

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOYCE A. ENGLISH,

Complainant

v.

PHILADELPHIA ELECTRIC
COMPANY,

Respondent

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DOCKET NO. E-12163

FINDINGS OF FACT

1. The Complainant is Joyce A. English, a black female, college graduate, who on April 26, 1977 was 27 years old. She presently resides in Pensacola, Florida. (N.T. 17, Exh. C-4: p.3)

2. The Respondent is Philadelphia Electric Company (PECO), 2301 Market Street, Philadelphia, Pennsylvania 19101. (N.T. 17)

3. On May 4, 1977, Complainant filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging in relevant part that Respondent had violated Section 5(a) of the Pennsylvania Human Relations Act (Act), Act of October 27, 1955 P.L. 744, as amended, 43 P.S. §951 et seq., in that Respondent had on or about April 26, 1977, "Refused to hire Complainant for the position of Customer Service Representative because of

her handicap/disability, obesity, which does not substantially interfere with her ability to perform essential functions of the job." (N.T. 17)

4. An investigation of the complaint was conducted. A finding of probable cause to credit the allegation was made. A response denying such probable cause was filed by the Respondent and an attempt to conciliate the case was undertaken, all in conformity with the requisites of Section 9 and other relevant provisions of the Act and the Special Rules of Administrative Practice and Procedure before the PHRC. (N.T. 17-18)

5. The Complainant applied for the position of Customer Service Clerk (CSC) with Respondent on April 26, 1977. (N.T. 18)

6. Respondent had approximately thirteen openings for CSCs on the date of Complainant's application. (N.T. 18)

7. On April 26, 1977, Joyce English satisfied all the necessary pre-employment ability, knowledge, skill and other requirements for the CSC position. (Exh. C-3: pp 6-10, Exh. C-4: pp 9-11)

8. The Complainant, as of April 26, 1977, fully satisfied all educational and experiential pre-employment criteria for the position of Customer Services Clerk. (Exh. C-3: pp 3-4, Exh. C-4: pp 3-4)

9. On April 26, 1977, Joyce English was interviewed by a PECO personnel staff person, Alfred Hetrick and was administered a battery of pre-employment tests, all of which she passed. She

was then told by Mr. Hetrick that she was qualified for the position she sought. (N.T. 75-76, Exh. C-4: pp. 8-9)

10. Joyce English was denied a CSC position by PECO for the sole reason that she failed the medical exam due to her obesity. (Exh. C-4: pp. 14-15, N.T. 167, 187, 194, 2.7)

11. PECO's medical department failed Joyce English in her medical examination because of their belief that massive obesity to the extent present in Ms. English, created a high risk that other medical problems would develop which might result in excessive absenteeism and underproductivity. (N.T. 76, 189, 211-212, 2.11)

12. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested that she was medically less well suited than the average person to perform the duties of a CSC. (N.T. 89, 2.15-2.16, 2.25)

13. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested with any reasonable degree of medical certainty that she was likely within the foreseeable future to develop illnesses or diseases which would render her less available for work or less productive. (N.T. 89, 199, 214)

14. On April 26, 1977, PECO considered Joyce English to be qualified for the CSC position and did not believe that her obesity would substantially interfere with her ability to perform the essential functions of the job. (N.T. 76)

15. At the time of the Complainant's application, the CSC position paid a salary of \$115 per week. (N.T. 18)

16. On or about August 1, 1977, the salary for a CSC increased by 7.5% to approximately \$124 per week. (N.T. 2.105)

17. On or about August 1, 1978, the salary for a CSC increased by 7.3% to approximately \$133 per week. (N.T. 2.105)

18. On or about August 1, 1979, the salary for a CSC increased by 7.2% to approximately \$143 per week. (N.T. 2.106)

19. Joyce English was given a thorough medical examination on September 8, 1977 by Anna Marie Chirico, M.D.. Her blood pressure was found to be 128 over 68 in the upper right arm and 120 over 80 in the forearm. There was no evidence of hypertension, diabetes mellitus, or any pulmonary, cardiovascular, or other respiratory or circulatory diseases or problems. (N.T. 80-87)

20. Compared to a person of average weight, a massively obese person has an increased likelihood of developing illnesses and diseases such as coronary heart disease, hypertension, respiratory failure and diabetes mellitus. (N.T. 196, 2.15, 2.44 - 2.56, 2.59, 2.74)

21. Psychological disturbances frequently result from obesity, particularly in the nature of self-disparagement, contempt for one's own body, and feelings of blameworthiness for one's physical condition. These disturbances manifest themselves in ways that severely restrict or limit social interaction. (N.T. 32-38, 41-43, 51, 2.85)

22. Blood pressure readings taken on a severely obese person using a regular sized cuff result in a spuriously elevated reading. A large cuff must be used to obtain an accurate reading. (N.T. 83)

23. PECO employees who gain so much weight that they exceed their acceptable weight (as determined by the weight chart) are not terminated from employment. (N.T. 144, 145)

24. Jobs in the Customer Service Department require a degree of mobility which a severely obese person might not have. (N.T. 215)

25. A lineman who became obese while employed by PECO would be temporarily transferred to a position which did not involve climbing, during the period of physical inability to perform. (N.T. 216, 217)

26. Applicants who have made real efforts to lose weight are likely to be recommended for employment by PECO's Medical Department even if they have not reached their permissible weight, as determined by the weight chart. (N.T. 208)

27. Obese persons are less agile and more accident prone than non-obese persons. (N.T. 2.15, 2.53)

28. Obesity is commonly defined as the state of weighing 20 per cent or more in excess of one's desirable weight, as determined by Metropolitan Life Insurance Company tables. (N.T. 2.39, 2.40)

29. Morbid obesity is defined as weighing twice one's desirable weight or more; Complainant in this case was morbidly obese. (N.T. 2.44), 2.45)

30. Severely obese persons have measurable dysfunction of the pulmonary system and must work at breathing. (N.T. 2.52)

31. Severe obesity frequently interferes with circulation, such that blood doesn't run to the heart as efficiently as it would in an agile, non-obese person. Obese persons are more likely to develop swollen legs and ankles after prolonged standing. (N.T. 2.54, 2.55)

32. Morbid obesity is positively correlated with premature death. (N.T. 2.57)

33. Obesity is positively correlated with the rate of absenteeism due to illness. (N.T. 2.58)

34. Severe obesity can pose a mechanical handicap by interfering with the physical ability to accomplish tasks. (N.T. 2.65-2.73)

35. Only an educated guess can be made regarding the potential reduction in duration of life for Complainant or any other severely obese person. A ten year reduction in Complainant's life span is plausible. (N.T. 2.81, 2.82)

36. On rare occasions an applicant is hired in spite of a negative recommendation from PECO's Medical Department. This may happen when there is great need to fill a position quickly. (N.T. 2.133)

37. PECO's Assistant to the Vice-President of Affirmative Action was aware, prior to May of 1977, that the federal Rehabilitation Act of 1973 had been amended so as to include, in the definition of handicapped person, a person who is

regarded as having an impairment which substantially limits major life activities. (N.T. 2.175)

38. PECO's Medical Department has no clearly articulated policy of questioning job applicants regarding their use of cigarettes, alcohol, or other drugs. (N.T. 180-184)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") properly has jurisdiction over the parties and subject matter of this action, pursuant to Sections 4, 5 and 9 of the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (43 P.S. §§ 954, 955, 959)

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter. (43 P.S. §959.)

3. Respondent Philadelphia Electric Company is an "employer" within the meaning of Sections 4(b), 5(a), and 5(d) of the Act. (43 P.S. 954(b), 955).

4. Complainant Joyce English is an "individual" within the meaning of Section 5 of the Act. (43 P.S. 955)

5. Morbid obesity is a handicap or disability within the meaning of Sections 4 and 5 of the Act. (43 P.S. 954, 955)

6. Complainant's handicap or disability did not substantially interfere with her ability to perform the duties of Customer Service Clerk.

7. Respondent has unlawfully discriminated against Complainant by refusing to hire her on the basis of her non-job related handicap or disability.

8. A prevailing Complainant in an action alleging discriminatory refusal to hire is entitled to an award of back-pay with interest, and to an order that she be hired for the position from which she was rejected.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Joyce English ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Philadelphia Electric Company ("Respondent") on May 4, 1977, wherein Ms. English alleged that Respondent refused to hire her because of her "handicap/disability, obesity, which does not substantially interfere with her ability to perform the essential functions of the job," in violation of Section 5(a) of the Pennsylvania Human Relations Act ("the Act"), Act of October 27, 1955, P.L. 744, as amended.

An investigation into the allegations of the complaint was made by representatives of the Commission, who determined that probable cause existed to credit the allegations. Thereupon, the Commission endeavored to eliminate the practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and the Commission approved the case for public hearing.

Public Hearing was held on August 8 and 9, 1979, in Philadelphia, Pennsylvania and was conducted at all times before Commissioners Alvin E. Echols, Jr., Esq., Chairperson of the Panel, Doris M. Leader, and John P. Wisniewski, pursuant to Section 9 of the Act. The case on behalf of the

complainant was presented by Benjamin G. Lipman, Assistant General Counsel to the Commission. The respondent was represented by John F. Smith III, Esq., and Leonard J. Cook, Esq., of Dilworth, Paxson, Kalish, Levy, and Kauffman. Edith E. Cox, Assistant General Counsel to the Commission, served as Legal Advisor to the Hearing Panel.

By stipulation of the parties and by leave of the Hearing Panel, the deposition of the Complainant, Joyce English, was taken on December 13, 1978, and made part of the record with the same effect as if Ms. English had appeared personally before the Hearing Panel.

II. FACTUAL BACKGROUND, ISSUE FORMULATION

The essential facts underlying this complaint are undisputed. On April 26, 1977, Ms. English applied for the position of Customer Service Clerk ("CSC") with Respondent. After passing a battery of pre-employment tests and meeting all educational and experiential pre-requisites, she was routinely referred to Respondent's Medical Department for a physical examination.

The examining physician concluded that Complainant was unsuited for employment. While he noted that her blood pressure was slightly elevated and that her mother had died prematurely, it is not seriously contested that the sole reason for his recommendation was Complainant's massive obesity: at the time of the examination she was 5'8" tall and weighed 341 pounds. No finding of inability to perform the duties of the CSC position was made. On the basis of this recommendation, Respondent declined to hire Ms. English. This suit followed.

This case therefore presents a novel issue of statutory construction, namely, whether obesity is a handicap or disability within the meaning of Section 4(p) and 5(a) of the Act. Should obesity be a handicap or disability, a secondary issue is presented as to its job relatedness in this case.

For the reasons which follow, we hold that severe obesity ^{1/} is a handicap or disability and find that Respondent has unlawfully discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability.

^{1/} The term "obesity" will be fully defined in Part III, infra.

III.

LIABILITY

Section 5 of the Act provides in pertinent part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification ... (a) For any employer because of the non-job related handicap or disability of any individual to refuse to hire or employ ... such individual ...

Section 4(p) provides in part:

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment (sought) ...

The Statute is thus essentially silent as to the meaning of "handicap or disability." Nor has any Pennsylvania court defined the terms.

Persons having handicaps or disabilities came under the coverage of the Act in 1974, when the General Assembly amended the Act to extend its protection to them. The legislative history of this amendment sheds little light on the question of whether the General Assembly wished to include obese persons in the category of handicapped or disabled persons. As Respondent's Brief states at page 5, "(s)pecific reference is made to the blind, wheelchair patients, epileptics, and the deaf and dumb." This list is illuminating mainly in its omissions. It is reasonable to conclude, as we do, that the

General Assembly did not intend this list to be other than exemplary. Difficult issues of interpretations such as that now before us were thus necessarily left to case by case resolution.

The issue of how much guidance may properly be drawn from the Commission's regulations, promulgated after this suit was filed, will be discussed subsequently. Our initial approach to this problem is guided by the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.

Section 1903 provides in part that "... words and phrases shall be construed according to ... their common and approved usage ..."

Webster's New Collegiate Dictionary (1976) includes the following definitions:

Disable: to make incapable or ineffective;
esp.: to deprive of physical, moral
or intellectual strength.

Disability: Inability to pursue an occupation
because of physical or mental impair-
ment.

Handicap: A disadvantage that makes achievement
unusually difficult; esp.: a physical
disability.

Thus, the terms, while closely related, are not exactly synonymous. This conclusion is in keeping with the general principle of statutory construction that a statute shall not be presumed to be redundant if it is possible to give effect

to all of its provisions. See 1. Pa. C.S.A. Section 1921 and Klein vs. Republic Steel Corp., 435 F.2d 762, C.A. 3 (1970).

As previously noted, regulations promulgated by the Commission subsequent to initiation of the instant action include a comprehensive definition of the terms "handicap or disability." A handicapped or disabled person is defined at 16 Pa. Code 44.4(4) 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.

A physical or mental impairment is defined as follows:

- 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; musculo-skeletal; special sense organs; respiratory, including digestive; genitourinary; hemic and lymphatic; skin and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

Major life activities are defined as follows:

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

Comparison of these definitions with those reflecting the common and approved usages of "handicap" and "disability"

indicates that definition A, supra, a physical or mental impairment which substantially limits major life activities, most nearly expresses the combined meaning of the terms as generally used. We therefore find that application of that definition to the facts of this case will result in no unfairness to Respondent. As Complainant's Brief states, the terms necessarily had some meaning prior to the adoption of the regulatory definitions. It is therefore against the standard set by this definition that the facts of this case must initially be examined.

Evidence adduced at Public Hearing established that Ms. English's application for employment with Respondent was processed in the same manner as are essentially all such applications. The initial phase of the process was directed toward determining whether she was qualified to perform the job. Respondent acknowledges that Ms. English was so qualified.

Following this initial pre-qualification, Ms. English was referred to Respondent's Medical Department for a physical examination. As previously noted, the Medical Department found her to be unsuitable for any employment with Respondent because of her obesity. Reference was made to Respondent's "weight chart," Exhibit R-1. Testimony established that applicants weighing more than forty pounds over (or under) the weight appearing on the chart for persons of a given sex, age and height were as a rule not hired; it was repeatedly emphasized that the standards are not rigidly applied, and that individual

variations in "frame" size are taken into account. Indeed, Respondent's Medical Director stated that if an applicant "... is 55 pounds overweight but doesn't look it ..." that applicant would be hired. (N.T. 158)

Despite this suggestion of concern with an applicant's appearance, Respondent vigorously argues that its weight policy is designed solely to help it achieve and maintain a healthy workforce. The bulk of its case in chief consisted of expert medical testimony regarding the high positive correlation between obesity and various medical problems which in their turn would lead to excessive absenteeism. Before discussing this expert evidence, it is necessary to comment briefly on the weight chart and the uses made of it.

It is chiefly notable that absolutely no empirical evidence validating either the chart or the "forty-plus" cut-off was produced by Respondents. Direct questions put to the Medical Director and to the examining physician established only that the weight chart and attendant policy had been in use prior to either man's employ with the company.

It is also noteworthy that Respondent's pre-employment medical examination of Ms. English was not individualized in either of two possible ways.

First, Ms. English was not questioned about any medically caused absenteeism problems which she herself might have had in previous jobs. Nor was any independent inquiry directed to any of her previous employers.

Second, the examination and subsequent recommendation were not based on Ms. English's present medically assessed ability to perform the duties of a Customer Service Clerk. It was readily conceded that on the date of her examination, she was physically able to perform those duties.

Rather, the entire thrust of Respondent's policy and of its argument before this Commission is that obesity,^{2/} though not itself a handicap or disability within the meaning of the Act, is nevertheless so regularly associated with disabling conditions which might cause absenteeism and early mortality as to preclude the hiring^{3/} of almost any obese person. We turn therefore to the expert testimony.

^{2/} Obesity was defined by one of Respondent's expert witnesses, Dr. Theodore van Itallie, as the state of weighing 20 per cent more above one's average desirable weight, based on the Metropolitan Life Insurance Company standards for desirable weight. (N.T. 2.39, 2.40) This chart was never introduced into evidence.

^{3/} PECO employees who exceed their permissible weight are not terminated, however.

The record overwhelmingly supports the Respondent's assertion that the correlation is high between obesity, particularly morbid obesity, ^{4/} and a long list of potentially disabling medical problems. Included in this list are heart disease, hypertension, diabetes mellitus, gall bladder disease, and cardio-respiratory dysfunction; it was also established that many conditions to which both obese and non-obese persons are subject are exacerbated by obesity: among these were complications of pregnancy and arthritis of the knees. The record additionally supports the assertion that obesity is positively related to increases in absenteeism, and to increased mortality rates.

