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

CERTIFICATE OF SATISFACTORY ADJUSTMENT

I, BEVERLY BLACKBURN WRIGHT (previously known as BEVERLY A. BLACKBURN), Complainant in the above-docketed cases, do hereby certify that my Complaint has been adjusted to my satisfaction in that: the Respondent has agreed to pay to me or on my behalf the total sum of Twenty-five Thousand Six Hundred Dollars ($25,600.00) in full settlement of all my claims.

I hereby request the Pennsylvania Human Relations Commission and the Equal Employment Opportunity Commission to close the above-docketed cases.

Beverly Blackburn Wright
Complainant

Beverly A Blackburn 11/10/82
Date

Witness

11/10/82
Date

Appendix "C"

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BEVERLY A. BLACKBURN	:	
vs.	:	DOCKET NO. E-10814
	:	EEOC File No. 034-618150
CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

RELEASE

Know all persons by these presents that upon the condition that Respondent shall full comply with all the terms of settlement set forth in Appendix "B" of this Agreement, I do hereby release and forever discharge Respondent from all manner of actions and causes of action and all suits, debts, claims and demands whatsoever based upon the allegations set forth in Appendix "A" of this Agreement, including the present action, except as described below. This release shall in no way discharge, release or absolve Respondent from liability for any violation of Section 5(d) of the Act (relating to retaliation) which may occur after execution of this Agreement, nor in any way limit my rights to bring suit or actions or file Complaints based in whole or in part on any violation of the Act or other applicable law which may occur in the future.

Dated: 11/10/82. Complainant: Beverly A Blackburn
Beverly A Blackburn Wright

COMMONWEALTH OF PENNSYLVANIA)
) SS
COUNTY OF ALLEGHENY)

On the 10th day of NOVEMBER 1982, Beverly A. Blackburn a/k/a Beverly Blackburn Wright the Complainant, named above, personally appeared before me. He/she is known to me or proved his/her identity as the person who signed this release. He/she acknowledged that the release was freely signed, with full understanding of its contents and legal effect, and solely for the consideration and upon the conditions expressed therein.

Witness my hand and seal the day and year written above.

Joy Isaacson

My Commission Expires:

JOY ISAACSON, NOTARY PUBLIC
PITTSBURGH, ALLEGHENY COUNTY
MY COMMISSION EXPIRES OCT. 11, 1984
Member, Pennsylvania Association of Notaries

Appendix "C"

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS
COMMISSION

BEVERLY A. BLACKBURN	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED	:	

FINAL ORDER AND DECREE

AND NOW, this 24th day of November, 1982, upon consideration of the Conciliation Agreement submitted in the above-captioned case it is hereby ORDERED AND DECREED that said Conciliation Agreement be entered into the official record of the Pennsylvania Human Relations Commission as a Final Order, to be given the same force and effect as if entered after a public hearing.

BY:

Joseph X. Yaffe, Chairperson
Pennsylvania Human Relations Commission

ATTEST:

Elizabeth M. Scott, Secretary
Pennsylvania Human Relations Commission

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, Respondent	:	

FINDINGS OF FACTS

1. Complainant is an adult individual named Beverly A. Blackburn, residing at Box 175, Daisytown, Pennsylvania 15427 (admitted by Respondent).

2. Respondent is the Crescent Hills Coal Company, Incorporated with its principal place of business in Daisytown, Allegheny County, Pennsylvania and an employer of more than four individuals. (admitted by Respondent)

3. On May 25, 1976, Complainant applied for employment with Respondent and was interviewed for a laborers position at that time. (N.T. 14)

4. This oral interview was conducted by Melvin Peluchette, secretary of Crescent Hills Coal Company and superintendent of the Daisytown operation. (N.T. 26)

5. Respondent's method of filling positions is via word-of-mouth or walk-in. Respondent does not recruit. (N.T. 8)

6. Respondent reviews applications on file when an opening exists. (N.T. 9)

7. Complainant testified that she returned to the Crescent Hills Coal Company on two subsequent occasions to acquire about employment. (N.T. 28, 29)

8. Respondent discussed the type of work available with Respondent. (N.T. 14)

9. Respondent discussed heavy lifting with Complainant but did not ask her to demonstrate her capacity for heavy lifting. (N.T. 16)

10. Respondent does not require a demonstration of heavy lifting unless the applicant requests it. (N.T. 23)

11. Melvin Peluchette testified that if he were in doubt about a persons capability to lift heavy loads, he would ask them how much they could lift. (N.T. 23)

12. Melvin Peluchette asked Complainant during her interview what she thought she could lift. (N.T. 15)

13. Complainant advised she could lift 50 to 75 pounds. (N.T. 26)

14. Melvin Peluchette told Complainant he would call her if there was an opening. (N.T. 15, 95)

15. Respondent determined that Complainant was not the best qualified applicant for the position of laborer. (N.T. 18 vol. 1, 96, 97, Vol. II)

