



5. Subsequent to the determination of probable cause the Commission and Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion but were unable to do so.

6. Complainant applied for the position of State Police Cadet on February 17, 1981.

7. In order to be accepted as a State Police Cadet all candidates are required to pass in sequence:

- a) an initial screening;
- b) a written examination administered by the Pennsylvania Civil Service Commission;
- c) a medical examination by the candidates' personal physician;
- d) a strength and agility test;
- e) a medical examination by Respondent's Medical Officer;
- f) an oral interview; and
- g) a background investigation.

8. Complainant successfully completed all phases of the selection process up to and including the strength and agility test.

9. Complainant was eliminated at the physical examination by Respondent's Medical Officer.

  
JOSEPH S. RENGERT  
Counsel for Respondent

  
G. THOMPSON BELL  
Counsel for Complainant



6. Kidney damage due to traumatic injury may result from blunt trauma or a penetrating wound; in either case, other organs in addition to the kidney are generally injured. (N.T. 89, 90, 155)

7. No cadet known to the State Police Medical Officer has lost a kidney as a result of trauma received while at the academy. (N.T. 179)

8. State Police cadet training includes activities, such as boxing and learning self-defense techniques, which involve the possibility of physical blows to the body. (N.T. 122-132; R.E. 2)

9. State Police troopers are exposed to the risk of injury in automobile accidents while pursuing and stopping other motorists. (N.T. 139, 149; R.E. 3)

10. State Police troopers are exposed to the risk of injury inflicted by persons armed with weapons. (N.T. 139, 149; R.E. 3)

11. The risk to the Complainant posed by the activities of State Police cadets and troopers is not greater than the risk to any other cadet or trooper. (N.T. 160)

12. An unknown number of persons are born with one kidney. (N.T. 80)

13. The regular medical examination performed by the State Police Medical Officer as part of the pre-employment process does not reveal the otherwise undetected absence of a kidney. (N.T. 181-182)

### CONCLUSIONS OF LAW

1. Complainant is an individual person within the meaning of the Act.

2. Respondent is an employer within the meaning of the Act.

3. The Commission has jurisdiction over the parties and subject matter of this case.

4. All prerequisites to a jurisdictional and procedural public hearing in this case have been met.

5. To prevail in this case, Complainant must show that he had a handicap or disability within the meaning of the Act and applicable regulations, that he applied for a position for which he was qualified, and that the Respondent continued to seek other applicants.

6. Complainant was not in 1981 limited in the performance of any major life activities.

7. Respondent regarded Complainant as having a physical impairment which substantially limited him in the conduct of a major life activity, working.

8. Respondent may prevail in this case by establishing that Complainant had a job-related handicap or disability.

9. A handicap or disability is job-related if the position sought may pose a threat of demonstrable and serious harm to the handicapped applicant.

10. Respondent has not established that the position sought by Complainant would pose a threat of demonstrable and serious harm to him.

11. A prevailing complainant in a case of discriminatory refusal to hire is entitled to an award which will place him in the position in which he would have been, absent the discrimination.

12. Once discriminatory refusal to hire has been found, Complainant is entitled to backpay relief unless Respondent establishes by clear and convincing evidence that he would not have been hired even if no discrimination had taken place.

13. Respondent has not established that Complainant would not have been hired, absent the discrimination.

O P I N I O N

This case arises on a complaint filed by Mr. Governor Felton Williams ("Complainant") against the Pennsylvania State Police ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on June 11, 1981, at Docket No. E-20510. Commission staff investigated the matter and found probable cause to credit the allegations. When attempts to conciliate were unsuccessful, the case was set for public hearing. Prior to hearing, the parties stipulated to certain facts; these were subsequently incorporated into the record of the public hearing, and are hereby incorporated into the foregoing Findings of Fact. Both parties waived their statutory right to a hearing before a panel of three Commissioners; the case went to public hearing on September 23, 1982, before Commissioner Doris M. Leader.