Respondent concedes that Ms. English at the time of her application had no discernible medical complications. ^{5/} It argues vigorously, however, that she was so likely to develop such problems in the future as to be unfit for present employment. We shall consider this "increased risk" argument in two contexts: first, in its impact on the determination of whether or not obesity is a handicap; second, in the consideration of

^{4/} Morbid obesity is the state of weighing twice one's average desirable weight, or more. (N.T. 2.44) Complainant in this case was morbidly obese. (N.T. 2.45)

^{5/} Respondent does not contest the fact that the slight elevation in blood pressure found during Complainant's pre-employment physical examination was actually the result of using a narrow cuff when her blood pressure was taken. (N.T. 83)

job relatedness. The testimony of Respondent's Medical experts was, as we have noted, highly persuasive. Rather than refuting the contention that morbid obesity may properly be regarded as a handicap or disability, however, we find that this evidence supports that contention. The line which Respondent has attempted to draw between "simple" morbid obesity on the one hand and the long list of disabling conditions which are regularly association with "simple" morbid obesity on the other, doubtless has validity as a matter of precise medical diagnosis. As the long experience of the law in attempting to develop a legal definition of insanity^{6/} illustrates, however, medical diagnoses are not and cannot be co-extensive with legal definitions. The legal definition which we have adopted, supra, is concerned with impairment of function by disorders or conditions which affect various body systems. Nowhere does that definition confine itself, as Respondent would seemingly have it do, to diseases of the enumerated systems. We therefore find, as a matter of law, that morbid obesity is a handicap or disability within the meaning of the Act, because of its high and extremely well documented correlation with illnesses such as hypertention, heart disease and diabetes mellitis. Unquestionably, it is a physiological condition affecting many bodily systems.

^{6/}

See especially Durham vs. United States, 214 F.2d 862 (CA D.C., 1954); Carter vs. United States, 252 F.2d 608 (CA D.C., 1957); Blocker vs. United States, 274 F.2d 572 (CA D.C., 1957); United States vs. Brawner, 471 F.2d 969 (CA D.C., 1972). These cases rather dramatically illuminate the difficulties encountered by the District of Columbia Circuit Court of Appeals in its attempts to forge a new legal definition of insanity.

A positive correlation exists with regard to disabling emotional conditions as well. The expert testimony of Dr. Kelly Brownell established that obesity is regularly associated with psychological disturbances such as depression and self-loathing, which in their turn make normal social interaction and development extremely unlikely.

We need not and do not stop there. The record also clearly establishes that morbid obesity in and of itself, without reference to the conditions so regularly associated with it, substantially interferes with major life activities.

Working is, of course, one of these activities. Respondent's Medical Director indicated under cross-examination his view that severe obesity will in some instances cause (physical) inability to perform components of a job (N.T. 211, 215, 217), including the job of Customer Service Clerk.

Respondent's leading medical expert, Dr. Theodore Van Itallie, further supported this view by testifying to the loss of mobility and agility which are direct consequences of severe obesity. At one extreme, he noted that he himself had experienced a "modest handicap" (N.T. 2.72) attendant upon being only thirty pounds overweight, when attempting to tie his shoes. The further extreme he established with descriptions of a person so obese as to be unable to assume an upright posture after falling. Between these poles, and clearly relevant to the facts of his case, was his testimony establishing the mechanical handicap attendant upon "simple" morbid obesity.

Even more fundamental is the impairment of the unquestionable major life activity of breathing.

In response to direct examination, Dr. Van Itallie stated that:

...it's been well documented that obese individuals, and I'm referring particularly to fairly severely obese individuals, have measurable dysfunction of the pulmonary system and they work at breathing. Reserve capacity of the lungs is reduced ... (N.T. 2.52, emphasis added).

We therefore find that morbid obesity, quite apart from the illnesses associated with it, so substantially interferes with the major life activities of working and breathing as to require its inclusion within the Act's definition of handicap or disability.

Our decision thus far is confined to the determination that morbid obesity is a handicap or disability within the meaning of the Act, for the reasons just stated. We express no opinion as to whether persons who are obese, but not morbidly obese, are also handicapped or disabled.

Finally, we return to the issue of the permissible degree of application of the Commission's 1978 Guidelines. As noted above, we find no unfairness to Respondent in application of the regulatory definition of handicap or disability as a condition substantially interfering with major life activities. Nor does Respondent seem to contest use of this definition. Vigorously contested is applicability of that part of the

definition relating to persons who are "regarded as" having such impairments.

Respondent urges that application to this case, filed in 1977, of a regulation adopted in 1978, is impermissible because of the resultant lack of notice. Implicit in this argument is the assumption that the "regarded as" component of the definition was not in 1977 foreseeably included among the possible meanings of handicap or disability.

Respondent's claimed lack of notice was seriously undermined at public hearing. Mr. Thomas Rowe, Assistant to PECO's Vice President for Affirmative Action, admitted under cross-examination that he had known, prior to the initiation of this case, of 1976 amendments to the (federal) Rehabilitation Act of 1973, which defined a handicapped person as, inter alia, one who is regarded as having an impairment. We thus cannot accept Respondent's contention that it was not foreseeable in May of 1977 that the Commission might follow the lead of the United States Congress in defining handicap or disability.

It is self evident that Respondent did regard Ms. English as too handicapped to hire. While repeated reference was made to the likelihood that she would become medically unable to work at some indefinite time in the future, none of the eminently well-qualified medical experts who testified could predict when, if ever, she could be expected to become disabled. It was also estimated that the foreseeable reduction

in her life expectancy is approximately ten years. As Ms. English was twenty-seven years old when this complaint was filed, Respondent's own statistics indicate that she is likely to have many potentially productive years ahead of her. Whatever the likelihood of future incapacity, Respondent's decision not to hire her was made in a present, at a time when she was unquestionably physically able to work. It is their perception of her at that time which is of concern to us.

We do find that Respondent regarded Ms. English as having a handicap or disability. Our previous determination that morbid obesity is a handicap within the meaning of the Act obviously makes it unnecessary for us to base this decision solely on the secondary finding that Respondent regarded Complainant as handicapped. However, because of our determination that Respondent cannot validly claim surprise at the Commission's propagation of a "regarded as" definition of handicap or disability, we find no unfairness in entry of this secondary finding.

As noted above, our determination that morbid obesity is a handicap or disability within the meaning of the Act must necessarily be followed by an inquiry into the job relatedness of Ms. English's obesity. It is in this context that Respondent's "increased risk" rationale loses its force. While all agreed that Ms. English was more likely than a non-obese person to develop an incapacitating illness, we have already

noted that none of the many physicians who testified could offer any opinion at all as to when or if she might develop such an illness. Faced with similar arguments in a case decided by this Commission last year, we followed a Wisconsin Court's reasoning that indefinite future likelihood of disability cannot justify present discrimination. As the Court stated in Chrysler Outboard Corporation vs. Wisconsin DILHR, 13 EPD 11, 526 (Wis. Cir. 1976):

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

ID at 6884, cited with approval in Masters vs. Duquesne Light, E-10375, decided September 24, 1979; emphasis added.

See also City of Wisconsin Rapids vs. Wisc. DILHR, 15 EPD 7846 (Wisc. Cir. 1977).

We consequently reject Respondent's implicit argument that the risk of future inability to perform justifies, by making job related, a present policy of refusing to hire obese persons. Our inquiry into job-relatedness may therefore end with Respondent's admission that in May of 1977 Ms. English was physically able to perform CSC duties: her handicap was not job related.

One additional argument advanced by Respondent requires brief attention: their contention that obesity should not be

considered a handicap or disability because of its "voluntary", and therefore reversible, nature. This argument must fail, as it did in Masters vs. Duquesne Light, supra.

First, it is clear that Respondent's own weight policy is applied to all obese applicants in the same fashion, whether the origin of the individual problem is a metabolic disorder or simply eating more than one expends. Further, Respondent's general assertion that it attempts to maintain a healthy workforce by eliminating applicants whose "voluntary" behavior may lead to health problems was made questionable by the Medical Director's statement that applicants are not questioned about their consumption of cigarettes, alcohol, or other drugs.

We note also that, as Complainant's Brief urges (at p. 23), the General Assembly in another context has characterized drug and alcohol abuse, also "voluntary" conditions, as disabilities, indicating legislative rejection of the attempted distinction. See 71 P.S. §1690.110.

More fundamentally, the considerations which lead us to determine that morbid obesity is a statutory handicap apply with equal force to all cases, of whatever origin. Mobility and breathing are affected in any case. Ultimately, we are persuaded that the legislature wished to extend the Act's protection to those handicapped persons who are physically willing and able to work, but who are, like Ms. English, nevertheless denied the opportunity to do so. Voluntariness vel non is simply irrelevant.

IV.

REMEDY

Our finding of discriminatory refusal to hire leads necessarily to consideration of appropriate relief.

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in ... any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue ... an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... with or without back pay ... as, in the judgment of the Commission, will effectuate the purposes of this Act ...

Any complainant entitled to back pay should receive an amount which will restore that person to the economic position in which he or she would have been had it not been for the discriminatory act. The method used to calculate the backpay award need be only reasonable and realistic, not mathematically precise. See Pennsylvania Human Relations Commission vs. Transit Casualty Insurance Company, Pa. Cmwlth. 340 A.2d 624; Pettway vs. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir., 1974).

Pennsylvania law provides for the assessment of interest on a backpay award at the rate of 6%, compounded annually. See Goetz vs. Norristown Area School District, Pa. Cmwlth. 328 A.2d 579 (1975).

The record in this case establishes that in April of 1977, the salary for the Customer Service Clerk position was \$115 weekly, and that this salary was increased by roughly 7.5 per cent in August of each intervening year.

Wherefore, having concluding that Respondent discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability, we find that she is entitled to be offered the next available position as CSC with Respondent, and to receive backpay with interest as specified in the Order which follows.

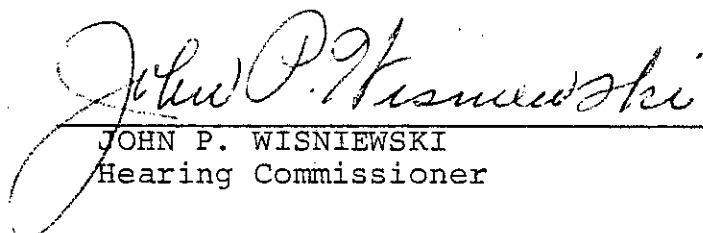
RECOMMENDATION OF HEARING PANEL

AND NOW, this ___ day of _____, 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 hereby adopts the attached as their proposed Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
ALVIN ECHOLS, JR., ESQ.
Chairperson

DORIS M. LEADER
Hearing Commissioner



JOHN P. WISNIEWSKI
Hearing Commissioner

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functions of the position sought.

2. That Respondent, PECO, pay to Complainant, Joyce A. English, the following sums within thirty days of the date of this Order, by check made payable to Joyce A. English and delivered in care of Benjamin G. Lipman, Esq., Pennsylvania Human Relations Commission, 711 State Office Building, Broad and Spring Garden Street, Philadelphia, Pennsylvania 19130:

(a) back wages of \$115 per week plus 6% interest representing the period of April 26, 1977 to July 31, 1977;

(b) back wages of \$124 per week plus 6% interest representing the period of August 1, 1977 to July 31, 1978;

(c) back wages of \$133 per week plus 6% interest representing the period August 1 1978 to July 31, 1979;

(d) back wages of \$143 per week plus 6% interest representing the period August 1, 1979 to the date of this Order.

4. That Respondent, PECO, offer to Complainant the next available Customer Services Clerk position or a position

that is comparable in terms of salary, promotional opportunities and duties.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, Chairperson

ATTEST:

BY: _____
ELIZABETH M. SCOTT, Secretary

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOYCE A. ENGLISH,
Complainant

v.

PHILADELPHIA ELECTRIC
COMPANY,
Respondent

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:
:

DOCKET NO. E-12163

FINDINGS OF FACT

1. The Complainant is Joyce A. English, a black female, college graduate, who on April 26, 1977 was 27 years old. She presently resides in Pensacola, Florida. (N.T. 17, Exh. C-4: p.3)

2. The Respondent is Philadelphia Electric Company (PECO), 2301 Market Street, Philadelphia, Pennsylvania 19101. (N.T. 17)

3. On May 4, 1977, Complainant filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging in relevant part that Respondent had violated Section 5(a) of the Pennsylvania Human Relations Act (Act), Act of October 27, 1955 P.L. 744, as amended, 43 P.S. §951 et seq., in that Respondent had on or about April 26, 1977, "Refused to hire Complainant for the position of Customer Service Representative because of

her handicap/disability, obesity, which does not substantially interfere with her ability to perform essential functions of the job." (N.T. 17)

4. An investigation of the complaint was conducted. A finding of probable cause to credit the allegation was made. A response denying such probable cause was filed by the Respondent and an attempt to conciliate the case was undertaken, all in conformity with the requisites of Section 9 and other relevant provisions of the Act and the Special Rules of Administrative Practice and Procedure before the PHRC. (N.T. 17-18)

5. The Complainant applied for the position of Customer Service Clerk (CSC) with Respondent on April 26, 1977. (N.T. 18)

6. Respondent had approximately thirteen openings for CSCs on the date of Complainant's application. (N.T. 18)

7. On April 26, 1977, Joyce English satisfied all the necessary pre-employment ability, knowledge, skill and other requirements for the CSC position. (Exh. C-3: pp 6-10, Exh. C-4: pp 9-11)

8. The Complainant, as of April 26, 1977, fully satisfied all educational and experiential pre-employment criteria for the position of Customer Services Clerk. (Exh. C-3: pp 3-4, Exh. C-4: pp 3-4)

9. On April 26, 1977, Joyce English was interviewed by a PECO personnel staff person, Alfred Hetrick and was administered a battery of pre-employment tests, all of which she passed. She

was then told by Mr. Hetrick that she was qualified for the position she sought. (N.T. 75-76, Exh. C-4: pp. 8-9)

10. Joyce English was denied a CSC position by PECO for the sole reason that she failed the medical exam due to her obesity. (Exh. C-4: pp. 14-15, N.T. 167, 187, 194, 2.7)

11. PECO's medical department failed Joyce English in her medical examination because of their belief that massive obesity to the extent present in Ms. English, created a high risk that other medical problems would develop which might result in excessive absenteeism and underproductivity. (N.T. 76, 189, 211-212, 2.11)

12. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested that she was medically less well suited than the average person to perform the duties of a CSC. (N.T. 89, 2.15-2.16, 2.25)

13. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested with any reasonable degree of medical certainty that she was likely within the foreseeable future to develop illnesses or diseases which would render her less available for work or less productive. (N.T. 89, 199, 214)

14. On April 26, 1977, PECO considered Joyce English to be qualified for the CSC position and did not believe that her obesity would substantially interfere with her ability to perform the essential functions of the job. (N.T. 76)

15. At the time of the Complainant's application, the CSC position paid a salary of \$115 per week. (N.T. 18)

16. On or about August 1, 1977, the salary for a CSC increased by 7.5% to approximately \$124 per week. (N.T. 2.105)

17. On or about August 1, 1978, the salary for a CSC increased by 7.3% to approximately \$133 per week. (N.T. 2.105)

18. On or about August 1, 1979, the salary for a CSC increased by 7.2% to approximately \$143 per week. (N.T. 2.106)

19. Joyce English was given a thorough medical examination on September 8, 1977 by Anna Marie Chirico, M.D.. Her blood pressure was found to be 128 over 68 in the upper right arm and 120 over 80 in the forearm. There was no evidence of hypertension, diabetes mellitus, or any pulmonary, cardiovascular, or other respiratory or circulatory diseases or problems. (N.T. 80-87)

20. Compared to a person of average weight, a massively obese person has an increased likelihood of developing illnesses and diseases such as coronary heart disease, hypertension, respiratory failure and diabetes mellitus. (N.T. 196, 2.15, 2.44 - 2.56, 2.59, 2.74)

21. Psychological disturbances frequently result from obesity, particularly in the nature of self-disparagement, contempt for one's own body, and feelings of blameworthiness for one's physical condition. These disturbances manifest themselves in ways that severely restrict or limit social interaction. (N.T. 32-38, 41-43, 51, 2.85)

22. Blood pressure readings taken on a severely obese person using a regular sized cuff result in a spuriously elevated reading. A large cuff must be used to obtain an accurate reading. (N.T. 83)

23. PECO employees who gain so much weight that they exceed their acceptable weight (as determined by the weight chart) are not terminated from employment. (N.T. 144, 145)

24. Jobs in the Customer Service Department require a degree of mobility which a severely obese person might not have. (N.T. 215)

25. A lineman who became obese while employed by PECO would be temporarily transferred to a position which did not involve climbing, during the period of physical inability to perform. (N.T. 216, 217)

26. Applicants who have made real efforts to lose weight are likely to be recommended for employment by PECO's Medical Department even if they have not reached their permissible weight, as determined by the weight chart. (N.T. 208)

27. Obese persons are less agile and more accident prone than non-obese persons. (N.T. 2.15, 2.53)

28. Obesity is commonly defined as the state of weighing 20 per cent or more in excess of one's desirable weight, as determined by Metropolitan Life Insurance Company tables. (N.T. 2.39, 2.40)

29. Morbid obesity is defined as weighing twice one's desirable weight or more; Complainant in this case was morbidly obese. (N.T. 2.44), 2.45)

30. Severely obese persons have measurable dysfunction of the pulmonary system and must work at breathing. (N.T. 2.52)

31. Severe obesity frequently interferes with circulation, such that blood doesn't run to the heart as efficiently as it would in an agile, non-obese person. Obese persons are more likely to develop swollen legs and ankles after prolonged standing. (N.T. 2.54 , 2.55)

32. Morbid obesity is positively correlated with premature death. (N.T. 2.57)

33. Obesity is positively correlated with the rate of absenteeism due to illness. (N.T. 2.58)

34. Severe obesity can pose a mechanical handicap by interfering with the physical ability to accomplish tasks. (N.T. 2.65-2.73)

35. Only an educated guess can be made regarding the potential reduction in duration of life for Complainant or any other severely obese person. A ten year reduction in Complainant's life span is plausible. (N.T. 2.81, 2.82)

36. On rare occasions an applicant is hired in spite of a negative recommendation from PECO's Medical Department. This may happen when there is great need to fill a position quickly. (N.T. 2.133)

37. PECO's Assistant to the Vice-President of Affirmative Action was aware, prior to May of 1977, that the federal Rehabilitation Act of 1973 had been amended so as to include, in the definition of handicapped person, a person who is

regarded as having an impairment which substantially limits major life activities. (N.T. 2.175)

38. PECO's Medical Department has no clearly articulated policy of questioning job applicants regarding their use of cigarettes, alcohol, or other drugs. (N.T. 180-184)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") properly has jurisdiction over the parties and subject matter of this action, pursuant to Sections 4, 5 and 9 of the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (43 P.S. §§ 954, 955, 959)

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter. (43 P.S. §959.)