16. Respondent has never hired women as laborers. (N.T. 18)

17. Respondent's first criteria for employment as a mine laborer is mining experience. There is no written criteria. (N.T. 7, 10)

18. During the period of August 19, 1975 to September 12, 1977, Respondent hired 17 males, of whom nine had listed mechanical schooling or experience, or some mining experience. Eight had no mechanical school or training listed. Of these eight, at least one had an education comparable to Complainant's. (Complainant's Exhibit #40)

19. Complainant's cousin's husband's nephew was an experienced miner who held a miner's certificate. (N.T. 47)

20. Complainant testified that her uncle and cousin's husband's nephew were hired since her application (N.T. 37)

21. Complainant did not know the name of her cousin's husband's nephew. (N.T. 37)

22. Complainant testified, upon cross-examination, that she supposed, but was not certain, that her uncle Donald Vadella, was the same Donald Vadella who was a master mechanic at Respondent's mine. (N.T. 45)

23. Complainant testified, upon cross-examination, that she did not know her uncle's job position or work experience. (N.T. 46)

24. Complainant testified that her job as a school bus driver entailed lifting children who could not walk. She first testified that she and an aide lifted them. She subsequently testified she did this job without assistance. (N.T. 52, 53)

25. Complainant testified that she quit her job as a school bus driver because she had an automobile accident. She later said it was because she didn't want the responsibility of children. (N.T. 54-56)

26. Complainant did not list her laborer's experience as a road worker on the Crescent Hills Coal Company application. (N.T. 55)

27. Complainant vacillated in her testimony concerning the weight of the road paving roller she had operated. (N.T. 89)

28. Complainant's testimony changed concerning her brother's attempt to apply for employment with Respondent. (N.T. 102-106)

29. Complainant was inconsistent in her testimony concerning the occasions she visits Respondent's mine, viz; she testified these visits were the date of application; two weeks after filing her application, and again four weeks after filing. All were meetings with only Melvin Peluchette. In later testimony, she said her sister-in-law accompanied her on the third visit. Still later, she changed her testimony to state her sister-in-law accompanied her on her second visit. (N.T. 67-74)

30. Complainant testified that her brother, George, went to Respondent's mine and was refused an application. After the lunch recess, she returned and testified that he was given an application, but told there would be no further applications given out. (N.T. 102-107)

31. Complainant stated Melvin Peluchette would not hire women. He said this when alone with her on her third visit to the plant. Later, Complainant said the statement was made on the second visit, in the presence of her sister-in-

law. Finally, Complainant said Mr. Peluchette's statement was made on both subsequent visits. At no time prior to so testifying did Complainant advise her attorney that Mr. Peluchette had made this statement on two separate occasions.

32. Mary Shemansky, another female applicant was also inconsistent in her testimony concerning the occasions she had to visit Respondent. She testified she filed an application the same date as Complainant's brother, George. She stated she went to the plant only once more in July and alone. Then she testified that Complainant went with her in July on her second visit. Later on she testified she and the Complainant went to the mine on a third visit there. Next she testified Complainant went with her on her first visit. Next, she testified that when she filled out the application, Complainant was with her and her brother as well. She stated that Melvin Peluchette did not discuss anything with them while she was there.

She subsequently changed these statements again to state that she heard Melvin Peluchette say that he would not hire women. This was on the second visit. She was excused from testifying after she stated there were two visits but she could not remember the dates.

33. Stanley Williams, witness for Complainant, was brought into court at the January 8, 1980 hearing. He testified that he overheard Melvin Peluchette make the comment that Peluchette would never hire women and blacks. (N.T. 47)

34. Edward Roskevitch testified that Complainant asked him in October, 1976 if he could get her a job at Crescent Coal Company. He answered he was lucky to have one himself. She replied the coal company would pay if they did not give her a job. (N.T. 67)

35. Respondent has an unwritten policy of discriminating against females as a class by refusing to consider them for laborer positions in its mines.

36. Respondent's records indicate at least three other females who applied for employment as laborers. (Respondent Ex. E)

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, 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, § P.S. §959.

2. Complainant filed a timely complaint with the Pennsylvania Human Relations Commission alleging that Respondent had refused to hire her because of her sex, in violation of Section 5(a) of the Act 43 P.S. 955(a).

3. Complainant filed a proper amendment to her complaint alleging inter alia that Respondent had discriminated against her and all other similarly situated females as a class by refusing to hire them for positions in the mines in violation of 43 P.S. 955(a).

4. 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.

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

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

7. Section 5(a) of the Pennsylvania Human Relations Act makes it unlawful "for any employer because of the..... sex..... of any individual to refuse to hire or employ.... such individual or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is best able and most competent to perform the services required." 43 P.S. §955(a).

