

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BARBARA KENNEDY, :
Complainant :
v. : Docket No. E-13696
GENERAL TELEPHONE CO., :
Respondent :

COMMISSION'S FINDINGS OF FACT

1. The Complainant herein is Barbara Kennedy, an adult female, who resides at 27 Wyoming Street, Johnstown, Pennsylvania 15905. (Stipulation of Fact (S.F.) #1).
2. The Respondent herein is the General Telephone Company of Pennsylvania, a Pennsylvania corporation, with a business office located at 150 W. Tenth Street, Erie, Pennsylvania 16512. (S.F. #2).
3. The Respondent employs four or more employees within the Commonwealth of Pennsylvania. (S.F. #3)
4. The Complainant on or about January 23, 1978 filed a complaint with the Pennsylvania Human Relations Commission (Commission). (S.F. #4).
5. The Complainant, on or about March 17, 1978, filed a notarized Amended Complaint with the Commission at Docket No. E-13696. (S.F. #5)
6. On April 17, 1978, Commission staff duly served all parties to this action with a copy of the complaint described in Findings of Fact #5 above in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S.F. #6).

7. In correspondence, dated May 1, 1978, the Respondent acknowledged receipt of the above-captioned Amended Complaint. (S.F. #7).

8. The Complainant, on or about March 8, 1979, filed an Amended notarized complaint with the Commission at Docket No. E-13696. (S.F. #8).

9. On March 28, 1979, Commission staff duly served all parties to this action with a copy of the complaint described in Findings of Fact #8 above in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S.F. #9).

10. The Complainant, on or about June 15, 1979, filed a notarized Amended complaint with the Commission at Docket No. E-13696. (S.F. #10).

11. On June 25, 1979 Commission staff fully served all parties to this action with a copy of the complaint described in Finding of Fact #10 above in a manner which satisfies the requisites of 1 Pa. Code 33.32. (S.F. #11).

12. In correspondence, dated January 11, 1979, the Commission notified the Respondent that Probable Cause existed to credit the allegations contained in the complaint of January 23, 1978 as amended in the complaint of March 17, 1978. In correspondence dated April 7, 1981, the Commission notified Respondent that Probable Cause existed to credit the allegations contained in the Amended complaints dated March 8, 1979, and June 15, 1979. (S.F. #12).

13. Subsequent to the determination of Probable Cause the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion but were unable to do so. (S.F. #13)

14. In correspondence, dated February 29, 1980, the Commission notified the Respondent that it had voted to approve a Public Hearing as to the allegations of the complaint dated January 23, 1978 as amended in the complaint of March 17, 1978. In correspondence dated May 5, 1981, the Commission notified the Respondent that it had approved a Public Hearing as to the allegations of the complaint dated January 23, 1978 and all subsequent amendments dated March 17, 1978, March 8, 1979, and June 15, 1979. (S.F. #14).

15. Pursuant to an oral waiver by Respondent's counsel of a three Commissioner hearing panel, a public hearing was convened on June 3, 1981, before Commissioner E. E. Smith.

16. Complainant, Barbara Kennedy, was employed by General Telephone Company for 34 years as of June 3, 1981 and held positions of telephone operator, plant clerk, line and cable assigner, facility assigner and frame maintainer. (Tr. 16-18)

17. All positions which Barbara Kennedy held were considered to be clerical positions. (Tr. 18)

18. On or about December 1, 1977 Respondent posted notice of a job vacancy for a position of facility test analyst. (C's Ex. 4, S.F. 15)

19. A collective bargaining agreement was in existence and the terms of said agreement controlled the selection process for the job opening referenced in No. 18 above (C's Ex. 3)

20. Said collective bargaining agreement provides that in making a selection for a job opening in any department, if more than one employee meets qualifications for the job and their qualifications are substantially the same, seniority will govern. (C's Ex. 3)

21. Complainant bid for the position of facility test analyst and was the most senior employee who bid for and did not withdraw her bid for that position. (Tr. 19, C's Ex. 3)

22. The position of facility test analyst was considered to be a "craft position, rather than a clerical position." (Tr. 17, C's. Ex. 10)

23. In 1976, the year prior to Complainant's first bid on the facility test analyst position, of 1,238 craft positions only 9 were held by women. (C's Ex. 10)

24. In the facility where Complainant worked in Johnstown, one female held a craft position and the other 38 craft positions were filled by men. (C's Ex. 10)

25. Four women (not including Complainant) had successfully bid on the job of facility test analyst, a "craft" position, as of July 1980. (C's Ex. 12)

26. Despite statistics as to number of craft positions filled by men versus those filled by women, no evidence was submitted of record to indicate how many women were unsuccessful bidders on craft positions. (C's Ex. 10, 12)

27. Complainant introduced no statistical evidence that other women unsuccessfully bid on craft jobs and were denied such jobs because of their sex. (C's Ex. 10, 12)