3. Respondent Philadelphia Electric Company is an "employer" within the meaning of Sections 4(b), 5(a), and 5(d) of the Act. (43 P.S. 954(b), 955).

4. Complainant Joyce English is an "individual" within the meaning of Section 5 of the Act. (43 P.S. 955)

5. Morbid obesity is a handicap or disability within the meaning of Sections 4 and 5 of the Act. (43 P.S. 954, 955)

6. Complainant's handicap or disability did not substantially interfere with her ability to perform the duties of Customer Service Clerk.

7. Respondent has unlawfully discriminated against Complainant by refusing to hire her on the basis of her non-job related handicap or disability.

8. A prevailing Complainant in an action alleging discriminatory refusal to hire is entitled to an award of back-pay with interest, and to an order that she be hired for the position from which she was rejected.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Joyce English ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Philadelphia Electric Company ("Respondent") on May 4, 1977, wherein Ms. English alleged that Respondent refused to hire her because of her "handicap/disability, obesity, which does not substantially interfere with her ability to perform the essential functions of the job," in violation of Section 5(a) of the Pennsylvania Human Relations Act ("the Act"), Act of October 27, 1955, P.L. 744, as amended.

An investigation into the allegations of the complaint was made by representatives of the Commission, who determined that probable cause existed to credit the allegations. Thereupon, the Commission endeavored to eliminate the practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and the Commission approved the case for public hearing.

Public Hearing was held on August 8 and 9, 1979, in Philadelphia, Pennsylvania and was conducted at all times before Commissioners Alvin E. Echols, Jr., Esq., Chairperson of the Panel, Doris M. Leader, and John P. Wisniewski, pursuant to Section 9 of the Act. The case on behalf of the

For the reasons which follow, we hold that severe obesity ^{1/} is a handicap or disability and find that Respondent has unlawfully discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability.

^{1/} The term "obesity" will be fully defined in Part III, infra.

III.

LIABILITY

Section 5 of the Act provides in pertinent part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification ... (a) For any employer because of the non-job related handicap or disability of any individual to refuse to hire or employ ... such individual ...

Section 4(p) provides in part:

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment (sought) ...

The Statute is thus essentially silent as to the meaning of "handicap or disability." Nor has any Pennsylvania court defined the terms.

Persons having handicaps or disabilities came under the coverage of the Act in 1974, when the General Assembly amended the Act to extend its protection to them. The legislative history of this amendment sheds little light on the question of whether the General Assembly wished to include obese persons in the category of handicapped or disabled persons. As Respondent's Brief states at page 5, "(s)pecific reference is made to the blind, wheelchair patients, epileptics, and the deaf and dumb." This list is illuminating mainly in its omissions. It is reasonable to conclude, as we do, that the

General Assembly did not intend this list to be other than exemplary. Difficult issues of interpretations such as that now before us were thus necessarily left to case by case resolution.

The issue of how much guidance may properly be drawn from the Commission's regulations, promulgated after this suit was filed, will be discussed subsequently. Our initial approach to this problem is guided by the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.

Section 1903 provides in part that "... words and phrases shall be construed according to ... their common and approved usage ..."

Webster's New Collegiate Dictionary (1976) includes the following definitions:

Disable: to make incapable or ineffective;
esp.: to deprive of physical, moral
or intellectual strength.

Disability: Inability to pursue an occupation
because of physical or mental impair-
ment.

Handicap: A disadvantage that makes achievement
unusually difficult; esp.: a physical
disability.

Thus, the terms, while closely related, are not exactly synonymous. This conclusion is in keeping with the general principle of statutory construction that a statute shall not be presumed to be redundant if it is possible to give effect

to all of its provisions. See 1. Pa. C.S.A. Section 1921 and Klein vs. Republic Steel Corp., 435 F.2d 762, C.A. 3 (1970).

As previously noted, regulations promulgated by the Commission subsequent to initiation of the instant action include a comprehensive definition of the terms "handicap or disability." A handicapped or disabled person is defined at 16 Pa. Code 44.4(4) 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.

A physical or mental impairment is defined as follows:

- 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; musculo-skeletal; special sense organs; respiratory, including digestive; genitourinary; hemic and lymphatic; skin and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

Major life activities are defined as follows:

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

Comparison of these definitions with those reflecting the common and approved usages of "handicap" and "disability"

indicates that definition A, supra, a physical or mental impairment which substantially limits major life activities, most nearly expresses the combined meaning of the terms as generally used. We therefore find that application of that definition to the facts of this case will result in no unfairness to Respondent. As Complainant's Brief states, the terms necessarily had some meaning prior to the adoption of the regulatory definitions. It is therefore against the standard set by this definition that the facts of this case must initially be examined.

Evidence adduced at Public Hearing established that Ms. English's application for employment with Respondent was processed in the same manner as are essentially all such applications. The initial phase of the process was directed toward determining whether she was qualified to perform the job. Respondent acknowledges that Ms. English was so qualified.

Following this initial pre-qualification, Ms. English was referred to Respondent's Medical Department for a physical examination. As previously noted, the Medical Department found her to be unsuitable for any employment with Respondent because of her obesity. Reference was made to Respondent's "weight chart," Exhibit R-1. Testimony established that applicants weighing more than forty pounds over (or under) the weight appearing on the chart for persons of a given sex, age and height were as a rule not hired; it was repeatedly emphasized that the standards are not rigidly applied, and that individual

variations in "frame" size are taken into account. Indeed, Respondent's Medical Director stated that if an applicant "... is 55 pounds overweight but doesn't look it ..." that applicant would be hired. (N.T. 158)

Despite this suggestion of concern with an applicant's appearance, Respondent vigorously argues that its weight policy is designed solely to help it achieve and maintain a healthy workforce. The bulk of its case in chief consisted of expert medical testimony regarding the high positive correlation between obesity and various medical problems which in their turn would lead to excessive absenteeism. Before discussing this expert evidence, it is necessary to comment briefly on the weight chart and the uses made of it.

It is chiefly notable that absolutely no empirical evidence validating either the chart or the "forty-plus" cut-off was produced by Respondents. Direct questions put to the Medical Director and to the examining physician established only that the weight chart and attendant policy had been in use prior to either man's employ with the company.

It is also noteworthy that Respondent's pre-employment medical examination of Ms. English was not individualized in either of two possible ways.

First, Ms. English was not questioned about any medically caused absenteeism problems which she herself might have had in previous jobs. Nor was any independent inquiry directed to any of her previous employers.

Second, the examination and subsequent recommendation were not based on Ms. English's present medically assessed ability to perform the duties of a Customer Service Clerk. It was readily conceded that on the date of her examination, she was physically able to perform those duties.

Rather, the entire thrust of Respondent's policy and of its argument before this Commission is that obesity,^{2/} though not itself a handicap or disability within the meaning of the Act, is nevertheless so regularly associated with disabling conditions which might cause absenteeism and early mortality as to preclude the hiring^{3/} of almost any obese person. We turn therefore to the expert testimony.

^{2/} Obesity was defined by one of Respondent's expert witnesses, Dr. Theodore van Itallie, as the state of weighing 20 percent more above one's average desirable weight, based on the Metropolitan Life Insurance Company standards for desirable weight. (N.T. 2.39, 2.40) This chart was never introduced into evidence.

^{3/} PECO employees who exceed their permissible weight are not terminated, however.

The record overwhelmingly supports the Respondent's assertion that the correlation is high between obesity, particularly morbid obesity, ^{4/} and a long list of potentially disabling medical problems. Included in this list are heart disease, hypertension, diabetes mellitus, gall bladder disease, and cardio-respiratory dysfunction; it was also established that many conditions to which both obese and non-obese persons are subject are exacerbated by obesity: among these were complications of pregnancy and arthritis of the knees. The record additionally supports the assertion that obesity is positively related to increases in absenteeism, and to increased mortality rates.

Respondent concedes that Ms. English at the time of her application had no discernible medical complications. ^{5/} It argues vigorously, however, that she was so likely to develop such problems in the future as to be unfit for present employment. We shall consider this "increased risk" argument in two contexts: first, in its impact on the determination of whether or not obesity is a handicap; second, in the consideration of

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Morbid obesity is the state of weighing twice one's average desirable weight, or more. (N.T. 2.44) Complainant in this case was morbidly obese. (N.T. 2.45)

5/

Respondent does not contest the fact that the slight elevation in blood pressure found during Complainant's pre-employment physical examination was actually the result of using a narrow cuff when her blood pressure was taken. (N.T. 83)

job relatedness. The testimony of Respondent's Medical experts was, as we have noted, highly persuasive. Rather than refuting the contention that morbid obesity may properly be regarded as a handicap or disability, however, we find that this evidence supports that contention. The line which Respondent has attempted to draw between "simple" morbid obesity on the one hand and the long list of disabling conditions which are regularly association with "simple" morbid obesity on the other, doubtless has validity as a matter of precise medical diagnosis. As the long experience of the law in attempting to develop a legal definition of insanity ^{6/} illustrates, however, medical diagnoses are not and cannot be co-extensive with legal definitions. The legal definition which we have adopted, supra, is concerned with impairment of function by disorders or conditions which affect various body systems. Nowhere does that definition confine itself, as Respondent would seemingly have it do, to diseases of the enumerated systems. We therefore find, as a matter of law, that morbid obesity is a handicap or disability within the meaning of the Act, because of its high and extremely well documented correlation with illnesses such as hypertention, heart disease and diabetes mellitis. Unquestionably, it is a physiological condition affecting many bodily systems.

^{6/} See especially Durham vs. United States, 214 F.2d 862 (CA D.C., 1954); Carter vs. United States, 252 F.2d 608 (CA D.C., 1957); Blocker vs. United States, 274 F.2d 572 (CA D.C., 1957); United States vs. Brawner, 471 F.2d 969 (CA D.C., 1972). These cases rather dramatically illuminate the difficulties encountered by the District of Columbia Circuit Court of Appeals in its attempts to forge a new legal definition of insanity.

A positive correlation exists with regard to disabling emotional conditions as well. The expert testimony of Dr. Kelly Brownell established that obesity is regularly associated with psychological disturbances such as depression and self-loathing, which in their turn make normal social interaction and development extremely unlikely.

We need not and do not stop there. The record also clearly establishes that morbid obesity in and of itself, without reference to the conditions so regularly associated with it, substantially interferes with major life activities.

Working is, of course, one of these activities. Respondent's Medical Director indicated under cross-examination his view that severe obesity will in some instances cause (physical) inability to perform components of a job (N.T. 211, 215, 217), including the job of Customer Service Clerk.

Respondent's leading medical expert, Dr. Theodore Van Itallie, further supported this view by testifying to the loss of mobility and agility which are direct consequences of severe obesity. At one extreme, he noted that he himself had experienced a "modest handicap" (N.T. 2.72) attendant upon being only thirty pounds overweight, when attempting to tie his shoes. The further extreme he established with descriptions of a person so obese as to be unable to assume an upright posture after falling. Between these poles, and clearly relevant to the facts of his case, was his testimony establishing the mechanical handicap attendant upon "simple" morbid obesity.

Even more fundamental is the impairment of the unquestionable major life activity of breathing.

In response to direct examination, Dr. Van Itallie stated that:

...it's been well documented that obese individuals, and I'm referring particularly to fairly severely obese individuals, have measurable dysfunction of the pulmonary system and they work at breathing. Reserve capacity of the lungs is reduced ... (N.T. 2.52, emphasis added).

We therefore find that morbid obesity, quite apart from the illnesses associated with it, so substantially interferes with the major life activities of working and breathing as to require its inclusion within the Act's definition of handicap or disability.

Our decision thus far is confined to the determination that morbid obesity is a handicap or disability within the meaning of the Act, for the reasons just stated. We express no opinion as to whether persons who are obese, but not morbidly obese, are also handicapped or disabled.

Finally, we return to the issue of the permissible degree of application of the Commission's 1978 Guidelines. As noted above, we find no unfairness to Respondent in application of the regulatory definition of handicap or disability as a condition substantially interfering with major life activities. Nor does Respondent seem to contest use of this definition. Vigorously contested is applicability of that part of the

definition relating to persons who are "regarded as" having such impairments.

Respondent urges that application to this case, filed in 1977, of a regulation adopted in 1978, is impermissible because of the resultant lack of notice. Implicit in this argument is the assumption that the "regarded as" component of the definition was not in 1977 foreseeably included among the possible meanings of handicap or disability.

Respondent's claimed lack of notice was seriously undermined at public hearing. Mr. Thomas Rowe, Assistant to PECO's Vice President for Affirmative Action, admitted under cross-examination that he had known, prior to the initiation of this case, of 1976 amendments to the (federal) Rehabilitation Act of 1973, which defined a handicapped person as, inter alia, one who is regarded as having an impairment. We thus cannot accept Respondent's contention that it was not foreseeable in May of 1977 that the Commission might follow the lead of the United States Congress in defining handicap or disability.

It is self evident that Respondent did regard Ms. English as too handicapped to hire. While repeated reference was made to the likelihood that she would become medically unable to work at some indefinite time in the future, none of the eminently well-qualified medical experts who testified could predict when, if ever, she could be expected to become disabled. It was also estimated that the foreseeable reduction

in her life expectancy is approximately ten years. As Ms. English was twenty-seven years old when this complaint was filed, Respondent's own statistics indicate that she is likely to have many potentially productive years ahead of her. Whatever the likelihood of future incapacity, Respondent's decision not to hire her was made in a present, at a time when she was unquestionably physically able to work. It is their perception of her at that time which is of concern to us.

We do find that Respondent regarded Ms. English as having a handicap or disability. Our previous determination that morbid obesity is a handicap within the meaning of the Act obviously makes it unnecessary for us to base this decision solely on the secondary finding that Respondent regarded Complainant as handicapped. However, because of our determination that Respondent cannot validly claim surprise at the Commission's propagation of a "regarded as" definition of handicap or disability, we find no unfairness in entry of this secondary finding.

As noted above, our determination that morbid obesity is a handicap or disability within the meaning of the Act must necessarily be followed by an inquiry into the job relatedness of Ms. English's obesity. It is in this context that Respondent's "increased risk" rationale loses its force. While all agreed that Ms. English was more likely than a non-obese person to develop an incapacitating illness, we have already

noted that none of the many physicians who testified could offer any opinion at all as to when or if she might develop such an illness. Faced with similar arguments in a case decided by this Commission last year, we followed a Wisconsin Court's reasoning that indefinite future likelihood of disability cannot justify present discrimination. As the Court stated in Chrysler Outboard Corporation vs. Wisconsin DILHR, 13 EPD 11, 526 (Wis. Cir. 1976):

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

ID at 6884, cited with approval in Masters vs. Dugesne Light, E-10375, decided September 24, 1979; emphasis added.

See also City of Wisconsin Rapids vs. Wisc. DILHR, 15 EPD 7846 (Wisc. Cir. 1977).

We consequently reject Respondent's implicit argument that the risk of future inability to perform justifies, by making job related, a present policy of refusing to hire obese persons. Our inquiry into job-relatedness may therefore end with Respondent's admission that in May of 1977 Ms. English was physically able to perform CSC duties: her handicap was not job related.

One additional argument advanced by Respondent requires brief attention: their contention that obesity should not be

considered a handicap or disability because of its "voluntary", and therefore reversible, nature. This argument must fail, as it did in Masters vs. Duquesne Light, supra.