8. Complainant has the burden of establishing: (1) that she is a member of a protected class; (2) that she has applied for a position with Respondent for which she is qualified; (3) that she was rejected; and (4) that Respondent continued to seek and hire other applicants subsequent to its rejection of Complainant. McDonald-Douglas Corp. v. Green, 411 U.S. 792 93 S.Ct. 1817 (1973).

9. Complainant's own testimony, as well as supporting testimony, lacked credibility and candor with the result that she did not meet the standard of proof sufficient to sustain her case.

10. Complainant has failed to meet her burden that she applied for a position with Respondent for which she was qualified.

11. Complainant has not established a violation of sex based on discrimination pursuant to section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §955(a).

12. "Actions on behalf of a class may survive even though claims of individually named plaintiffs do not." Sosna v. Iowa, 419 U.S. 393 (1975).

13. Respondent's evidence that only a few females applied for employment as laborers does not rebut Complainant's showing of class-wide discrimination of females for a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." Commonwealth Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976).

14. Denial of relief on the ground that more class members "had not formally applied for the job could exclude from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from minority groups." Id. at 365.

15. Once discrimination has been found, Respondent may be ordered to cease and desist from the discriminatory practice, hire, upgrade, and/or grant backpay. 43 P.S. Section 959

16. The PHRC may order relief for persons other than the named Complainant where, as here, the Complainant alleges that such other persons have been affected by the alleged discriminatory practice and such other persons entitled to relief may be described with specificity. Cmwlth. Pennsylvania Human Relations Commission v. Freeport Area School District, 467 Pa. 522, 359 A.2d 724 (1976).

COMMONWEALTH OF PENNSYLVANIA

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PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
vs.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, Respondent	:	

HISTORY OF THE CASE

On or about July 28, 1976, Complainant, Beverly A. Blackburn, filed a complaint with the Pennsylvania Human Relations Commission ("Commission"). The complaint alleged that the Respondent, Crescent Hills Coal Company, Incorporated 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 because of her sex, female. Further, the Complainant alleged that males have been hired since her application in March, 1976.

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 the allegations. Efforts to conciliate the matter, as mandated by §9 of the Act, were unsuccessful and the case proceeded

to a Public Hearing on October 23, 1979 before a Hearing Panel that consisted of John P. Wisniewski, Elizabeth M. Scott, and Doris A. Smith, Esquire. Marion M. Cowperthwait, Esquire, acted as Legal Advisor to the Hearing Panel; Ellen M. Doyle, Esquire appeared to prosecute the complaint; and Oliver N. Hormell, Esquire, appeared on behalf of the Respondent.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, Complainant	:	
v.	:	DOCKET NO. E-10814
CRESCENT HILLS COAL COMPANY, INCORPORATED, Respondent	:	

OPINION

I. FACTUAL BACKGROUND AND ISSUE FORMULATION

This case involves a complaint of employment discrimination on the basis of sex in violation of §5(a) of the Pennsylvania Human Relations Act, as amended, 43 P.S. 951, 955 (Supp. 1979-80) (Act). There is substantial disagreement regarding the events which precipated the filing of the complaint.

The Complainant, on May 25, 1976, applied for employment with Respondent and was interviewed for a laborer's position. The position involved a non-traditional job for females; working as a laborer in Respondent's coal mine. In the course of the interview, the issue of qualifications arose. The Respondent stated that the job required heavy lifting. The Complainant

never asked to demonstrate her ability to lift. However, she was asked what she thought she could lift. The Complainant stated 50 to 75 lbs. During the application process, the Complainant did not reveal to the Respondent those parts of her employment history which would reflect favorably upon her qualifications for the laborer's position.

After the initial interview, the Complainant's application was placed in a file from which the Respondent selected the persons who were hired as laborers. The Complainant made two subsequent visits to the Respondent to inquire about her chances for employment. After her initial interview, at least 17 males were hired as laborers. No female has ever been hired by the Respondent as a laborer.

The Complainant introduced evidence that a second female, Mary Shemansky, had filed an application for any type of employment, after the Complainant made her initial application. Shemansky was not hired as a laborer.

It appears, that at least facially, the Complainant's application was treated no differently than any other. As a policy, the Respondent makes no effort to recruit or solicit applications. Rather, knowledge of employment opportunities passes by word of mouth. Persons simply go to the Respondent, fill out applications and are interviewed. After the interviews, applications are placed in a file. As vacancies occur , the hiring officer selects the applicant he desires. At least for the position of laborer, the qualifications of those selected varied widely. Date of initial application has little bearing

on order of selection for hiring.

The Complainant introduced testimony that the Respondent's hiring officer twice stated that no woman would ever be hired to work in the mines. At the outset, it should be noted that the reason for the non-hire of the Complainant is at issue. For the Complainant to prevail, it must be demonstrated that the Respondent violated §5(a) 43 P.S. §955(a) of the Pennsylvania Human Relations Act which makes it unlawful:

> "For any employer because of the... sex...of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or otherwise to discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required." [Emphasis added.]