Mr. Williams alleged that the State Police violated Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§ 951 et seq., by rejecting his application for the position of State Police Cadet because of his handicap/disability, loss of right kidney, which he further alleged did not interfere with his ability to perform the essential functions of the job. Respondent denied that any violation of the Act occurred.

The burden of proof in this case is on the Complainant; he must establish that he is a member of a protected class, that he applied for a position for which he was qualified, and

that the employer continued to seek other applicants of equal qualifications. General Electric Corp v. Pennsylvania Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976); the burden then shifts to the Respondent to show that no violation of the Act took place. Pennsylvania State Police v. Pennsylvania Human Relations Commission and Phyllis M. Sweeting, \_\_\_ Pa. Cmwlth. \_\_\_, \_\_\_ A.2d \_\_\_ (1983) ("Sweeting").

Counsel stipulated that Mr. Williams applied for a position as a State Police Cadet, and successfully completed all phases of the selection process up to but not including the physical examination by the State Police Medical Officer. At that point, he was rejected when it was discovered that he lacked one kidney.<sup>1</sup> We must therefore first determine whether this condition constituted a handicap or disability within the meaning of the Act and applicable regulations, at the time of unsuccessful application.

Section 4(p) of the Act defines "non-job related handicap or disability" as:

any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job related.

Regulations adopted by the Commission prior to the filing

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of this complaint define "handicapped or disabled person" as one who:

(A) has a physical or mental impairment which substantially limits one or more major life activities;

(B) has a record of such an impairment;  
or

(C) is regarded as having such an impairment.

16 Pa. Code §44.4(i)

Phrases used in these basic definitions are further defined:

(A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular, reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing learning and working.

(C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(D) "is regarded as having an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.

16 Pa. Code §44.4(ii)

These regulations were upheld by Pennsylvania's Commonwealth Court in Sweeting, supra. The Court there determined that the Commission in enacting the regulations was engaged in legislative rule - making. The regulations themselves were found to be a proper interpretation of the Act, not in violation of fundamental principles of law. (Slip opinion, p. 7-8).

A missing kidney is unquestionably an anatomical loss affecting the genitourinary system. We find, however, that Complainant was not a handicapped person at the time of his application, within the meaning of §44.4(i)(A) of the regulations. Extensive testimony established that he was not, at the time of this application, in any way limited in the conduct of any major life activities.

We find that Complainant was a handicapped person within the meaning of §44.4(i)(c), because Respondent regarded him as handicapped. The State Police medical officer, Dr. Dutlinger, testified that in his opinion Mr. Williams should not, for the rest of his life, engage in any physical activity carrying the risk of physical contact or a severe blow to the remaining kidney. It was on the basis of this opinion that Complainant's application was rejected.<sup>2</sup>

While denying that Mr. Williams was regarded as handicapped, Respondent urges that his condition was job-related because of the risk that damage to his remaining kidney would result in his death or disability.

Pertinent portions of the Commission's regulations provide that "(a) handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm". 16 Pa. Code 44.4(e)(ii). For the reasons which follow, we find that no such threat of harm has been shown.<sup>3</sup>

Expert testimony established that the kidneys are naturally protected from injury by their location in the abdominal cavity, and by the structures which surround them. Major injury to the abdominal area is generally required before kidney damage occurs. Such damage may result from either severe blunt trauma or a penetrating wound, such as a gunshot or knife wound. Testimony indicated that blunt trauma severe enough to cause kidney damage would damage other organs as well, such as the liver or spleen. Penetrating wounds likewise would almost always involve injury to other organs. Only a gunshot or knife wound from behind which entered the body at a precise angle and with a precise amount of force would injure no organ besides the kidney. The risk of this was described as extremely small.

While the activities of State Police Cadets and troopers carry a relatively high risk of injury in general, the evidence does not show that Mr. Williams would be at any particularly greater risk because of his condition. As Complainant urges, we find that the cited regulation requires more than a showing that harm to the handicapped applicant may hypothetically

occur. This showing has not been made; Mr. Williams' condition has not been shown by Respondent to be job related. Having determined that Complainant was not hired because of his non-job related handicap or disability, we must consider appropriate relief.