First, it is clear that Respondent's own weight policy is applied to all obese applicants in the same fashion, whether the origin of the individual problem is a metabolic disorder or simply eating more than one expends. Further, Respondent's general assertion that it attempts to maintain a healthy workforce by eliminating applicants whose "voluntary" behavior may lead to health problems was made questionable by the Medical Director's statement that applicants are not questioned about their consumption of cigarettes, alcohol, or other drugs.

We note also that, as Complainant's Brief urges (at p. 23), the General Assembly in another context has characterized drug and alcohol abuse, also "voluntary" conditions, as disabilities, indicating legislative rejection of the attempted distinction. See 71 P.S. §1690.110.

More fundamentally, the considerations which lead us to determine that morbid obesity is a statutory handicap apply with equal force to all cases, of whatever origin. Mobility and breathing are affected in any case. Ultimately, we are persuaded that the legislature wished to extend the Act's protection to those handicapped persons who are physically willing and able to work, but who are, like Ms. English, nevertheless denied the opportunity to do so. Voluntariness vel non is simply irrelevant.

IV.

REMEDY

Our finding of discriminatory refusal to hire leads necessarily to consideration of appropriate relief.

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in ... any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue ... an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... with or without back pay ... as, in the judgment of the Commission, will effectuate the purposes of this Act ...

Any complainant entitled to back pay should receive an amount which will restore that person to the economic position in which he or she would have been had it not been for the discriminatory act. The method used to calculate the backpay award need be only reasonable and realistic, not mathematically precise. See Pennsylvania Human Relations Commission vs. Transit Casualty Insurance Company, Pa. Cmwlth. 340 A.2d 624; Pettway vs. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir., 1974).

Pennsylvania law provides for the assessment of interest on a backpay award at the rate of 6%, compounded annually. See Goetz vs. Norristown Area School District, Pa. Cmwlth. 328 A.2d 579 (1975).

The record in this case establishes that in April of 1977, the salary for the Customer Service Clerk position was \$115 weekly, and that this salary was increased by roughly 7.5 per cent in August of each intervening year.

Wherefore, having concluding that Respondent discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability, we find that she is entitled to be offered the next available position as CSC with Respondent, and to receive backpay with interest as specified in the Order which follows.

RECOMMENDATION OF HEARING PANEL

AND NOW, this ___ day of _____, 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 hereby adopts the attached as their proposed Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

ALVIN ECHOLS, JR., ESQ.
Chairperson

DORIS M. LEADER
Hearing Commissioner



JOHN P. WISNIEWSKI
Hearing Commissioner

PA. H. R. C.
HEADQUARTERS

functions of the position sought.

2. That Respondent, PECO, pay to Complainant, Joyce A. English, the following sums within thirty days of the date of this Order, by check made payable to Joyce A. English and delivered in care of Benjamin G. Lipman, Esq., Pennsylvania Human Relations Commission, 711 State Office Building, Broad and Spring Garden Street, Philadelphia, Pennsylvania 19130:

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(c) back wages of \$133 per week plus 6% interest representing the period August 1 1978 to July 31, 1979;

(d) back wages of \$143 per week plus 6% interest representing the period August 1, 1979 to the date of this Order.

4. That Respondent, PECO, offer to Complainant the next available Customer Services Clerk position or a position

that is comparable in terms of salary, promotional opportunities and duties.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, Chairperson

ATTEST:

BY: _____
ELIZABETH M. SCOTT, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOYCE A. ENGLISH, :
 Complainant :
 v. : DOCKET NO. E-12163
 PHILADELPHIA ELECTRIC :
 COMPANY, :
 Respondent :

FINDINGS OF FACT

1. The Complainant is Joyce A. English, a black female, college graduate, who on April 26, 1977 was 27 years old. She presently resides in Pensacola, Florida. (N.T. 17, Exh. C-4: p.3)

2. The Respondent is Philadelphia Electric Company (PECO), 2301 Market Street, Philadelphia, Pennsylvania 19101. (N.T. 17)

3. On May 4, 1977, Complainant filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging in relevant part that Respondent had violated Section 5(a) of the Pennsylvania Human Relations Act (Act), Act of October 27, 1955 P.L. 744, as amended, 43 P.S. §951 et seq., in that Respondent had on or about April 26, 1977, "Refused to hire Complainant for the position of Customer Service Representative because of

her handicap/disability, obesity, which does not substantially interfere with her ability to perform essential functions of the job." (N.T. 17)

4. An investigation of the complaint was conducted. A finding of probable cause to credit the allegation was made. A response denying such probable cause was filed by the Respondent and an attempt to conciliate the case was undertaken, all in conformity with the requisites of Section 9 and other relevant provisions of the Act and the Special Rules of Administrative Practice and Procedure before the PHRC. (N.T. 17-18)

5. The Complainant applied for the position of Customer Service Clerk (CSC) with Respondent on April 26, 1977. (N.T. 18)

6. Respondent had approximately thirteen openings for CSCs on the date of Complainant's application. (N.T. 18)

7. On April 26, 1977, Joyce English satisfied all the necessary pre-employment ability, knowledge, skill and other requirements for the CSC position. (Exh. C-3: pp 6-10, Exh. C-4: pp 9-11)

8. The Complainant, as of April 26, 1977, fully satisfied all educational and experiential pre-employment criteria for the position of Customer Services Clerk. (Exh. C-3: pp 3-4, Exh. C-4: pp 3-4)

9. On April 26, 1977, Joyce English was interviewed by a PECO personnel staff person, Alfred Hetrick and was administered a battery of pre-employment tests, all of which she passed. She

was then told by Mr. Hetrick that she was qualified for the position she sought. (N.T. 75-76, Exh. C-4: pp. 8-9)

10. Joyce English was denied a CSC position by PECO for the sole reason that she failed the medical exam due to her obesity. (Exh. C-4: pp. 14-15, N.T. 167, 187, 194, 2.7)

11. PECO's medical department failed Joyce English in her medical examination because of their belief that massive obesity to the extent present in Ms. English, created a high risk that other medical problems would develop which might result in excessive absenteeism and underproductivity. (N.T. 76, 189, 211-212, 2.11)

12. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested that she was medically less well suited than the average person to perform the duties of a CSC. (N.T. 89, 2.15-2.16, 2.25)

13. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested with any reasonable degree of medical certainty that she was likely within the foreseeable future to develop illnesses or diseases which would render her less available for work or less productive. (N.T. 89, 199, 214)

14. On April 26, 1977, PECO considered Joyce English to be qualified for the CSC position and did not believe that her obesity would substantially interfere with her ability to perform the essential functions of the job. (N.T. 76)

15. At the time of the Complainant's application, the CSC position paid a salary of \$115 per week. (N.T. 18)

16. On or about August 1, 1977, the salary for a CSC increased by 7.5% to approximately \$124 per week. (N.T. 2.105)

17. On or about August 1, 1978, the salary for a CSC increased by 7.3% to approximately \$133 per week. (N.T. 2.105)

18. On or about August 1, 1979, the salary for a CSC increased by 7.2% to approximately \$143 per week. (N.T. 2.106)

19. Joyce English was given a thorough medical examination on September 8, 1977 by Anna Marie Chirico, M.D.. Her blood pressure was found to be 128 over 68 in the upper right arm and 120 over 80 in the forearm. There was no evidence of hypertension, diabetes mellitus, or any pulmonary, cardiovascular, or other respiratory or circulatory diseases or problems.

(N.T. 80-87)

20. Compared to a person of average weight, a massively obese person has an increased likelihood of developing illnesses and diseases such as coronary heart disease, hypertension, respiratory failure and diabetes mellitus. (N.T. 196, 2.15, 2.44 - 2.56, 2.59, 2.74)

21. Psychological disturbances frequently result from obesity, particularly in the nature of self-disparagement, contempt for one's own body, and feelings of blameworthiness for one's physical condition. These disturbances manifest themselves in ways that severely restrict or limit social interaction.

(N.T. 32-38, 41-43, 51, 2.85)

22. Blood pressure readings taken on a severely obese person using a regular sized cuff result in a spuriously elevated reading. A large cuff must be used to obtain an accurate reading. (N.T. 83)

23. PECO employees who gain so much weight that they exceed their acceptable weight (as determined by the weight chart) are not terminated from employment. (N.T. 144, 145)

24. Jobs in the Customer Service Department require a degree of mobility which a severely obese person might not have. (N.T. 215)

25. A lineman who became obese while employed by PECO would be temporarily transferred to a position which did not involve climbing, during the period of physical inability to perform. (N.T. 216, 217)

26. Applicants who have made real efforts to lose weight are likely to be recommended for employment by PECO's Medical Department even if they have not reached their permissible weight, as determined by the weight chart. (N.T. 208)

27. Obese persons are less agile and more accident prone than non-obese persons. (N.T. 2.15, 2.53)

28. Obesity is commonly defined as the state of weighing 20 per cent or more in excess of one's desirable weight, as determined by Metropolitan Life Insurance Company tables. (N.T. 2.39, 2.40)

29. Morbid obesity is defined as weighing twice one's desirable weight or more; Complainant in this case was morbidly obese. (N.T. 2.44, 2.45)

30. Severely obese persons have measurable dysfunction of the pulmonary system and must work at breathing. (N.T. 2.53)

31. Severe obesity frequently interferes with circulation such that blood doesn't run to the heart as efficiently as it would in an agile, non-obese person. Obese persons are more likely to develop swollen legs and ankles after prolonged standing. (N.T. 2.54 , 2.55)

32. Morbid obesity is positively correlated with premature death. (N.T. 2.57)

33. Obesity is positively correlated with the rate of absenteeism due to illness. (N.T. 2.58)

34. Severe obesity can pose a mechanical handicap by interfering with the physical ability to accomplish tasks. (N.T. 2.65-2.73)

35. Only an educated guess can be made regarding the potential reduction in duration of life for Complainant or any other severely obese person. A ten year reduction in Complainant's life span is plausible. (N.T. 2.81, 2.82)

36. On rare occasions an applicant is hired in spite of a negative recommendation from PECO's Medical Department. This may happen when there is great need to fill a position quickly. (N.T. 2.133)

37. PECO's Assistant to the Vice-President of Affirmative Action was aware, prior to May of 1977, that the federal Rehabilitation Act of 1973 had been amended so as to include, in the definition of handicapped person, a person who is

regarded as having an impairment which substantially limits major life activities. (N.T. 2.175)

38. PECO's Medical Department has no clearly articulated policy of questioning job applicants regarding their use of cigarettes, alcohol, or other drugs. (N.T. 180-184)

OPINION

I.

HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Joyce English ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Philadelphia Electric Company ("Respondent") on May 4, 1977, wherein Ms. English alleged that Respondent refused to hire her because of her "handicap/disability, obesity, which does not substantially interfere with her ability to perform the essential functions of the job," in violation of Section 5(a) of the Pennsylvania Human Relations Act ("the Act"), Act of October 27, 1955, P.L. 744, as amended.

An investigation into the allegations of the complaint was made by representatives of the Commission, who determined that probable cause existed to credit the allegations. Thereupon, the Commission endeavored to eliminate the practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and the Commission approved the case for public hearing.

Public Hearing was held on August 8 and 9, 1979, in Philadelphia, Pennsylvania and was conducted at all times before Commissioners Alvin E. Echols, Jr., Esq., Chairperson of the Panel, Doris M. Leader, and John P. Wisniewski, pursuant to Section 9 of the Act. The case on behalf of the

complainant was presented by Benjamin G. Lipman, Assistant General Counsel to the Commission. The respondent was represented by John F. Smith III, Esq., and Leonard J. Cook, Esq., of Dilworth, Paxson, Kalish, Levy, and Kauffman. Edith E. Cox, Assistant General Counsel to the Commission, served as Legal Advisor to the Hearing Panel.

By stipulation of the parties and by leave of the Hearing Panel, the deposition of the Complainant, Joyce English, was taken on December 13, 1978, and made part of the record with the same effect as if Ms. English had appeared personally before the Hearing Panel.

II. FACTUAL BACKGROUND, ISSUE FORMULATION

The essential facts underlying this complaint are undisputed. On April 26, 1977, Ms. English applied for the position of Customer Service Clerk ("CSC") with Respondent. After passing a battery of pre-employment tests and meeting all educational and experiential pre-requisites, she was routinely referred to Respondent's Medical Department for a physical examination.

The examining physician concluded that Complainant was unsuited for employment. While he noted that her blood pressure was slightly elevated and that her mother had died prematurely, it is not seriously contested that the sole reason for his recommendation was Complainant's massive obesity: at the time of the examination she was 5'8" tall and weighed 341 pounds. No finding of inability to perform the duties of the CSC position was made. On the basis of this recommendation, Respondent declined to hire Ms. English. This suit followed.

This case therefore presents a novel issue of statutory construction, namely, whether obesity is a handicap or disability within the meaning of Section 4(p) and 5(a) of the Act. Should obesity be a handicap or disability, a secondary issue is presented as to its job relatedness in this case.

For the reasons which follow, we hold that severe obesity ^{1/} is a handicap or disability and find that Respondent has unlawfully discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability.

^{1/} The term "obesity" will be fully defined in Part III, infra

III.

LIABILITY

Section 5 of the Act provides in pertinent part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification ... (a) For any employer because of the non-job related handicap or disability of any individual to refuse to hire or employ ... such individual ...

Section 4(p) provides in part:

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment (sought) ...

The statute is thus essentially silent as to the meaning of "handicap or disability." Nor has any Pennsylvania court defined the terms.

Persons having handicaps or disabilities came under the coverage of the Act in 1974, when the General Assembly amended the Act to extend its protection to them. The legislative history of this amendment sheds little light on the question of whether the General Assembly wished to include obese persons in the category of handicapped or disabled persons. As Respondent's Brief states at page 5, "(s)pecific reference is made to the blind, wheelchair patients, epileptics, and the deaf and dumb." This list is illuminating mainly in its omissions.. It is reasonable to conclude, as we do, that the

General Assembly did not intend this list to be other than exemplary. Difficult issues of interpretations such as that now before us were thus necessarily left to case by case resolution.

The issue of how much guidance may properly be drawn from the Commission's regulations, promulgated after this suit was filed, will be discussed subsequently. Our initial approach to this problem is guided by the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.

Section 1903 provides in part that "... words and phrases shall be construed according to ... their common and approved usage ..."

Webster's New Collegiate Dictionary (1976) includes the following definitions:

Disable: To make incapable or ineffective;
esp.: to deprive of physical, moral
or intellectual strength.

Disability: Inability to pursue an occupation
because of physical or mental impair-
ment.

Handicap: A disadvantage that makes achievement
unusually difficult; esp.: a physical
disability.

Thus, the terms, while closely related, are not exactly synonymous. This conclusion is in keeping with the general principle of statutory construction that a statute shall not be presumed to be redundant if it is possible to give effect

to all of its provisions. See 1. Pa. C.S.A. Section 1921 and Klein vs. Republic Steel Corp., 435 F.2d 762, C.A. 3 (1970).

As previously noted, regulations promulgated by the Commission subsequent to initiation of the instant action include a comprehensive definition of the terms "handicap or disability." A handicapped or disabled person is defined at 16 Pa. Code 44.4(4) 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.

A physical or mental impairment is defined as follows:

- 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; musculo-skeletal; special sense organs; respiratory, including digestive; genitourinary; hemic and lymphatic; skin and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

Major life activities are defined as follows:

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

Comparison of these definitions with those reflecting the common and approved usages of "handicap" and "disability"

indicates that definition A, supra, a physical or mental impairment which substantially limits major life activities, most nearly expresses the combined meaning of the terms as generally used. We therefore find that application of that definition to the facts of this case will result in no unfairness to Respondent. As Complainant's Brief states, the terms necessarily had some meaning prior to the adoption of the regulatory definitions. It is therefore against the standard set by this definition that the facts of this case must initially be examined.

Evidence adduced at Public Hearing established that Ms. English's application for employment with Respondent was processed in the same manner as are essentially all such applications. The initial phase of the process was directed toward determining whether she was qualified to perform the job. Respondent acknowledges that Ms. English was so qualified.

Following this initial pre-qualification, Ms. English was referred to Respondent's Medical Department for a physical examination. As previously noted, the Medical Department found her to be unsuitable for any employment with Respondent because of her obesity. Reference was made to Respondent's "weight chart," Exhibit R-1. Testimony established that applicants weighing more than forty pounds over (or under) the weight appearing on the chart for persons of a given sex, age and height were as a rule not hired; it was repeatedly emphasized that the standards are not rigidly applied, and that individual

variations in "frame" size are taken into account. Indeed, Respondent's Medical Director stated that if an applicant "... is 55 pounds overweight but doesn't look it ..." that applicant would be hired. (N.T. 158)

Despite this suggestion of concern with an applicant's appearance, Respondent vigorously argues that its weight policy is designed solely to help it achieve and maintain a healthy workforce. The bulk of its case in chief consisted of expert medical testimony regarding the high positive correlation between obesity and various medical problems which in their turn would lead to excessive absenteeism. Before discussing this expert evidence, it is necessary to comment briefly on the weight chart and the uses made of it.