Thus, the "best able" test is the threshold issue in this action. If it can be established that the Complainant was the best able and most competent applicant for the position, but others were hired, the Commission may then inquire whether the non-hire was the result of unlawful sex discrimination. In making this inquiry, the Commission may consider the issues raised in the record including, but not limited to:

(1) the Respondent's failure to formulate standards in qualifying applicants;

(2) the Respondent's failure to actively recruit or solicit applicants for employment as laborers;

(3) the existence of discriminatory attitudes within the Respondent's management towards females in non-traditional jobs.

Upon reviewing these and other factors, the Commission may determine that the Act was violated - but only if the threshold "best able" test was met. Upon a finding a violation of the Act, the Commission then must consider the issues of damages and other remedies.

II. LIABILITY ISSUES

A. LIABILITY TO THE NAMED COMPLAINANT

After a complete and final review of the record and consideration of the brief on behalf of the Complainant, it is the conclusion of the Commission that the Complainant has failed to sustain her burden of proof as required by law.

In employment discrimination cases brought under the Act, Pennsylvania has adopted the approach of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), an action brought under Title VII of the Civil Rights Act of 1964, 42 USCA 2000e et seq. General Electric Corporation v. Commonwealth Human Relations Commission, (469 Pa. 292, 365 A.2d 649 (1976).

In McDonnell-Douglas, the United States Supreme Court held that:

> ...a prima facie case of discrimination under Title VII is made out if the complainant establishes that he is a member of a protected minority, that he applied for a job for which he was qualified, that his application was rejected and that the employer continued to seek other

> applicants of equal qualification. 411 U.S. at 800, 93 S.Ct. at 1823, 36 L.Ed. 2d at 677.
>
> Once a complainant establishes these elements, the burden then shifts to the employer to justify his employe selections on the basis of job-related criteria which are necessary for the safety and efficiency of the enterprise. 411 U.S. at 802, 93 S.Ct. at 1824, 36 L. Ed. at 678. General Electric, 365 A.2d at 655-656. (emphasis added)

The Pennsylvania Human Relations Act specifically says the complainant is faced:

> "with the additional requirement that the complainant be the best able and most competent to perform the services required."

G.C. Murphy Company v. Commonwealth Human Relations Commission, 12 Pa. Cmwlth. 20, Pa. Cmwlth., 314 A.2d 356 at 358.

However, General Electric imposes no greater standard than Title VII so that the "best able and most competent" standard is not a pecularly higher test and should not be construed as such here or elsewhere. In General Electric, the burden was placed on the employer to show that the Complainant was not "best able and most competent." The Pennsylvania Supreme Court explained,

> "To cast the burden of establishing one's relative qualifications on the complainant would, in both objective and subjective situations, impose significant obstacles of time and expense which could serve to deter vigorous enforcement of the rights conferred by the statute. In the case where subjective standards have been employed, the burden of proving relative qualifications might well be an impossible one. In either event, however, effective enforcement of the PHRA seems best promoted by casting the burden on the employer to demonstrate that the female worker was not

best qualified. Such a solution best advances the salutory purposes of the PHRA and is in accord with accepted notions of allocation of burden of proof:

> "If the existence of non-existence of a fact can be demonstrated by one party to a controversy much more easily than by the other party, the burden of proof may be placed on that party who can discharge it most earily." Barrett v. Otis Elevator Company, 431 Pa. 446, 452-453, 246 A.2d 668, 672 (1968). 365 A.2d at 657.

While General Electric places upon the employer the burden to disprove that the Complainant was best qualified, it does not relieve the Complainant of her initial burden of showing that she is qualified. This view is consistent with the "business necessity doctrine" formulated in Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). In General Electric, the Pennsylvania Supreme Court explained the business necessity doctrine:

> [It] "protect(s) employers from having to select employees who do not meet their qualifications standards. In essence, it serves as a limitation upon the right of equal employment broadly bestowed upon the citizens of this Commonwealth by the PHRA." (365 A.2d at 649.)

The requirement of the Complainant to establish her qualifications as opposed to "best" qualifications has been continued in post General Electric case law interpreting McDonnell-Douglas:

> "The importance of McDonnell-Douglas lies, not in its specification of the discrete elements of proof there re-

> quired, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidences adequate to create an inference that an employment decision was based on a discriminatory criterion under the Act."

International Brotherhood of Teamsters v. United States, 431 US 324, at 358, 97 S.Ct. 1843; 52 L.Ed.2d 396 (1977)

> "Under McDonnell-Douglas a title VII case is divided into three phases. First the plaintiff must demonstrate a prima facia case of discrimination. Then the defendant is called upon to articulate a legitimate non-discriminatory reason for its action. Finally, the plaintiff is afforded an opportunity to show that the proffered reason is in fact a pretext designed to cover what is actually an illegal discrimination."
>
> "This tripartite arrangement is a useful tool in analyzing these controversies, but it should not be construed so as to divide a single cause of action into three different cases. There are no hard and fast rules as to what evidence must be considered as constituting a prima facia case and what evidence is needed in order to establish a pretext. Most importantly, the ultimate burden of persuading the fact finder that there has been illegal discrimination always resides with the plaintiff."