Section 9 of the Act provides that hiring, with or without back pay, may be ordered after a finding of discrimination. The function of back pay relief is to put the victim of discrimination in the position she or he would have attained absent the discrimination. Albermarle Paper Company v. Moody, 422 U.S. 405, 418-423 (1975); Pennsylvania Human Relations Commission v. Transit Casualty Insurance Company, Pa., 307 A.2d 58 (1978).

The difficulty in this case is that it is impossible to tell with absolute certainty whether Mr. Williams would have been hired absent the discrimination. At the time his application was rejected, he had successfully completed all portions of the pre-employment process up to, but not including, the medical examination.

Federal cases uniformly hold that, once discrimination has been found, the burden of proof shifts to the discriminating employer to prove, by clear and convincing evidence, that the discriminatee would not have been hired even absent the discrimination. Day v. Matthews, 530 F.2d 1083 (D.C. Cir. 1976); Rodriguez v. Taylor, 569 F.2d 1231 (3rd Cir. 1977); League of Latin American Citizens v. City of Salinas Fire Department, 654 F.2d 557 (9th Cir. 1981). Any uncertainty

should be resolved against the discriminating employer. Day v. Matthews, supra.

In Rodriguez v. Taylor, supra, the Third Circuit Court of Appeals upheld an award of back pay to an applicant who, like Mr. Williams, had been unlawfully rejected before completing the pre-employment process. At the time of the appeal the applicant had taken and failed the remaining examination. The Rodriguez court nevertheless upheld the award of back pay, noting the protracted uncertainty endured by the plaintiff through no fault of his own.

In the case before us, there has been no showing that Mr. Williams would not have been hired in the absence of discrimination. We therefore find that he is entitled to an award of back pay along with the other relief described in the Order which follows.

FOOT NOTES

<sup>1</sup>The kidney was removed for reasons fully described in the record and not relevant to this case: it was the absence of the kidney which caused Mr. Williams' application to be rejected, not the illness which originally caused its removal.

<sup>2</sup>Respondent's contention that Mr. Williams was not "regarded as handicapped" rests on the distinction between what they believed he could do and what they believed he should do. It is urged that the distinction is dispositive, as Respondent regarded him as being "able" to do things which, because of his condition, they decided he should not do.

This distinction has more semantic than legal significance: Respondent's attitude about Complainant's condition was that the condition operated to prevent Mr. Williams from performing State Police Cadet duties.

<sup>3</sup>Respondent argues that any showing of possible and serious harm to Complainant renders his handicap job related under this section. We cannot agree. The meaning of "demonstrable harm" is less than clear; however, the regulation makes little sense unless read to require a showing that a handicapped applicant is at greater risk than other applicants. This showing has not been made.

COMMONWEALTH OF PENNSYLVANIA  
EXECUTIVE OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

GOVERNOR FELTON WILLIAMS,  
Complainant

vs.

PENNSYLVANIA STATE POLICE,  
Respondent

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DOCKET NO. E-20510

RECOMMENDATION OF HEARING COMMISSIONER

Upon consideration of the entire record in this case, the Hearing Commissioner concludes that the Respondent discriminated against the Complainant, in violation of Section 5(a) of the Act. She therefore recommends that the attached Findings of Fact, Conclusions of Law, Opinion and Order be adopted and entered by the full Pennsylvania Human Relations Commission.

Doris M. Leader  
DORIS M. LEADER  
Hearing Commissioner

DATE: 5/10/83





4. If Complainant is placed in a Cadet class, he shall receive employment seniority retroactive to May 11, 1981. Complainant and Respondent shall explore the use of protective devices such as "flak jackets".
5. Respondent shall report to the Commission within thirty days of the date of this Order, and at regular intervals thereafter if necessary, as to its manner of compliance with the terms of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: *Joseph X. Yaffe*  
JOSEPH X. YAFFE  
Chairperson

ATTEST:

BY: *Elizabeth M. Scott*  
ELIZABETH M. SCOTT  
Secretary