It is chiefly notable that absolutely no empirical evidence validating either the chart or the "forty-plus" cut-off was produced by Respondents. Direct questions put to the Medical Director and to the examining physician established only that the weight chart and attendant policy had been in use prior to either man's employ with the company.

It is also noteworthy that Respondent's pre-employment medical examination of Ms. English was not individualized in either of two possible ways.

First, Ms. English was not questioned about any medically caused absenteeism problems which she herself might have had in previous jobs. Nor was any independent inquiry directed to any of her previous employers.

Second, the examination and subsequent recommendation were not based on Ms. English's present medically assessed ability to perform the duties of a Customer Service Clerk. It was readily conceded that on the date of her examination, she was physically able to perform those duties.

Rather, the entire thrust of Respondent's policy and of its argument before this Commission is that obesity,^{2/} though not itself a handicap or disability within the meaning of the Act, is nevertheless so regularly associated with disabling conditions which might cause absenteeism and early mortality as to preclude the hiring^{3/} of almost any obese person. We turn therefore to the expert testimony.

^{2/} Obesity was defined by one of Respondent's expert witnesses, Dr. Theodore van Itallie, as the state of weighing 20 percent or more above one's average desirable weight, based on the Metropolitan Life Insurance Company standards for desirable weight. (N.T. 2.39, 2.40) This chart was never introduced into evidence.

^{3/} PECO employees who exceed their permissible weight are not terminated, however.

The record overwhelmingly supports the Respondent's assertion that the correlation is high between obesity, particularly morbid obesity, ^{4/} and a long list of potentially disabling medical problems. Included in this list are heart disease, hypertension, diabetes mellitus, gall bladder disease and cardio-respiratory dysfunction; it was also established that many conditions to which both obese and non-obese persons are subject are exacerbated by obesity: among these were complications of pregnancy and arthritis of the knees. The record additionally supports the assertion that obesity is positively related to increases in absenteeism, and to increased mortality rates.

Respondent concedes that Ms. English at the time of her application had no discernible medical complications. ^{5/} It argues vigorously, however, that she was so likely to develop such problems in the future as to be unfit for present employment. We shall consider this "increased risk" argument in two contexts: first, in its impact on the determination of whether or not obesity is a handicap; second, in the consideration of

^{4/} Morbid obesity is the state of weighing twice one's average desirable weight, or more. (N.T. 2.44) Complainant in this case was morbidly obese. (N.T. 2.45)

^{5/} Respondent does not contest the fact that the slight elevation in blood pressure found during Complainant's pre-employment physical examination was actually the result of using a narrow cuff when her blood pressure was taken. (N.T. 83)

job relatedness. The testimony of Respondent's Medical experts was, as we have noted, highly persuasive. Rather than refuting the contention that morbid obesity may properly be regarded as a handicap or disability, however, we find that this evidence supports that contention. The line which Respondent has attempted to draw between "simple" morbid obesity on the one hand and the long list of disabling conditions which are regularly association with "simple" morbid obesity on the other, doubtless has validity as a matter of precise medical diagnosis. As the long experience of the law in attempting to develop a legal definition of insanity ^{6/} illustrates, however, medical diagnoses are not and cannot be co-extensive with legal definitions. The legal definition which we have adopted, supra, is concerned with impairment of function by disorders or conditions which affect various body systems. Nowhere does that definition confine itself, as Respondent would seemingly have it do, to diseases of the enumerated systems. We therefore find, as a matter of law, that morbid obesity is a handicap or disability within the meaning of the Act, because of its high and extremely well documented correlation with illnesses such as hypertension heart disease and diabetes mellitus. Unquestionably, it is a physiological condition affecting many bodily systems.

^{6/}

See especially Durham vs. United States, 214 F.2d 862 (CA D.C., 1954); Carter vs. United States, 252 F.2d 608 (CA D.C., 1957); Blocker vs. United States, 274 F.2d 572 (CA D.C., 1957); United States vs. Brawner, 471 F.2d 969 (CA D.C., 1972). These cases rather dramatically illuminate the difficulties encountered by the District of Columbia Circuit Court of Appeals in its attempts to forge a new

A positive correlation exists with regard to disabling emotional conditions as well. The expert testimony of Dr. Kelly Brownell established that obesity is regularly associated with psychological disturbances such as depression and self-loathing, which in their turn make normal social interaction and development extremely unlikely.

We need not and do not stop there. The record also clearly establishes that morbid obesity in and of itself, without reference to the conditions so regularly associated with it, substantially interferes with major life activities.

Working is, of course, one of these activities. Respondent's Medical Director indicated under cross-examination his view that severe obesity will in some instances cause (physical) inability to perform components of a job (N.T. 211, 215, 217), including the job of Customer Service Clerk.

Respondent's leading medical expert, Dr. Theodore Van Itallie, further supported this view by testifying to the loss of mobility and agility which are direct consequences of severe obesity. At one extreme, he noted that he himself had experienced a "modest handicap" (N.T. 2.72) attendant upon being only thirty pounds overweight, when attempting to tie his shoes. The furthest extreme he established with descriptions of a person so obese as to be unable to assume an upright posture after falling. Between these poles, and clearly relevant to the facts of his case, was his testimony establishing the mechanical handicap attendant upon "simple" morbid obesity.

Even more fundamental is the impairment of the unquestionably major life activity of breathing.

In response to direct examination, Dr. Van Itallie stated that:

...it's been well documented that obese individuals, and I'm referring particularly to fairly severely obese individuals, have measurable dysfunction of the pulmonary system and they work at breathing. Reserve capacity of the lungs is reduced ... (N.T. 2.52, emphasis added).

We therefore find that morbid obesity, quite apart from the illnesses associated with it, so substantially interferes with the major life activities of working and breathing as to require its inclusion within the Act's definition of handicap or disability.

Our decision thus far is confined to the determination that morbid obesity is a handicap or disability within the meaning of the Act, for the reasons just stated. We express no opinion as to whether persons who are obese, but not morbidly obese, are also handicapped or disabled.

Finally, we return to the issue of the permissible degree of application of the Commission's 1978 Guidelines. As noted above, we find no unfairness to Respondent in application of the regulatory definition of handicap or disability as a condition substantially interfering with major life activities. Nor does Respondent seem to contest use of this definition. Vigorously contested is applicability of that part of the

definition relating to persons who are "regarded as" having such impairments.

Respondent urges that application to this case, filed in 1977, of a regulation adopted in 1978, is impermissible because of the resultant lack of notice. Implicit in this argument is the assumption that the "regarded as" component of the definition was not in 1977 foreseeably included among the possible meanings of handicap or disability.

Respondent's claimed lack of notice was seriously undermined at public hearing. Mr. Thomas Rowe, Assistant to PECO's Vice President for Affirmative Action, admitted under cross-examination that he had known, prior to the initiation of this case, of 1976 amendments to the (federal) Rehabilitation Act of 1973, which defined a handicapped person as, inter alia, one who is regarded as having an impairment. We thus cannot accept Respondent's contention that it was not foreseeable in May of 1977 that the Commission might follow the lead of the United States Congress in defining handicap or disability.

It is self evident that Respondent did regard Ms. English as too handicapped to hire. While repeated reference was made to the likelihood that she would become medically unable to work at some indefinite time in the future, none of the eminently well-qualified medical experts who testified could predict when, if ever, she could be expected to become disabled. It was also estimated that the foreseeable reductio

in her life expectancy is approximately ten years. As Ms. English was twenty-seven years old when this complaint was filed, Respondent's own statistics indicate that she is likely to have many potentially productive years ahead of her. Whatever the likelihood of future incapacity, Respondent's decision not to hire her was made in a present, at a time when she was unquestionably physically able to work. It is their perception of her at that time which is of concern to us.

We do find that Respondent regarded Ms. English as having a handicap or disability. Our previous determination that morbid obesity is a handicap within the meaning of the Act obviously makes it unnecessary for us to base this decision solely on the secondary finding that Respondent regarded Complainant as handicapped. However, because of our determination that Respondent cannot validly claim surprise at the Commission's propagation of a "regarded as" definition of handicap or disability, we find no unfairness in entry of this secondary finding.

As noted above, our determination that morbid obesity is a handicap or disability within the meaning of the Act must necessarily be followed by an inquiry into the job relatedness of Ms. English's obesity. It is in this context that Respondent's "increased risk" rationale loses its force. While all agreed that Ms. English was more likely than a non-obese person to develop an incapacitating illness, we have already

noted that none of the many physicians who testified could offer any opinion at all as to when or if she might develop such an illness. Faced with similar arguments in a case decided by this Commission last year, we followed a Wisconsin Court's reasoning that indefinite future likelihood of disability cannot justify present discrimination. As the Court stated in Chrysler Outboard Corporation vs. Wisconsin DILHR, 13 EPD 11, 526 (Wis. Cir. 1976):

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

ID at 6884, cited with approval in Masters vs. Ducquesne Light, E-10375, decided September 24, 1979; emphasis added.

See also City of Wisconsin Rapids vs. Wisc. DILHR, 15 EPD 7846 (Wisc. Cir. 1977).

We consequently reject Respondent's implicit argument that the risk of future inability to perform justifies, by making job related, a present policy of refusing to hire obese persons. Our inquiry into job-relatedness may therefore end with Respondent's admission that in May of 1977 Ms. English was physically able to perform CSC duties: her handicap was no job related.

One additional argument advanced by Respondent requires brief attention: their contention that obesity should not be

considered a handicap or disability because of its "voluntary", and therefore reversible, nature. This argument must fail, as it did in Masters vs. Ducuesne Light, supra.

First, it is clear that Respondent's own weight policy is applied to all obese applicants in the same fashion, whether the origin of the individual problem is a metabolic disorder or simply eating more than one expends. Further, Respondent's general assertion that it attempts to maintain a healthy workforce by eliminating applicants whose "voluntary" behavior may lead to health problems was made questionable by the Medical Director's statement that applicants are not questioned about their consumption of cigarettes, alcohol, or other drugs.

We note also that, as Complainant's Brief urges (at p. 23), the General Assembly in another context has characterized drug and alcohol abuse, also "voluntary" conditions, as disabilities, indicating legislative rejection of the attempted distinction. See 71 P.S. §1690.110.

More fundamentally, the considerations which lead us to determine that morbid obesity is a statutory handicap apply with equal force to all cases, of whatever origin. Mobility and breathing are affected in any case. Ultimately, we are persuaded that the legislature wished to extend the Act's protection to those handicapped persons who are physically willing and able to work, but who are, like Ms. English, nevertheless denied the opportunity to do so. Voluntariness vel non is simply irrelevant.

IV.

REMEDY

Our finding of discriminatory refusal to hire leads necessarily to consideration of appropriate relief.

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in ... any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue ... an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... with or without back pay ... as, in the judgment of the Commission, will effectuate the purposes of this Act ...

Any complainant entitled to back pay should receive an amount which will restore that person to the economic position in which he or she would have been had it not been for the discriminatory act. The method used to calculate the backpay award need be only reasonable and realistic, not mathematically precise. See Pennsylvania Human Relations Commission vs. Transit Casualty Insurance Company, Pa. Cmwlth. 340 A.2d 624; Pettway vs. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir., 1974).

Pennsylvania law provides for the assessment of interest on a backpay award at the rate of 6%, compounded annually. See Goetz vs. Norristown Area School District, Pa. Cmwlth. 328 A.2d 579 (1975).

The record in this case establishes that in April of 1977 the salary for the Customer Service Clerk position was \$115 weekly, and that this salary was increased by roughly 7.5 per cent in August of each intervening year.

Wherefore, having concluding that Respondent discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability, we find that she is entitled to be offered the next available position as CSC with Respondent, and to receive backpay with interest as specified in the Order which follows.

RECOMMENDATION OF HEARING PANEL

AND NOW, this 24th day of March, 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 hereby adopts the attached as their proposed Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____

ALVIN ECHOLS, JR., ESQ.
Chairperson

Doris M. Leader

DORIS M. LEADER
Hearing Commissioner

John P. Wisniewski

JOHN P. WISNIEWSKI
Hearing Commissioner

PA. COMMISSIONERS
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6. Respondent had approximately thirteen openings for CSCs on the date of Complainant's application. (N.T. 18)

7. On April 26, 1977, Joyce English satisfied all the necessary pre-employment ability, knowledge, skill and other requirements for the CSC position. (Exh. C-3: pp 6-10, Exh. C-4: pp 9-11)

8. The Complainant, as of April 26, 1977, fully satisfied all educational and experiential pre-employment criteria for the position of Customer Services Clerk. (Exh. C-3: pp 3-4, Exh. C-4: pp 3-4)

9. On April 26, 1977, Joyce English was interviewed by a PECO personnel staff person, Alfred Hetrick and was administered a battery of pre-employment tests, all of which she passed. She

was then told by Mr. Hetrick that she was qualified for the position she sought. (N.T. 75-76, Exh. C-4: pp. 8-9)

10. Joyce English was denied a CSC position by PECO for the sole reason that she failed the medical exam due to her obesity. (Exh. C-4: pp. 14-15, N.T. 167, 187, 194, 2.7)

11. PECO's medical department failed Joyce English in her medical examination because of their belief that massive obesity to the extent present in Ms. English, created a high risk that other medical problems would develop which might result in excessive absenteeism and underproductivity. (N.T. 76, 189, 211-212, 2.11)

12. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested that she was medically less well suited than the average person to perform the duties of a CSC. (N.T. 89, 2.15-2.16, 2.25)

13. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested with any reasonable degree of medical certainty that she was likely within the foreseeable future to develop illnesses or diseases which would render her less available for work or less productive. (N.T. 89, 199, 214)

14. On April 26, 1977, PECO considered Joyce English to be qualified for the CSC position and did not believe that her obesity would substantially interfere with her ability to perform the essential functions of the job. (N.T. 76)

15. At the time of the Complainant's application, the CSC position paid a salary of \$115 per week. (N.T. 18)

16. On or about August 1, 1977, the salary for a CSC increased by 7.5% to approximately \$124 per week. (N.T. 2.105)

17. On or about August 1, 1978, the salary for a CSC increased by 7.3% to approximately \$133 per week. (N.T. 2.105)

18. On or about August 1, 1979, the salary for a CSC increased by 7.2% to approximately \$143 per week. (N.T. 2.106)

19. Joyce English was given a thorough medical examination on September 8, 1977 by Anna Marie Chirico, M.D.. Her blood pressure was found to be 128 over 68 in the upper right arm and 120 over 80 in the forearm. There was no evidence of hypertension, diabetes mellitus, or any pulmonary, cardiovascular, or other respiratory or circulatory diseases or problems. (N.T. 80-87)

20. Compared to a person of average weight, a massively obese person has an increased likelihood of developing illnesses and diseases such as coronary heart disease, hypertension, respiratory failure and diabetes mellitus. (N.T. 196, 2.15, 2.44 - 2.56, 2.59, 2.74)

21. Psychological disturbances frequently result from obesity, particularly in the nature of self-disparagement, contempt for one's own body, and feelings of blameworthiness for one's physical condition. These disturbances manifest themselves in ways that severely restrict or limit social interaction. (N.T. 32-38, 41-43, 51, 2.85)

22. Blood pressure readings taken on a severely obese person using a regular sized cuff result in a spuriously elevated reading. A large cuff must be used to obtain an accurate reading. (N.T. 83)

23. PECO employees who gain so much weight that they exceed their acceptable weight (as determined by the weight chart) are not terminated from employment. (N.T. 144, 145)

24. Jobs in the Customer Service Department require a degree of mobility which a severely obese person might not have. (N.T. 215)

25. A lineman who became obese while employed by PECO would be temporarily transferred to a position which did not involve climbing, during the period of physical inability to perform. (N.T. 216, 217)

26. Applicants who have made real efforts to lose weight are likely to be recommended for employment by PECO's Medical Department even if they have not reached their permissible weight, as determined by the weight chart. (N.T. 208)

27. Obese persons are less agile and more accident prone than non-obese persons. (N.T. 2.15, 2.53)

28. Obesity is commonly defined as the state of weighing 20 per cent or more in excess of one's desirable weight, as determined by Metropolitan Life Insurance Company tables. (N.T. 2.39, 2.40)

29. Morbid obesity is defined as weighing twice one's desirable weight or more; Complainant in this case was morbidly obese. (N.T. 2.44), 2.45)

30. Severely obese persons have measurable dysfunction of the pulmonary system and must work at breathing. (N.T. 2.52)

31. Severe obesity frequently interferes with circulation, such that blood doesn't run to the heart as efficiently as it would in an agile, non-obese person. Obese persons are more likely to develop swollen legs and ankles after prolonged standing. (N.T. 2.54 , 2.55)

32. Morbid obesity is positively correlated with premature death. (N.T. 2.57)

33. Obesity is positively correlated with the rate of absenteeism due to illness. (N.T. 2.58)

34. Severe obesity can pose a mechanical handicap by interfering with the physical ability to accomplish tasks. (N.T. 2.65-2.73)

35. Only an educated guess can be made regarding the potential reduction in duration of life for Complainant or any other severely obese person. A ten year reduction in Complainant's life span is plausible. (N.T. 2.81, 2.82)

36. On rare occasions an applicant is hired in spite of a negative recommendation from PECO's Medical Department. This may happen when there is great need to fill a position quickly. (N.T. 2.133)

37. PECO's Assistant to the Vice-President of Affirmative Action was aware, prior to May of 1977, that the federal Rehabilitation Act of 1973 had been amended so as to include, in the definition of handicapped person, a person who is

regarded as having an impairment which substantially limits major life activities. (N.T. 2.175)

38. PECO's Medical Department has no clearly articulated policy of questioning job applicants regarding their use of cigarettes, alcohol, or other drugs. (N.T. 180-184)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") properly has jurisdiction over the parties and subject matter of this action, pursuant to Sections 4, 5 and 9 of the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (43 P.S. §§ 954, 955, 959)

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter. (43 P.S. §959.)