Whack v. Peabody & Wind Engineering Co., 595 F.2d 190 (3rd Cir., 1979) at 193. (emphasis added) See Board of Trustees of Keene State College v. Sweeney, 439 US 24, 99 S.Ct. 295, 58 L.Ed.2d 216 (1978). (emphasis added)

Additionally, General Electric did not abrogate the previous requirement that a finding of "qualified" or "best able and most competent" be supported by substantial evidence.

> "The burden is on the Commission to prove through substantial evidence a violation of the Act. Even if a respondent takes the risky tactic of presenting no evidence whatsoever, the Commission cannot utilize that failure to present any evidence as the basis for determining a violation." (J. Howard Brandt, Inc. v. Commonwealth Human Relations Commission, (15 Pa. Cmwlth 123, Pa. Cmwlth, 324 A.2d 840 (1974) at 845), a housing discrimination case.

The requirement that a finding be based on substantial evidence is derived from the Pennsylvania Administrative Agency Law, at 2 PCSA §704, which requires an appeals court to affirm an agency adjudication unless that "adjudication is not supported by substantial evidence." St. Andrews Development Co., Inc. v. Commonwealth Human Relations Commission, 10 Pa. Cmwlth 123, Pa. Cmwlth, 308 A.2d 623 (1973); Tomlinson Agency v. Commonwealth Human Relations Commission. 11 Pa. Cmwlth 227, Pa. Cmwlth, 312 A.2d 119 (1973). See also Wilkinsburg School District v. Human Relations Commission, 6 Pa. Cmwlth 378, 295 A.2d 609 (1972); Pennsylvania Human Relations Commission v. Chester School District 209 Pa. Super. 37, 224 A.2d 811 (1966).

The Administrative Agency Law is made applicable to proceedings of the Human Relations Commission at 2 PCSA §501. Substantial evidence has been defined as

> "...more than a scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Tomlinson at 312 A.2d 120. See A.P. Weaver and Sons v. Sanitary Water Board, 3 Pa. Cmwlth 499, 284 A.2d 515 (1971) citing. Consolidated Edison Co. v. NLRB, 305 US 197, 229, 59

S.Ct. 206, 217, 83 L.Ed.126 (1938).

Substantial evidence was further described in St. Andrews 308 A.2d at 625; quoting A.P. Weaver,284 A.2d at 515:

> [S]ubstantial evidence should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, could not have reached the decision from the evidence and its inferences then the decision is not supported by substantial evidence and it should be set aside.

In determining whether the Complainant's allegations were supported by substantial evidence, the Commission weighed the credibility of her testimony. While there are no appellate court decisions on credibility as applied to the Act, the courts have upheld the exercise of broad discretion by Pennsylvania administrative agencies in weighing credibility.

Credibility of a witness has been defined as that quality "which renders his evidence worthy of belief." Jones v. Workmen's Compensation Appeal Board, (25 Pa. Cmwlth 546, Pa. Cmwlth, 360 A.2d 821 (1976) at 823, quoting Black's Law Dictionary, 440 (Revised Fourth Edition 1968).

"It is the responsibility of the referee to weigh the testimony and to accept it, or reject it, in whole or in part."

Jones at 360 A.2d 824 citing Workmen's Compensation Appeals Board v. Guzman, 18 Pa. Cmwlth 275, 334 A.2d 852 (1975). "The fact finder may reject the testimony of the claimant when it conflicts with the testimony of the employer, or even when it is uncontradicted." Affalter v. Commonwealth Unemployment Compensation Board of Review. Pa. Cmwlth 397 A.2d 863 (1979) at 865 citing Wardlow v. Unemployment Compensation of Review, 36 Pa. Cmwlth 477, 387 A.2d 1356 (1978). "Credibility of a witness and the weight given his testimony are matters for the compensation authorities who are not required to accept even uncontroverted testimony as true." Unemployment Compensation Board of Review v. Devictoria, Pa. Cmwlth. 353 A.2d 920 (1976) at 922 citing Edelman v. Unemployment Compensation Board of Review, 10 Pa. Cmwlth 275, 310 A.2d 707 (1973).

Upon careful review of the record, the Commission has determined that the testimony of the Complainant lacks sufficient credibility upon which to make a finding in her favor based on substantial evidence. The testimony of the Complainant is inconsistent and contradictory.

In claiming that her failure to be hired as a laborer constituted sex discrimination, the Complainant cited a relative later identified as Donald Vadella. The testimony of the Complainant on cross-examination puts the validity of her charge in question. Her inconsistent testimony erodes her credibility.

Q. Is this the same Donald Vadella who is a master mechanic at the mine?

A. I suppose he is

Q. That is not the same as a general laborer. You didn't want a job as a master mechanic, did you?

A. I heard that he was hired.

Q. You stated that this is one of the reasons you felt discriminated against, because he was hired and you weren't. Are you willing to state for the record that Mr. Vadella is a mechanic and therefore, extremely qualified?

Ms. Doyle: Let's find out if she knows.

The Witness: I didn't know that he was a mechanic. I just know he was hired by Crescent Coal Company. (NT 45-46, Vol. I)

The Complainant was inconsistent in her testimony about her job as a school bus driver (NT 52, 53, Vol. I). First she testified that she and an aide carried children who were unable to walk. Then she testified that this task was done without assistance. Later she was inconsistent on why she quit. First she testified that it was because of an automobile accident.

Q. You quit working there in 1975?

A. Yes, I did.

Q. Because you were in an automobile accident?

A. Yes

(NT 54, October 23, 1979)

Later, she changed her story:

Q. The reason for leaving employment with the intermediate unit you had indicated was because you were in a car accident.

A. Yes.

Q. If you were not hurt in that car accident, why would you leave?

A. They wouldn't accept my application for the following year.

Q. Why not?

A. Because I told them I felt that it was a responsibility in driving them kids.

Q. Then, your employment was not terminated because you were in an accident, but because you told them you didn't want to work?

A. I didn't say I didn't want to work. I told them I felt it was a responsibility not to drive those kids, and I felt ---

Q. This employment record asks you the reasons for leaving work, so what you are telling me now is that you didn't leave because you were in an accident, you left because you didn't think that you wanted to accept that responsibility, isn't that right?

A. That's right.

Q. That is the real reason you left?

A. It is a responsibility to drive somebody's else's kids. (NT 56-57, Vol. I)

The Complainant vacillated in her testimony concerning the weight of the road paving roller she had operated. (NT 89, Vol I)

The Complainant changed her testimony about her brother's attempt to apply for employment with the Respondent. (NT 102, 106, 107, 108, Vol. I)

The Complainant was inconsistent in her testimony concerning the occasions on which she visited the Respondent's mine.

First she testified that these visits were on the date of application, two weeks after filing her application and again four weeks after filing her application. All were meetings with only Melvin Peluchette. In later testimony, she said Mary Shemansky was present during the third visit. Still later the Complainant changed her testimony to say that Shermansky was present on the second visit. (NT 67-74, Vol. I). According to the Complainant, Melvin Peluchette said he would not hire women when they were alone on the third visit. Later the Complainant testified that the statement was made on the second visit in the presence of Shermansky. Finally, the Complainant testified that the statement was made on the second and third visits. At no time prior to so testifying, did the Complainant advise her attorney that Peluchette had made the statement on two separate occasions.

The credibility of the Complainant is further put into question by the confused and inconsistent testimony of Mary Shermansky (NT 117-135, Vol. I). Shermansky testified that she filed an application the same day as the Complainant's brother George. She stated that she went to the mine only once more in July. On that occasion she was alone. Later, Shermansky testified that the complainant went with her in July to the mine on her second visit. Still later, Shermansky testified that she and the Complainant went to the mine on a third visit. Next Shemansky testified that when she filled out the application, the Complainant and George were both present. She stated that Melvin Peluchette did not discuss anything with them while she was there. Shermansky subsequently changed these statements

again to state that during the second visit, she heard Peluchette say he would not hire women. The testimony of Complainant lacks credibility.

Her case is further weakened by her failure to disclose to the Respondent those job skills which would have reflected favorably upon her qualifications as a laborer. At the hearing, the Complainant offered her past employment as proof of her qualifications and hence the basis of her discrimination charge. Yet she admitted under cross-examination that she never listed these qualifications on her employment application. (NT 55-56, Vol. I).

By this very admission, it appears that the Complainant may have herself been responsible for her failure to have been selected for hiring.

The recent case of Holder v. Old Ben Coal Company, (22 EPD ¶30,623, 7th Cir. 1980) sheds light on the present action. In Holder, the Complainant sued a coal company for sex discrimination claiming she was passed over for an unskilled position in favor of several males who were hired. Remarkably, the Complainant in Holder failed to disclose all her job related skills on her employment application.

In Holder, the Court recognized that "unskilled" can be legitimately distinguished from "unqualified."