3. Respondent Philadelphia Electric Company is an "employer" within the meaning of Sections 4(b), 5(a), and 5(d) of the Act. (43 P.S. 954(b), 955).

4. Complainant Joyce English is an "individual" within the meaning of Section 5 of the Act. (43 P.S. 955)

5. Morbid obesity is a handicap or disability within the meaning of Sections 4 and 5 of the Act. (43 P.S. 954, 955)

6. Complainant's handicap or disability did not substantially interfere with her ability to perform the duties of Customer Service Clerk.

7. Respondent has unlawfully discriminated against Complainant by refusing to hire her on the basis of her non-job related handicap or disability.

8. A prevailing Complainant in an action alleging discriminatory refusal to hire is entitled to an award of back-pay with interest, and to an order that she be hired for the position from which she was rejected.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Joyce English ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Philadelphia Electric Company ("Respondent") on May 4, 1977, wherein Ms. English alleged that Respondent refused to hire her because of her "handicap/disability, obesity, which does not substantially interfere with her ability to perform the essential functions of the job," in violation of Section 5(a) of the Pennsylvania Human Relations Act ("the Act"), Act of October 27, 1955, P.L. 744, as amended.

An investigation into the allegations of the complaint was made by representatives of the Commission, who determined that probable cause existed to credit the allegations. Thereupon, the Commission endeavored to eliminate the practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and the Commission approved the case for public hearing.

Public Hearing was held on August 8 and 9, 1979, in Philadelphia, Pennsylvania and was conducted at all times before Commissioners Alvin E. Echols, Jr., Esq., Chairperson of the Panel, Doris M. Leader, and John P. Wisniewski, pursuant to Section 9 of the Act. The case on behalf of the

complainant was presented by Benjamin G. Lipman, Assistant General Counsel to the Commission. The respondent was represented by John F. Smith III, Esq., and Leonard J. Cook, Esq., of Dilworth, Paxson, Kalish, Levy, and Kauffman. Edith E. Cox, Assistant General Counsel to the Commission, served as Legal Advisor to the Hearing Panel.

By stipulation of the parties and by leave of the Hearing Panel, the deposition of the Complainant, Joyce English, was taken on December 13, 1978, and made part of the record with the same effect as if Ms. English had appeared personally before the Hearing Panel.

II. FACTUAL BACKGROUND, ISSUE FORMULATION

The essential facts underlying this complaint are undisputed. On April 26, 1977, Ms. English applied for the position of Customer Service Clerk ("CSC") with Respondent. After passing a battery of pre-employment tests and meeting all educational and experiential pre-requisites, she was routinely referred to Respondent's Medical Department for a physical examination.

The examining physician concluded that Complainant was unsuited for employment. While he noted that her blood pressure was slightly elevated and that her mother had died prematurely, it is not seriously contested that the sole reason for his recommendation was Complainant's massive obesity: at the time of the examination she was 5'8" tall and weighed 341 pounds. No finding of inability to perform the duties of the CSC position was made. On the basis of this recommendation, Respondent declined to hire Ms. English. This suit followed.

This case therefore presents a novel issue of statutory construction, namely, whether obesity is a handicap or disability within the meaning of Section 4(p) and 5(a) of the Act. Should obesity be a handicap or disability, a secondary issue is presented as to its job relatedness in this case.

For the reasons which follow, we hold that severe obesity ^{1/} is a handicap or disability and find that Respondent has unlawfully discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability.

^{1/} The term "obesity" will be fully defined in Part III, infra.

III.

LIABILITY

Section 5 of the Act provides in pertinent part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification ... (a) For any employer because of the non-job related handicap or disability of any individual to refuse to hire or employ ... such individual ...

Section 4(p) provides in part:

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment (sought) ...

The Statute is thus essentially silent as to the meaning of "handicap or disability." Nor has any Pennsylvania court defined the terms.

Persons having handicaps or disabilities came under the coverage of the Act in 1974, when the General Assembly amended the Act to extend its protection to them. The legislative history of this amendment sheds little light on the question of whether the General Assembly wished to include obese persons in the category of handicapped or disabled persons. As Respondent's Brief states at page 5, "(s)pecific reference is made to the blind, wheelchair patients, epileptics, and the deaf and dumb." This list is illuminating mainly in its omissions. It is reasonable to conclude, as we do, that the

General Assembly did not intend this list to be other than exemplary. Difficult issues of interpretations such as that now before us were thus necessarily left to case by case resolution.

The issue of how much guidance may properly be drawn from the Commission's regulations, promulgated after this suit was filed, will be discussed subsequently. Our initial approach to this problem is guided by the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.

Section 1903 provides in part that "... words and phrases shall be construed according to ... their common and approved usage ..."

Webster's New Collegiate Dictionary (1976) includes the following definitions:

Disable: to make incapable or ineffective;
esp.: to deprive of physical, moral
or intellectual strength.

Disability: Inability to pursue an occupation
because of physical or mental impair-
ment.

Handicap: A disadvantage that makes achievement
unusually difficult; esp.: a physical
disability.

Thus, the terms, while closely related, are not exactly synonymous. This conclusion is in keeping with the general principle of statutory construction that a statute shall not be presumed to be redundant if it is possible to give effect

to all of its provisions. See 1. Pa. C.S.A. Section 1921 and Klein vs. Republic Steel Corp., 435 F.2d 762, C.A. 3 (1970).

As previously noted, regulations promulgated by the Commission subsequent to initiation of the instant action include a comprehensive definition of the terms "handicap or disability." A handicapped or disabled person is defined at 16 Pa. Code 44.4(4) 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.

A physical or mental impairment is defined as follows:

- 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; musculo-skeletal; special sense organs; respiratory, including digestive; genitourinary; hemic and lymphatic; skin and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

Major life activities are defined as follows:

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

Comparison of these definitions with those reflecting the common and approved usages of "handicap" and "disability"

indicates that definition A, supra, a physical or mental impairment which substantially limits major life activities, most nearly expresses the combined meaning of the terms as generally used. We therefore find that application of that definition to the facts of this case will result in no unfairness to Respondent. As Complainant's Brief states, the terms necessarily had some meaning prior to the adoption of the regulatory definitions. It is therefore against the standard set by this definition that the facts of this case must initially be examined.

Evidence adduced at Public Hearing established that Ms. English's application for employment with Respondent was processed in the same manner as are essentially all such applications. The initial phase of the process was directed toward determining whether she was qualified to perform the job. Respondent acknowledges that Ms. English was so qualified.

Following this initial pre-qualification, Ms. English was referred to Respondent's Medical Department for a physical examination. As previously noted, the Medical Department found her to be unsuitable for any employment with Respondent because of her obesity. Reference was made to Respondent's "weight chart," Exhibit R-1. Testimony established that applicants weighing more than forty pounds over (or under) the weight appearing on the chart for persons of a given sex, age and height were as a rule not hired; it was repeatedly emphasized that the standards are not rigidly applied, and that individual

variations in "frame" size are taken into account. Indeed, Respondent's Medical Director stated that if an applicant "... is 55 pounds overweight but doesn't look it ..." that applicant would be hired. (N.T. 158)

Despite this suggestion of concern with an applicant's appearance, Respondent vigorously argues that its weight policy is designed solely to help it achieve and maintain a healthy workforce. The bulk of its case in chief consisted of expert medical testimony regarding the high positive correlation between obesity and various medical problems which in their turn would lead to excessive absenteeism. Before discussing this expert evidence, it is necessary to comment briefly on the weight chart and the uses made of it.

It is chiefly notable that absolutely no empirical evidence validating either the chart or the "forty-plus" cut-off was produced by Respondents. Direct questions put to the Medical Director and to the examining physician established only that the weight chart and attendant policy had been in use prior to either man's employ with the company.

It is also noteworthy that Respondent's pre-employment medical examination of Ms. English was not individualized in either of two possible ways.

First, Ms. English was not questioned about any medically caused absenteeism problems which she herself might have had in previous jobs. Nor was any independent inquiry directed to any of her previous employers.

Second, the examination and subsequent recommendation were not based on Ms. English's present medically assessed ability to perform the duties of a Customer Service Clerk. It was readily conceded that on the date of her examination, she was physically able to perform those duties.

Rather, the entire thrust of Respondent's policy and of its argument before this Commission is that obesity,^{2/} though not itself a handicap or disability within the meaning of the Act, is nevertheless so regularly associated with disabling conditions which might cause absenteeism and early mortality as to preclude the hiring^{3/} of almost any obese person. We turn therefore to the expert testimony.

^{2/} Obesity was defined by one of Respondent's expert witnesses, Dr. Theodore van Itallie, as the state of weighing 20 percent more above one's average desirable weight, based on the Metropolitan Life Insurance Company standards for desirable weight. (N.T. 2.39, 2.40) This chart was never introduced into evidence.

^{3/} PECO employees who exceed their permissible weight are not terminated, however.

The record overwhelmingly supports the Respondent's assertion that the correlation is high between obesity, particularly morbid obesity,^{4/} and a long list of potentially disabling medical problems. Included in this list are heart disease, hypertention, diabetes mellitis, gall bladder disease, and cardio-respiratory dysfunction; it was also established that many conditions to which both obese and non-obese persons are subject are exacerbated by obesity: among these were complications of pregnancy and arthritis of the knees. The record additionally supports the assertion that obesity is positively related to increases in absenteeism, and to increased mortality rates.

Respondent concedes that Ms. English at the time of her application had no discernible medical complications.^{5/} It argues vigorously, however, that she was so likely to develop such problems in the future as to be unfit for present employment. We shall consider this "increased risk" argument in two contexts: first, in its impact on the determination of whether or not obesity is a handicap; second, in the consideration of

^{4/} Morbid obesity is the state of weighing twice one's average desirable weight, or more. (N.T. 2.44) Complainant in this case was morbidly obese. (N.T. 2.45)

^{5/} Respondent does not contest the fact that the slight elevation in blood pressure found during Complainant's pre-employment physical examination was actually the result of using a narrow cuff when her blood pressure was taken. (N.T. 83)

job relatedness. The testimony of Respondent's Medical experts was, as we have noted, highly persuasive. Rather than refuting the contention that morbid obesity may properly be regarded as a handicap or disability, however, we find that this evidence supports that contention. The line which Respondent has attempted to draw between "simple" morbid obesity on the one hand and the long list of disabling conditions which are regularly association with "simple" morbid obesity on the other, doubtless has validity as a matter of precise medical diagnosis. As the long experience of the law in attempting to develop a legal definition of insanity ^{6/} illustrates, however, medical diagnoses are not and cannot be co-extensive with legal definitions. The legal definition which we have adopted, supra, is concerned with impairment of function by disorders or conditions which affect various body systems. Nowhere does that definition confine itself, as Respondent would seemingly have it do, to diseases of the enumerated systems. We therefore find, as a matter of law, that morbid obesity is a handicap or disability within the meaning of the Act, because of its high and extremely well documented correlation with illnesses such as hypertention, heart disease and diabetes mellitis. Unquestionably, it is a physiological condition affecting many bodily systems.

6/

See especially Durham vs. United States, 214 F.2d 862 (CA D.C., 1954); Carter vs. United States, 252 F.2d 608 (CA D.C., 1957); Blocker vs. United States, 274 F.2d 572 (CA D.C., 1957); United States vs. Brawner, 471 F.2d 969 (CA D.C., 1972). These cases rather dramatically illuminate the difficulties encountered by the District of Columbia Circuit Court of Appeals in its attempts to forge a new legal definition of insanity.

A positive correlation exists with regard to disabling emotional conditions as well. The expert testimony of Dr. Kelly Brownell established that obesity is regularly associated with psychological disturbances such as depression and self-loathing, which in their turn make normal social interaction and development extremely unlikely.

We need not and do not stop there. The record also clearly establishes that morbid obesity in and of itself, without reference to the conditions so regularly associated with it, substantially interferes with major life activities.

Working is, of course, one of these activities. Respondent's Medical Director indicated under cross-examination his view that severe obesity will in some instances cause (physical) inability to perform components of a job (N.T. 211, 215, 217), including the job of Customer Service Clerk.

Respondent's leading medical expert, Dr. Theodore Van Itallie, further supported this view by testifying to the loss of mobility and agility which are direct consequences of severe obesity. At one extreme, he noted that he himself had experienced a "modest handicap" (N.T. 2.72) attendant upon being only thirty pounds overweight, when attempting to tie his shoes. The further extreme he established with descriptions of a person so obese as to be unable to assume an upright posture after falling. Between these poles, and clearly relevant to the facts of his case, was his testimony establishing the mechanical handicap attendant upon "simple" morbid obesity.

Even more fundamental is the impairment of the unquestionable major life activity of breathing.

In response to direct examination, Dr. Van Itallie stated that:

...it's been well documented that obese individuals, and I'm referring particularly to fairly severely obese individuals, have measurable dysfunction of the pulmonary system and they work at breathing. Reserve capacity of the lungs is reduced ... (N.T. 2.52, emphasis added).

We therefore find that morbid obesity, quite apart from the illnesses associated with it, so substantially interferes with the major life activities of working and breathing as to require its inclusion within the Act's definition of handicap or disability.

Our decision thus far is confined to the determination that morbid obesity is a handicap or disability within the meaning of the Act, for the reasons just stated. We express no opinion as to whether persons who are obese, but not morbidly obese, are also handicapped or disabled.

Finally, we return to the issue of the permissible degree of application of the Commission's 1978 Guidelines. As noted above, we find no unfairness to Respondent in application of the regulatory definition of handicap or disability as a condition substantially interfering with major life activities. Nor does Respondent seem to contest use of this definition. Vigorously contested is applicability of that part of the

definition relating to persons who are "regarded as" having such impairments.

Respondent urges that application to this case, filed in 1977, of a regulation adopted in 1978, is impermissible because of the resultant lack of notice. Implicit in this argument is the assumption that the "regarded as" component of the definition was not in 1977 foreseeably included among the possible meanings of handicap or disability.

Respondent's claimed lack of notice was seriously undermined at public hearing. Mr. Thomas Rowe, Assistant to PECO's Vice President for Affirmative Action, admitted under cross-examination that he had known, prior to the initiation of this case, of 1976 amendments to the (federal) Rehabilitation Act of 1973, which defined a handicapped person as, inter alia, one who is regarded as having an impairment. We thus cannot accept Respondent's contention that it was not foreseeable in May of 1977 that the Commission might follow the lead of the United States Congress in defining handicap or disability.

It is self evident that Respondent did regard Ms. English as too handicapped to hire. While repeated reference was made to the likelihood that she would become medically unable to work at some indefinite time in the future, none of the eminently well-qualified medical experts who testified could predict when, if ever, she could be expected to become disabled. It was also estimated that the foreseeable reduction

in her life expectancy is approximately ten years. As Ms. English was twenty-seven years old when this complaint was filed, Respondent's own statistics indicate that she is likely to have many potentially productive years ahead of her. Whatever the likelihood of future incapacity, Respondent's decision not to hire her was made in a present, at a time when she was unquestionably physically able to work. It is their perception of her at that time which is of concern to us.

We do find that Respondent regarded Ms. English as having a handicap or disability. Our previous determination that morbid obesity is a handicap within the meaning of the Act obviously makes it unnecessary for us to base this decision solely on the secondary finding that Respondent regarded Complainant as handicapped. However, because of our determination that Respondent cannot validly claim surprise at the Commission's propagation of a "regarded as" definition of handicap or disability, we find no unfairness in entry of this secondary finding.

As noted above, our determination that morbid obesity is a handicap or disability within the meaning of the Act must necessarily be followed by an inquiry into the job relatedness of Ms. English's obesity. It is in this context that Respondent's "increased risk" rationale loses its force. While all agreed that Ms. English was more likely than a non-obese person to develop an incapacitating illness, we have already

noted that none of the many physicians who testified could offer any opinion at all as to when or if she might develop such an illness. Faced with similar arguments in a case decided by this Commission last year, we followed a Wisconsin Court's reasoning that indefinite future likelihood of disability cannot justify present discrimination. As the Court stated in Chrysler Outboard Corporation vs. Wisconsin DILHR, 13 EPD 11, 526 (Wis. Cir. 1976):

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

ID at 6884, cited with approval in Masters vs. Duquesne Light, E-10375, decided September 24, 1979; emphasis added.