> A job categorized as unskilled, however, does not necessarily mean that certain qualifications or experience are not required or preferred for the

> ...ob. Unskilled does not mea.. unqualified. "Unskilled" commonly means not skilled in some handicraft, or devoid of any technical training. Oxford English Dictionary (Compact ed. 1971). It need not mean lacking any useful experience qualification.
>
> No evidence was introduced to show that defendant applied the term 'unskilled' to mean a total lack of qualifications or experience. The record shows to the contrary that defendant did look for certain qualifications in reviewing applicants for unskilled positions. Defendant's personnel administrator testified that when defendant sought applicants for unskilled positions, it primarily sought persons who had operated mobile equipment or had worked with heavy equipment. The applications of several persons hired demonstrate that defendant also sought applicants who had welding or extensive truck driving or maintenance experience. The mine also sought employees in the unskilled category who appeared to be capable not only of menial tasks but also of filling in and assisting with other jobs as might be helpful when needed due to vacations, sickness or otherwise.
> (22 EPD at p. 14,321)

At the hearing, Peluchette, the Respondent's hiring officer, also distinguished unskilled from unqualified. Peluchette testified that he had five criteria for hiring persons as laborers - experience, education, technical knowledge, technical training and physical capacity. (NT 7, Vol I), (1979). He testified that job seekers were provided with an

> "application with their previous work and what type work they have done. Also, in our application, it states
>
> > 'List any mechanical equipment that you have operated.'
>
> (NT 11, Vol. I)

In the second hearing, Peluchette further explained the hiring process.

"...I go through the applications. The ones that have anything on them that are more outstanding than others, those are the ones I select. [to interview]" (NT 124, Vol. II)

Peluchette explained the failure to offer a laborers position to the Complainant:

"When I went through the applications looking for potential employees, I checked them off as to anything outstanding on there that would make anyone more qualified than another. I didn't find anything on her application to show that she happened to be outstanding or that she was more qualified for work than some of the other people I looked at."
(NT 97, Vol. II)

Unfortunately, whether or not the Respondent violated the Act is not at issue, because the Complainant must first meet her burden of proof as to her initial qualifications. Albeit, she did not have to be "more" qualified than others, but this point is not reached.

By her own admission, the Claimant failed to list her relevant mechanical education and mechanical experience on her job application. (Complainant's Exhibit 40). She might, at least, have demonstrated minimum qualifications. In contrast, of the 17 males hired as laborers, (listed on Exhibit 40) nine listed some mechanical education, mechanical experience or both.

Clearly, the Complainant failed to establish her qualifications when she applied for the job. Claiming discrimination for not being hired after she neglected to submit some qualifications reflects negatively on her credibility and good faith diligence

in pursuit of employment with Respondent.

It may very well be true that Complainant was passed over in favor of the other eight males on account of her sex. However, Pennsylvania law requires that the Complainant be "best able and most qualified" (as defined by General Electric) in order to establish a violation of the Act.

Her failure to submit her relevant qualifications saved Respondent from committing a deliberate violation of the Act as to her. Her failure to submit her relevant qualifications deprived her of the means of proving discrimination against her.

B. LIABILITY TO FEMALES AS A CLASS

However, testimony demonstrates that Respondent willfully discriminates against women as a class.

Respondent established sex-segregated procedures for review and comparison of female applicants to each other rather than to males. Respondent claims that it did not interview Mary Shermansky because "there were no positions available and because there was a female applicant (Beverly Blackburn) who, assuming she would have been qualified, because of the date of her application would have been given preference." (Complainant's Ex. No. 27) Testimony regarding the hiring order of similarly-situated males shows that the date-of-application preference, said to apply to females, did not apply to the male hires (Complainant's Ex. Nos. 7,9,10,11,17,18,38, and Respondent's Ex. A).

The Pennsylvania Supreme Court has stated that 43 P.S. Sec. 955(a) "entitles every female job applicant to have her qualifications for employment considered on an equal footing with those of a man." General Electric Corp. v. Cmwlth. Human Rel. Comm., 469 Pa. 292, 365 A.2d 649, 660 (1976). It was precisely this equality of opportunity which was denied actual and potential female applicants for laborer positions in Respondent's mines because Respondent refused to seriously consider them.

The Pennsylvania Supreme Court has recognized that one "intent on violating the Law Against Discrimination cannot be expected to declare or announce his purpose." Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 233 A.2d 290, 298 (1967). Yet in the instant case, Respondent was so smug in its discriminatory practices that it announced its policy of not hiring females, both to Complainant and in the presence of other employees. (N.T. 47, Vol. 11)

Examination of Merwin Markel, PHRC investigator, clearly evidences that females suffer disparate treatment as a result of Respondent's hiring practices. The disparate impact on females in Respondent's labor force is equally evident. Markel's testimony demonstrates that Respondent's employment procedures result in a cognizable deprivation to females as a class. (N.T. 115-140, Vol. II). In addition, this case involves applicants being chosen from a pool rather than being hired seriatim. In this kind of situation, a showing of discriminatory animus completes a class based prima facie case. King v. New Hampshire Dept. of Resources and Economic Development, 562 F.2d 80,83 (1st Cir. 1977). An unwritten policy of refusing to hire females as laborers also

completes a prima facie case of class-based discrimination. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). Both elements are present here.

Thus, the burden shifts to Respondent to articulate some legitimate, non-discriminatory reason for Respondent's failure to hire females. Id., McDonnell-Douglas Corp. v. Green, supra.

Respondent seeks to avoid liability in this case by showing that based on numbers alone, it is unlikely that any of the female applicants would have been hired. It has placed great weight on the fact that only a handful of females have applied as laborers over the past five years. Respondent, however, chooses to ignore the effects its no-female policy presumably has had on the number of females applicants, for a "consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection." International Brotherhood of Teamsters v. United States, 431 U.S. at 365. The United States Supreme Court went on to state:

> "If an employer should announce his policy of discrimination by a sign reading "Whites Only" on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs. The same message can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices -- by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his workforce from which he has discriminatorily excluded members of

> minority groups. When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application." Id.

The same holds true for a policy of hiring only males as laborers.

The Court recognized that the most overtly discriminatory employers should not be allowed to escape liability simply "because the unlawful practices had been so successful as totally to deter job applications from minority groups." Id., In the instant case Respondent must be held responsible for the tiny numbers of females who have applied for employment as laborers.

III. CONCLUSION

The finding of the Commission rests on the lack of credibility of the Complainant, and upon the lack of substantial evidence upon which to conclude that she has met her burden of proof under the law. Absent the establishment of this burden, the threshold issue of "best able and most competent" does not come into play and the Commission need not look into the question of damages and other remedies as to the Complainant.

However, by this finding, the Commission in no way absolves the Respondent. It may well be true and should be true that somewhere in the Respondent's geographical workforce, there are women who are as qualified as the successful male applicants. It is expected that the Respondent will make a genuine effort to recruit from this workforce by advertisement and word of mouth.

Although the Complainant did not meet her burden of proof, the Commission determined by thorough review of the testimony that sex discrimination is rife in this industry and this company. The PHRA specifically provides that once discrimination has been found, Respondent may be ordered to cease and desist from the discriminatory practice, hire, upgrade, and grant backpay to prevailing persons. 43 P.S. Section 959.

The PHRC may order relief for persons other than the named Complainant where, as here, the Complainant alleges that such other persons have been affected by the alleged discriminatory practice. Having shown that Respondent illegally discriminated against females, the class members are entitled to an Order against Respondent requiring Respondent to: (1) cease and desist from refusing to hire females as laborers in its mines; (2) cease and desist from making derogatory and discriminatory comments to female applicants for such positions; and (3) devise and submit to the Commission within ninety (90) days of this Order, an Affirmative Action Plan to promote the hiring of women as laborers in its mines. The Affirmative Action Plan shall include, but not be limited to: (a) written job-related criteria; (b) a standardized written interview format, including any job-related tests to be conducted and scoring criteria for such tests; (c) procedures for active advertising and recruitment of females as laborers; (d) procedures for quarterly submission, for a five year period, of copies of all male and female applications; copies of all written interviews and designation of those who were hired with reasons for their hire.

RECOMMENDATION OF HEARING PANEL

AND NOW, this 29th day of September, 1980, in consideration of the entire record in this matter, including the Complaint, Stipulations, Exhibits, Record of the Hearing, and Briefs filed on behalf of Complainant and Respondent, the Hearing Panel recommends to the entire Commission that the enclosed findings of Fact, Conclusions of Law and Opinion be adopted and that an Order be entered dismissing the complaint.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOHN P. WISNIEWSKI, Chairperson

_____
DORIS A. SMITH, Esquire

_____
ELIZABETH M. SCOTT, Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY A. BLACKBURN, :
Complainant
:
v. : DOCKET NO. E-10814
:
CRESCENT HILLS COAL COMPANY, :
Respondent

O R D E R

AND NOW, this 16th day of October , 1980, upon consideration of the Findings of Fact, Conclusions of Law, and Opinion 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. Respondent shall cease and desist from refusing to hire females as laborers in its mines;

2. Respondent shall cease and desist from making derogatory and discriminatory comments to female applicants for such positions;

3. Respondent shall devise and submit a proposed affirmative action plan to the Commission within ninety (90) days of the date of this Order. The proposed Affirmative Action Plan shall include, but not be limited to: (a) written job-related criteria; (b) a standardized written interview format

including any job-related tests to be conducted and scoring criteria for such tests; (c) procedures for active advertising and recruitment of females as laborers; (d) procedures for quarterly submission, for a five year period, of copies of all male and female applications; copies of all written interviews and designations of those who were hired with reasons for their hire; and

4. The complaint shall be dismissed to Beverly A. Blackburn.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

JOSEPH X. YAFFE, CHAIRPERSON
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ATTEST:

JOHN P. WISNIEWSKI, ASSISTANT SECRETARY
PENNSYLVANIA HUMAN RELATIONS COMMISSION