See also City of Wisconsin Rapids vs. Wisc. DILHR, 15 EPD 7846 (Wisc. Cir. 1977).

We consequently reject Respondent's implicit argument that the risk of future inability to perform justifies, by making job related, a present policy of refusing to hire obese persons. Our inquiry into job-relatedness may therefore end with Respondent's admission that in May of 1977 Ms. English was physically able to perform CSC duties: her handicap was not job related.

One additional argument advanced by Respondent requires brief attention: their contention that obesity should not be

considered a handicap or disability because of its "voluntary", and therefore reversible, nature. This argument must fail, as it did in Masters vs. Duquesne Light, supra.

First, it is clear that Respondent's own weight policy is applied to all obese applicants in the same fashion, whether the origin of the individual problem is a metabolic disorder or simply eating more than one expends. Further, Respondent's general assertion that it attempts to maintain a healthy workforce by eliminating applicants whose "voluntary" behavior may lead to health problems was made questionable by the Medical Director's statement that applicants are not questioned about their consumption of cigarettes, alcohol, or other drugs.

We note also that, as Complainant's Brief urges (at p. 23), the General Assembly in another context has characterized drug and alcohol abuse, also "voluntary" conditions, as disabilities, indicating legislative rejection of the attempted distinction. See 71 P.S. §1690.110.

More fundamentally, the considerations which lead us to determine that morbid obesity is a statutory handicap apply with equal force to all cases, of whatever origin. Mobility and breathing are affected in any case. Ultimately, we are persuaded that the legislature wished to extend the Act's protection to those handicapped persons who are physically willing and able to work, but who are, like Ms. English, nevertheless denied the opportunity to do so. Voluntariness vel non is simply irrelevant.

IV.

REMEDY

Our finding of discriminatory refusal to hire leads necessarily to consideration of appropriate relief.

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in ... any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue ... an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... with or without back pay ... as, in the judgment of the Commission, will effectuate the purposes of this Act ...

Any complainant entitled to back pay should receive an amount which will restore that person to the economic position in which he or she would have been had it not been for the discriminatory act. The method used to calculate the backpay award need be only reasonable and realistic, not mathematically precise. See Pennsylvania Human Relations Commission vs. Transit Casualty Insurance Company, Pa. Cmwlth. 340 A.2d 624; Pettway vs. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir., 1974).

Pennsylvania law provides for the assessment of interest on a backpay award at the rate of 6%, compounded annually. See Goetz vs. Norristown Area School District, Pa. Cmwlth. 328 A.2d 579 (1975).

The record in this case establishes that in April of 1977, the salary for the Customer Service Clerk position was \$115 weekly, and that this salary was increased by roughly 7.5 per cent in August of each intervening year.

Wherefore, having concluding that Respondent discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability, we find that she is entitled to be offered the next available position as CSC with Respondent, and to receive backpay with interest as specified in the Order which follows.

RECOMMENDATION OF HEARING PANEL

AND NOW, this ___ day of _____, 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 hereby adopts the attached as their proposed Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:

ALVIN ECHOLS, JR., ESQ.
Chairperson

DORIS M. LEADER
Hearing Commissioner



JOHN P. WISNIEWSKI
Hearing Commissioner

PA
COMM
HEADQUARTERS

functions of the position sought.

2. That Respondent, PECO, pay to Complainant, Joyce A. English, the following sums within thirty days of the date of this Order, by check made payable to Joyce A. English and delivered in care of Benjamin G. Lipman, Esq., Pennsylvania Human Relations Commission, 711 State Office Building, Broad and Spring Garden Street, Philadelphia, Pennsylvania 19130:

(a) back wages of \$115 per week plus 6% interest representing the period of April 26, 1977 to July 31, 1977;

(b) back wages of \$124 per week plus 6% interest representing the period of August 1, 1977 to July 31, 1978;

(c) back wages of \$133 per week plus 6% interest representing the period August 1 1978 to July 31, 1979;

(d) back wages of \$143 per week plus 6% interest representing the period August 1, 1979 to the date of this Order.

4. That Respondent, PECO, offer to Complainant the next available Customer Services Clerk position or a position

that is comparable in terms of salary, promotional opportunities and duties.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____
JOSEPH X. YAFFE, Chairperson

ATTEST:

BY: _____
ELIZABETH M. SCOTT, Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOYCE A. ENGLISH,
Complainant

v.

PHILADELPHIA ELECTRIC
COMPANY,
Respondent

DOCKET NO. E-12163

FINDINGS OF FACT

1. The Complainant is Joyce A. English, a black female, college graduate, who on April 26, 1977 was 27 years old. She presently resides in Pensacola, Florida. (N.T. 17, Exh. C-4: p.3)

2. The Respondent is Philadelphia Electric Company (PECO), 2301 Market Street, Philadelphia, Pennsylvania 19101. (N.T. 17)

3. On May 4, 1977, Complainant filed a complaint with the Pennsylvania Human Relations Commission (PHRC) alleging in relevant part that Respondent had violated Section 5(a) of the Pennsylvania Human Relations Act (Act), Act of October 27, 1955 P.L. 744, as amended, 43 P.S. §951 et seq., in that Respondent had on or about April 26, 1977, "Refused to hire Complainant for the position of Customer Service Representative because of

her handicap/disability, obesity, which does not substantially interfere with her ability to perform essential functions of the job." (N.T. 17)

4. An investigation of the complaint was conducted. A finding of probable cause to credit the allegation was made. A response denying such probable cause was filed by the Respondent and an attempt to conciliate the case was undertaken, all in conformity with the requisites of Section 9 and other relevant provisions of the Act and the Special Rules of Administrative Practice and Procedure before the PHRC. (N.T. 17-18)

5. The Complainant applied for the position of Customer Service Clerk (CSC) with Respondent on April 26, 1977. (N.T. 18)

6. Respondent had approximately thirteen openings for CSCs on the date of Complainant's application. (N.T. 18)

7. On April 26, 1977, Joyce English satisfied all the necessary pre-employment ability, knowledge, skill and other requirements for the CSC position. (Exh. C-3: pp 6-10, Exh. C-4: pp 9-11)

8. The Complainant, as of April 26, 1977, fully satisfied all educational and experiential pre-employment criteria for the position of Customer Services Clerk. (Exh. C-3: pp 3-4, Exh. C-4: pp 3-4)

9. On April 26, 1977, Joyce English was interviewed by a PECO personnel staff person, Alfred Hetrick and was administered a battery of pre-employment tests, all of which she passed. She

was then told by Mr. Hetrick that she was qualified for the position she sought. (N.T. 75-76, Exh. C-4: pp. 8-9)

10. Joyce English was denied a CSC position by PECO for the sole reason that she failed the medical exam due to her obesity. (Exh. C-4: pp. 14-15, N.T. 167, 187, 194, 2.7)

11. PECO's medical department failed Joyce English in her medical examination because of their belief that massive obesity to the extent present in Ms. English, created a high risk that other medical problems would develop which might result in excessive absenteeism and underproductivity. (N.T. 76, 189, 211-212, 2.11)

12. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested that she was medically less well suited than the average person to perform the duties of a CSC. (N.T. 89, 2.15-2.16, 2.25)

13. Nothing about Joyce English's health or physical condition on April 26, 1977 suggested with any reasonable degree of medical certainty that she was likely within the foreseeable future to develop illnesses or diseases which would render her less available for work or less productive. (N.T. 89, 199, 214)

14. On April 26, 1977, PECO considered Joyce English to be qualified for the CSC position and did not believe that her obesity would substantially interfere with her ability to perform the essential functions of the job. (N.T. 76)

15. At the time of the Complainant's application, the CSC position paid a salary of \$115 per week. (N.T. 18)

16. On or about August 1, 1977, the salary for a CSC increased by 7.5% to approximately \$124 per week. (N.T. 2.105)

17. On or about August 1, 1978, the salary for a CSC increased by 7.3% to approximately \$133 per week. (N.T. 2.105)

18. On or about August 1, 1979, the salary for a CSC increased by 7.2% to approximately \$143 per week. (N.T. 2.106)

19. Joyce English was given a thorough medical examination on September 8, 1977 by Anna Marie Chirico, M.D.. Her blood pressure was found to be 128 over 68 in the upper right arm and 120 over 80 in the forearm. There was no evidence of hypertension, diabetes mellitus, or any pulmonary, cardiovascular, or other respiratory or circulatory diseases or problems. (N.T. 80-87)

20. Compared to a person of average weight, a massively obese person has an increased likelihood of developing illnesses and diseases such as coronary heart disease, hypertension, respiratory failure and diabetes mellitus. (N.T. 196, 2.15, 2.44 - 2.56, 2.59, 2.74)

21. Psychological disturbances frequently result from obesity, particularly in the nature of self-disparagement, contempt for one's own body, and feelings of blameworthiness for one's physical condition. These disturbances manifest themselves in ways that severely restrict or limit social interaction. (N.T. 32-38, 41-43, 51, 2.85)

22. Blood pressure readings taken on a severely obese person using a regular sized cuff result in a spuriously elevated reading. A large cuff must be used to obtain an accurate reading. (N.T. 83)

23. PECO employees who gain so much weight that they exceed their acceptable weight (as determined by the weight chart) are not terminated from employment. (N.T. 144, 145)

24. Jobs in the Customer Service Department require a degree of mobility which a severely obese person might not have. (N.T. 215)

25. A lineman who became obese while employed by PECO would be temporarily transferred to a position which did not involve climbing, during the period of physical inability to perform. (N.T. 216, 217)

26. Applicants who have made real efforts to lose weight are likely to be recommended for employment by PECO's Medical Department even if they have not reached their permissible weight, as determined by the weight chart. (N.T. 208)

27. Obese persons are less agile and more accident prone than non-obese persons. (N.T. 2.15, 2.53)

28. Obesity is commonly defined as the state of weighing 20 per cent or more in excess of one's desirable weight, as determined by Metropolitan Life Insurance Company tables. (N.T. 2.39, 2.40)

29. Morbid obesity is defined as weighing twice one's desirable weight or more; Complainant in this case was morbidly obese. (N.T. 2.44), 2.45)

30. Severely obese persons have measurable dysfunction of the pulmonary system and must work at breathing. (N.T. 2.52)

31. Severe obesity frequently interferes with circulation, such that blood doesn't run to the heart as efficiently as it would in an agile, non-obese person. Obese persons are more likely to develop swollen legs and ankles after prolonged standing. (N.T. 2.54 , 2.55)

32. Morbid obesity is positively correlated with premature death. (N.T. 2.57)

33. Obesity is positively correlated with the rate of absenteeism due to illness. (N.T. 2.58)

34. Severe obesity can pose a mechanical handicap by interfering with the physical ability to accomplish tasks. (N.T. 2.65-2.73)

35. Only an educated guess can be made regarding the potential reduction in duration of life for Complainant or any other severely obese person. A ten year reduction in Complainant's life span is plausible. (N.T. 2.81, 2.82)

36. On rare occasions an applicant is hired in spite of a negative recommendation from PECO's Medical Department. This may happen when there is great need to fill a position quickly. (N.T. 2.133)

37. PECO's Assistant to the Vice-President of Affirmative Action was aware, prior to May of 1977, that the federal Rehabilitation Act of 1973 had been amended so as to include, in the definition of handicapped person, a person who is

regarded as having an impairment which substantially limits major life activities. (N.T. 2.175)

38. PECO's Medical Department has no clearly articulated policy of questioning job applicants regarding their use of cigarettes, alcohol, or other drugs. (N.T. 180-184)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") properly has jurisdiction over the parties and subject matter of this action, pursuant to Sections 4, 5 and 9 of the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744 as amended, 43 P.S. §951 et seq. (43 P.S. §§ 954, 955, 959)

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter. (43 P.S. §959.)

3. Respondent Philadelphia Electric Company is an "employer" within the meaning of Sections 4(b), 5(a), and 5(d) of the Act. (43 P.S. 954(b), 955).

4. Complainant Joyce English is an "individual" within the meaning of Section 5 of the Act. (43 P.S. 955)

5. Morbid obesity is a handicap or disability within the meaning of Sections 4 and 5 of the Act. (43 P.S. 954, 955)

6. Complainant's handicap or disability did not substantially interfere with her ability to perform the duties of Customer Service Clerk.

7. Respondent has unlawfully discriminated against Complainant by refusing to hire her on the basis of her non-job related handicap or disability.

8. A prevailing Complainant in an action alleging discriminatory refusal to hire is entitled to an award of back-pay with interest, and to an order that she be hired for the position from which she was rejected.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Joyce English ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Philadelphia Electric Company ("Respondent") on May 4, 1977, wherein Ms. English alleged that Respondent refused to hire her because of her "handicap/disability, obesity, which does not substantially interfere with her ability to perform the essential functions of the job," in violation of Section 5(a) of the Pennsylvania Human Relations Act ("the Act"), Act of October 27, 1955, P.L. 744, as amended.

An investigation into the allegations of the complaint was made by representatives of the Commission, who determined that probable cause existed to credit the allegations. Thereupon, the Commission endeavored to eliminate the practice complained of by conference, conciliation and persuasion. These endeavors were unsuccessful and the Commission approved the case for public hearing.

Public Hearing was held on August 8 and 9, 1979, in Philadelphia, Pennsylvania and was conducted at all times before Commissioners Alvin E. Echols, Jr., Esq., Chairperson of the Panel, Doris M. Leader, and John P. Wisniewski, pursuant to Section 9 of the Act. The case on behalf of the

complainant was presented by Benjamin G. Lipman, Assistant General Counsel to the Commission. The respondent was represented by John F. Smith III, Esq., and Leonard J. Cook, Esq., of Dilworth, Paxson, Kalish, Levy, and Kauffman. Edith E. Cox, Assistant General Counsel to the Commission, served as Legal Advisor to the Hearing Panel.

By stipulation of the parties and by leave of the Hearing Panel, the deposition of the Complainant, Joyce English, was taken on December 13, 1978, and made part of the record with the same effect as if Ms. English had appeared personally before the Hearing Panel.

II. FACTUAL BACKGROUND, ISSUE FORMULATION

The essential facts underlying this complaint are undisputed. On April 26, 1977, Ms. English applied for the position of Customer Service Clerk ("CSC") with Respondent. After passing a battery of pre-employment tests and meeting all educational and experiential pre-requisites, she was routinely referred to Respondent's Medical Department for a physical examination.

The examining physician concluded that Complainant was unsuited for employment. While he noted that her blood pressure was slightly elevated and that her mother had died prematurely, it is not seriously contested that the sole reason for his recommendation was Complainant's massive obesity: at the time of the examination she was 5'8" tall and weighed 341 pounds. No finding of inability to perform the duties of the CSC position was made. On the basis of this recommendation, Respondent declined to hire Ms. English. This suit followed.

This case therefore presents a novel issue of statutory construction, namely, whether obesity is a handicap or disability within the meaning of Section 4(p) and 5(a) of the Act. Should obesity be a handicap or disability, a secondary issue is presented as to its job relatedness in this case.

For the reasons which follow, we hold that severe obesity ^{1/} is a handicap or disability and find that Respondent has unlawfully discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability.

^{1/} The term "obesity" will be fully defined in Part III, infra.

III.

LIABILITY

Section 5 of the Act provides in pertinent part:

It shall be an unlawful discriminatory practice, unless based on a bona fide occupational qualification ... (a) For any employer because of the non-job related handicap or disability of any individual to refuse to hire or employ ... such individual ...

Section 4(p) provides in part:

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment (sought) ...

The Statute is thus essentially silent as to the meaning of "handicap or disability." Nor has any Pennsylvania court defined the terms.

Persons having handicaps or disabilities came under the coverage of the Act in 1974, when the General Assembly amended the Act to extend its protection to them. The legislative history of this amendment sheds little light on the question of whether the General Assembly wished to include obese persons in the category of handicapped or disabled persons. As Respondent's Brief states at page 5, "(s)pecific reference is made to the blind, wheelchair patients, epileptics, and the deaf and dumb." This list is illuminating mainly in its omissions. It is reasonable to conclude, as we do, that the

General Assembly did not intend this list to be other than exemplary. Difficult issues of interpretations such as that now before us were thus necessarily left to case by case resolution.

The issue of how much guidance may properly be drawn from the Commission's regulations, promulgated after this suit was filed, will be discussed subsequently. Our initial approach to this problem is guided by the Statutory Construction Act, 1 Pa. C.S.A. §1501 et seq.

Section 1903 provides in part that "... words and phrases shall be construed according to ... their common and approved usage ..."

Webster's New Collegiate Dictionary (1976) includes the following definitions:

Disable: to make incapable or ineffective;
esp.: to deprive of physical, moral
or intellectual strength.

Disability: Inability to pursue an occupation
because of physical or mental impair-
ment.

Handicap: A disadvantage that makes achievement
unusually difficult; esp.: a physical
disability.

Thus, the terms, while closely related, are not exactly synonymous. This conclusion is in keeping with the general principle of statutory construction that a statute shall not be presumed to be redundant if it is possible to give effect

to all of its provisions. See 1. Pa. C.S.A. Section 1921 and Klein vs. Republic Steel Corp., 435 F.2d 762, C.A. 3 (1970).

As previously noted, regulations promulgated by the Commission subsequent to initiation of the instant action include a comprehensive definition of the terms "handicap or disability." A handicapped or disabled person is defined at 16 Pa. Code 44.4(4) 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.

A physical or mental impairment is defined as follows:

- 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; musculo-skeletal; special sense organs; respiratory, including digestive; genitourinary; hemic and lymphatic; skin and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

Major life activities are defined as follows:

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

Comparison of these definitions with those reflecting the common and approved usages of "handicap" and "disability"

indicates that definition A, supra, a physical or mental impairment which substantially limits major life activities, most nearly expresses the combined meaning of the terms as generally used. We therefore find that application of that definition to the facts of this case will result in no unfairness to Respondent. As Complainant's Brief states, the terms necessarily had some meaning prior to the adoption of the regulatory definitions. It is therefore against the standard set by this definition that the facts of this case must initially be examined.

Evidence adduced at Public Hearing established that Ms. English's application for employment with Respondent was processed in the same manner as are essentially all such applications. The initial phase of the process was directed toward determining whether she was qualified to perform the job. Respondent acknowledges that Ms. English was so qualified.

Following this initial pre-qualification, Ms. English was referred to Respondent's Medical Department for a physical examination. As previously noted, the Medical Department found her to be unsuitable for any employment with Respondent because of her obesity. Reference was made to Respondent's "weight chart," Exhibit R-1. Testimony established that applicants weighing more than forty pounds over (or under) the weight appearing on the chart for persons of a given sex, age and height were as a rule not hired; it was repeatedly emphasized that the standards are not rigidly applied, and that individual

variations in "frame" size are taken into account. Indeed, Respondent's Medical Director stated that if an applicant "... is 55 pounds overweight but doesn't look it ..." that applicant would be hired. (N.T. 158)

Despite this suggestion of concern with an applicant's appearance, Respondent vigorously argues that its weight policy is designed solely to help it achieve and maintain a healthy workforce. The bulk of its case in chief consisted of expert medical testimony regarding the high positive correlation between obesity and various medical problems which in their turn would lead to excessive absenteeism. Before discussing this expert evidence, it is necessary to comment briefly on the weight chart and the uses made of it.

It is chiefly notable that absolutely no empirical evidence validating either the chart or the "forty-plus" cut-off was produced by Respondents. Direct questions put to the Medical Director and to the examining physician established only that the weight chart and attendant policy had been in use prior to either man's employ with the company.

It is also noteworthy that Respondent's pre-employment medical examination of Ms. English was not individualized in either of two possible ways.

First, Ms. English was not questioned about any medically caused absenteeism problems which she herself might have had in previous jobs. Nor was any independent inquiry directed to any of her previous employers.

Second, the examination and subsequent recommendation were not based on Ms. English's present medically assessed ability to perform the duties of a Customer Service Clerk. It was readily conceded that on the date of her examination, she was physically able to perform those duties.

Rather, the entire thrust of Respondent's policy and of its argument before this Commission is that obesity,^{2/} though not itself a handicap or disability within the meaning of the Act, is nevertheless so regularly associated with disabling conditions which might cause absenteeism and early mortality as to preclude the hiring^{3/} of almost any obese person. We turn therefore to the expert testimony.

^{2/} Obesity was defined by one of Respondent's expert witnesses, Dr. Theodore van Itallie, as the state of weighing 20 percent more above one's average desirable weight, based on the Metropolitan Life Insurance Company standards for desirable weight. (N.T. 2.39, 2.40) This chart was never introduced into evidence.

^{3/} PECO employees who exceed their permissible weight are not terminated, however.

The record overwhelmingly supports the Respondent's assertion that the correlation is high between obesity, particularly morbid obesity, ^{4/} and a long list of potentially disabling medical problems. Included in this list are heart disease, hypertention, diabetes mellitus, gall bladder disease, and cardio-respiratory dysfunction; it was also established that many conditions to which both obese and non-obese persons are subject are exacerbated by obesity: among these were complications of pregnancy and arthritis of the knees. The record additionally supports the assertion that obesity is positively related to increases in absenteeism, and to increased mortality rates.

Respondent concedes that Ms. English at the time of her application had no discernible medical complications. ^{5/} It argues vigorously, however, that she was so likely to develop such problems in the future as to be unfit for present employment. We shall consider this "increased risk" argument in two contexts: first, in its impact on the determination of whether or not obesity is a handicap; second, in the consideration of

4/

Morbid obesity is the state of weighing twice one's average desirable weight, or more. (N.T. 2.44) Complainant in this case was morbidly obese. (N.T. 2.45)

5/

Respondent does not contest the fact that the slight elevation in blood pressure found during Complainant's pre-employment physical examination was actually the result of using a narrow cuff when her blood pressure was taken. (N.T. 83)

job relatedness. The testimony of Respondent's Medical experts was, as we have noted, highly persuasive. Rather than refuting the contention that morbid obesity may properly be regarded as a handicap or disability, however, we find that this evidence supports that contention. The line which Respondent has attempted to draw between "simple" morbid obesity on the one hand and the long list of disabling conditions which are regularly associated with "simple" morbid obesity on the other, doubtless has validity as a matter of precise medical diagnosis. As the long experience of the law in attempting to develop a legal definition of insanity ^{6/} illustrates, however, medical diagnoses are not and cannot be co-extensive with legal definitions. The legal definition which we have adopted, supra, is concerned with impairment of function by disorders or conditions which affect various body systems. Nowhere does that definition confine itself, as Respondent would seemingly have it do, to diseases of the enumerated systems. We therefore find, as a matter of law, that morbid obesity is a handicap or disability within the meaning of the Act, because of its high and extremely well documented correlation with illnesses such as hypertension, heart disease and diabetes mellitus. Unquestionably, it is a physiological condition affecting many bodily systems.

^{6/}

See especially Durham vs. United States, 214 F.2d 862 (CA D.C., 1954); Carter vs. United States, 252 F.2d 608 (CA D.C., 1957); Blocker vs. United States, 274 F.2d 572 (CA D.C., 1957); United States vs. Brawner, 471 F.2d 969 (CA D.C., 1972). These cases rather dramatically illuminate the difficulties encountered by the District of Columbia Circuit Court of Appeals in its attempts to forge a new legal definition of insanity.

A positive correlation exists with regard to disabling emotional conditions as well. The expert testimony of Dr. Kelly Brownell established that obesity is regularly associated with psychological disturbances such as depression and self-loathing, which in their turn make normal social interaction and development extremely unlikely.

We need not and do not stop there. The record also clearly establishes that morbid obesity in and of itself, without reference to the conditions so regularly associated with it, substantially interferes with major life activities.

Working is, of course, one of these activities. Respondent's Medical Director indicated under cross-examination his view that severe obesity will in some instances cause (physical) inability to perform components of a job (N.T. 211, 215, 217), including the job of Customer Service Clerk.

Respondent's leading medical expert, Dr. Theodore Van Itallie, further supported this view by testifying to the loss of mobility and agility which are direct consequences of severe obesity. At one extreme, he noted that he himself had experienced a "modest handicap" (N.T. 2.72) attendant upon being only thirty pounds overweight, when attempting to tie his shoes. The further extreme he established with descriptions of a person so obese as to be unable to assume an upright posture after falling. Between these poles, and clearly relevant to the facts of his case, was his testimony establishing the mechanical handicap attendant upon "simple" morbid obesity.

Even more fundamental is the impairment of the unquestionable major life activity of breathing.

In response to direct examination, Dr. Van Itallie stated that:

...it's been well documented that obese individuals, and I'm referring particularly to fairly severely obese individuals, have measurable dysfunction of the pulmonary system and they work at breathing. Reserve capacity of the lungs is reduced ... (N.T. 2.52, emphasis added).

We therefore find that morbid obesity, quite apart from the illnesses associated with it, so substantially interferes with the major life activities of working and breathing as to require its inclusion within the Act's definition of handicap or disability.

Our decision thus far is confined to the determination that morbid obesity is a handicap or disability within the meaning of the Act, for the reasons just stated. We express no opinion as to whether persons who are obese, but not morbidly obese, are also handicapped or disabled.

Finally, we return to the issue of the permissible degree of application of the Commission's 1978 Guidelines. As noted above, we find no unfairness to Respondent in application of the regulatory definition of handicap or disability as a condition substantially interfering with major life activities. Nor does Respondent seem to contest use of this definition. Vigorously contested is applicability of that part of the

definition relating to persons who are "regarded as" having such impairments.

Respondent urges that application to this case, filed in 1977, of a regulation adopted in 1978, is impermissible because of the resultant lack of notice. Implicit in this argument is the assumption that the "regarded as" component of the definition was not in 1977 foreseeably included among the possible meanings of handicap or disability.

Respondent's claimed lack of notice was seriously undermined at public hearing. Mr. Thomas Rowe, Assistant to PECO's Vice President for Affirmative Action, admitted under cross-examination that he had known, prior to the initiation of this case, of 1976 amendments to the (federal) Rehabilitation Act of 1973, which defined a handicapped person as, inter alia, one who is regarded as having an impairment. We thus cannot accept Respondent's contention that it was not foreseeable in May of 1977 that the Commission might follow the lead of the United States Congress in defining handicap or disability.

It is self evident that Respondent did regard Ms. English as too handicapped to hire. While repeated reference was made to the likelihood that she would become medically unable to work at some indefinite time in the future, none of the eminently well-qualified medical experts who testified could predict when, if ever, she could be expected to become disabled. It was also estimated that the foreseeable reduction

in her life expectancy is approximately ten years. As Ms. English was twenty-seven years old when this complaint was filed, Respondent's own statistics indicate that she is likely to have many potentially productive years ahead of her. Whatever the likelihood of future incapacity, Respondent's decision not to hire her was made in a present, at a time when she was unquestionably physically able to work. It is their perception of her at that time which is of concern to us.

We do find that Respondent regarded Ms. English as having a handicap or disability. Our previous determination that morbid obesity is a handicap within the meaning of the Act obviously makes it unnecessary for us to base this decision solely on the secondary finding that Respondent regarded Complainant as handicapped. However, because of our determination that Respondent cannot validly claim surprise at the Commission's propagation of a "regarded as" definition of handicap or disability, we find no unfairness in entry of this secondary finding.

As noted above, our determination that morbid obesity is a handicap or disability within the meaning of the Act must necessarily be followed by an inquiry into the job relatedness of Ms. English's obesity. It is in this context that Respondent's "increased risk" rationale loses its force. While all agreed that Ms. English was more likely than a non-obese person to develop an incapacitating illness, we have already

noted that none of the many physicians who testified could offer any opinion at all as to when or if she might develop such an illness. Faced with similar arguments in a case decided by this Commission last year, we followed a Wisconsin Court's reasoning that indefinite future likelihood of disability cannot justify present discrimination. As the Court stated in Chrysler Outboard Corporation vs. Wisconsin DILHR, 13 EPD 11, 526 (Wis. Cir. 1976):

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

ID at 6884, cited with approval in Masters vs. Duquesne Light, E-10375, decided September 24, 1979; emphasis added.

See also City of Wisconsin Rapids vs. Wisc. DILHR, 15 EPD 7846 (Wisc. Cir. 1977).

We consequently reject Respondent's implicit argument that the risk of future inability to perform justifies, by making job related, a present policy of refusing to hire obese persons. Our inquiry into job-relatedness may therefore end with Respondent's admission that in May of 1977 Ms. English was physically able to perform CSC duties: her handicap was not job related.

One additional argument advanced by Respondent requires brief attention: their contention that obesity should not be

considered a handicap or disability because of its "voluntary", and therefore reversible, nature. This argument must fail, as it did in Masters vs. Duquesne Light, supra.

First, it is clear that Respondent's own weight policy is applied to all obese applicants in the same fashion, whether the origin of the individual problem is a metabolic disorder or simply eating more than one expends. Further, Respondent's general assertion that it attempts to maintain a healthy workforce by eliminating applicants whose "voluntary" behavior may lead to health problems was made questionable by the Medical Director's statement that applicants are not questioned about their consumption of cigarettes, alcohol, or other drugs.

We note also that, as Complainant's Brief urges (at p. 23), the General Assembly in another context has characterized drug and alcohol abuse, also "voluntary" conditions, as disabilities, indicating legislative rejection of the attempted distinction. See 71 P.S. §1690.110.

More fundamentally, the considerations which lead us to determine that morbid obesity is a statutory handicap apply with equal force to all cases, of whatever origin. Mobility and breathing are affected in any case. Ultimately, we are persuaded that the legislature wished to extend the Act's protection to those handicapped persons who are physically willing and able to work, but who are, like Ms. English, nevertheless denied the opportunity to do so. Voluntariness vel non is simply irrelevant.

IV.

REMEDY

Our finding of discriminatory refusal to hire leads necessarily to consideration of appropriate relief.

Section 9 of the Act provides in part:

If upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in ... any unlawful discriminatory practice ... the Commission shall state its findings of fact, and shall issue ... an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to hiring ... with or without back pay ... as, in the judgment of the Commission, will effectuate the purposes of this Act ...

Any complainant entitled to back pay should receive an amount which will restore that person to the economic position in which he or she would have been had it not been for the discriminatory act. The method used to calculate the backpay award need be only reasonable and realistic, not mathematically precise. See Pennsylvania Human Relations Commission vs. Transit Casualty Insurance Company, Pa. Cmwlth. 340 A.2d 624; Pettway vs. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir., 1974).

Pennsylvania law provides for the assessment of interest on a backpay award at the rate of 6%, compounded annually. See Goetz vs. Norristown Area School District, Pa. Cmwlth. 328 A.2d 579 (1975).

The record in this case establishes that in April of 1977, the salary for the Customer Service Clerk position was \$115 weekly, and that this salary was increased by roughly 7.5 per cent in August of each intervening year.

Wherefore, having concluding that Respondent discriminated against Complainant by refusing to hire her, on the basis of her non-job related handicap or disability, we find that she is entitled to be offered the next available position as CSC with Respondent, and to receive backpay with interest as specified in the Order which follows.

RECOMMENDATION OF HEARING PANEL

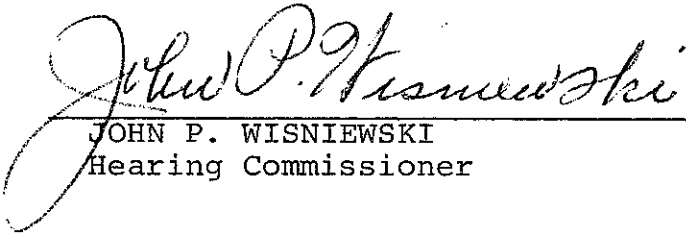
AND NOW, this 24th day of March, 1980, in consideration of the entire record in this matter, including the Complaint, Stipulations, Exhibits, Record of the Hearing, and Briefs filed on behalf of Complainant and Respondent, the Hearing Panel hereby adopts the attached as their proposed Findings of Fact, Conclusions of Law, Opinion and Final Order, and recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: _____

ALVIN ECHOLS, JR., ESQ.
Chairperson

DORIS M. LEADER
Hearing Commissioner



JOHN P. WISNIEWSKI
Hearing Commissioner

PAH
COMMISSIONERS
HEADQUARTERS

Mar 12 1980

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOYCE A. ENGLISH, :
 :
 Complainant :
 :
 :
 :
 vs. : DOCKET NO. E-12163
 :
 :
 PHILADELPHIA ELECTRIC COMPANY, :
 :
 Respondent :

COMMISSION'S DECISION AND
FINAL ORDER

AND NOW, this 31st day of *March*, 1980, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, and therefore

O R D E R S :

1. That Respondent Philadelphia Electric Company cease and desist from discriminating against any handicapped or disabled applicant for employment unless Respondent demonstrates that the handicap or disability substantially interferes with the ability of the individual to perform the essential

functions of the position sought.

2. That Respondent, PECO, pay to Complainant, Joyce A. English, the following sums within thirty days of the date of this Order, by check made payable to Joyce A. English and delivered in care of Benjamin G. Lipman, Esq., Pennsylvania Human Relations Commission, 711 State Office Building, Broad and Spring Garden Street, Philadelphia, Pennsylvania 19130:

(a) back wages of \$115 per week plus 6% interest representing the period of April 26, 1977 to July 31, 1977;

(b) back wages of \$124 per week plus 6% interest representing the period of August 1, 1977 to July 31, 1978;

(c) back wages of \$133 per week plus 6% interest representing the period August 1 1978 to July 31, 1979;

(d) back wages of \$143 per week plus 6% interest representing the period August 1, 1979 to the date of this Order.

4. That Respondent, PECO, offer to Complainant the next available Customer Services Clerk position or a position

that is comparable in terms of salary, promotional opportunities and duties.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: (s)
JOSEPH X. YAFFE, Chairperson

ATTEST:

BY: (s)
ELIZABETH M. SCOTT, Secretary