28. The basic duties of a facility test analyst are to receive trouble reports, analyze them, and by use of certain electrical testing equipment, determine to which department the trouble report should be referred for solution. (Tr. 113)

29. The duties of a facility test analyst involve the use of electrical testing equipment and a test board. (Tr. 114)

30. Occasionally, the facility test analyst must work with cable books, which contain information as to the location and capacity of various telephone cables in the service network. (Tr. 118)

31. Complainant had experience with the cable books from her duties as a line and cable assigner. (Tr. 65-66)

32. Experience with the cable books was considered to be helpful in performing the job of facility test analyst. (Tr. 122)

33. Lack of "trouble shooting" or repair experience was a drawback to Rosemarie Baer, a female facility test analyst, in performance of job duties. (Tr. 126)

34. Ms. Baer's lack of experience in the telephone system caused her some difficulties in passing a course in Trouble Training and Analysis, and it was suggested that she take AC-DC Theory. (Tr. 133)

35. In performing the duties of a facility test analyst, outside or "craft" experience such as frame maintenance, repair, cable splicing, communications technician or phone installation would also be helpful. (Tr. 122)

36. Duties of the facility test analyst involve the use of a volt meter to measure Ohmic resistance and voltage drops on the line in order to analyze where a fault might be on the line. (Tr. 157-163)

37. The duties of the facilities test analyst also involve the use of the dynatel and wilcom noise set in addition to the voltmeters and test board equipment, and the analyst must make the proper test and then read the test results to refer the problem to another department for correction. (Tr. 172)

38. Basic courses in electricity and AC-DC Theory are essential to adequate performance of the job of facility test analyst. (Tr. 247-249)

39. A basic overall understanding of the complete telephone network is essential to the performance of the duties of the position of facility test analyst as the analyst is responsible for making an accurate determination of where to route a particular case of trouble. (Tr. 247-249)

40. Familiarity with the cable books is helpful to performance of the job duties of test facility analyst, however, an untrained person can be shown how to read the cable books in a very short period of time. (Tr. 251-252)

41. Thus, experience with cable books is less valuable than experience in outside or "craft" positions. (Tr. 250-252)

42. The telephone company has an interest in the efficient performance of the job of facility test analyst, because a misdiagnosis of a hazzard situation may result in serious injury or death to other employees. (Tr. 256)

43. The telephone company also has an interest in the efficient performance in the duties of facility test analyst because a misdiagnosis will cause repeat calls and wasted trips for the repair persons. (Tr. 329-333)

44. In 1976, the phone company did an internal performance analysis which indicated that one of its most severe problems was repeat repair calls. (R's. Ex. 6) (Tr. 328-344)

45. The performance problem referenced here and above was related to dispatching troubles to the wrong department because of a lack of skill and knowledge on the part of the facility test analysts. (Tr. 330-332)

46. A cost analysis indicated that the telephone company was losing \$2,229,675 in 1973, \$2,100,150 in 1974 and \$2,439,475 in 1975 due to erroneously diagnosed trouble calls. (Tr. 332-333)

47. Respondent's analysis concluded that the facility test analyst were responsible for the problem of misguided trouble reports, as diagnostic errors were made and certain test equipment was not being used by the analyst. (Tr. 333)

48. In order to solve the problem of erroneous trouble diagnosis, the telephone company instituted training classes for trouble testing and analysis. (Tr. 334-335)

49. Knowledge of basic electricity and knowledge of the telephone system were thought to be important to a facility test analyst's ability to analyze troubles correctly. (Tr. 337)

50. In July, 1979, the performance records of persons who held the facility test analyst position indicate that the 8 persons without outside "plant" experience were ranked "very good", and no person ranked "very good" lacked plant experience. Conversely, 19 persons were only ranked "good" including 16 males with plant experience and 3 females. (C's Ex. 11)

51. An analysis of the performance evaluations of persons serving in the job of facility test analyst shows only that lack of knowledge of the outside plant may hinder a person in performance of the duty. (Tr. 429)

52. As of January 23, 1978, 4 women held the facility test analyst: Rosemary Baer since October 24, 1974, Lois Pullo since June 19, 1975, Marie Taylor since October 27, 1974 and Phylis Hess since April 22, 1974. (C's Ex. 12)

53. Phylis Hess, a female facility test analyst who gained the job in 1974, had voluntarily completed on her own time an Electricity I correspondence course prior to obtaining the facility test analyst job. (Tr. 432)

54. Marie Taylor, a facility test analyst in the Erie Division became a test analyst October 27, 1974, but had not taken any courses in basic electrical theory. (Tr. 433)

55. The evaluation for Marie Taylor indicated that her knowledge and skill were fair and that she needed "more knowledge of electrical theory".

56. At the time that Barbara Kennedy applied for the position of facility test analyst in December of 1977, Respondent's qualifications for the successful bidder on the job included knowledge of basic electrical theory and outside or plant experience, which were qualifications validly related to the company's business requirements of accurate analysis of trouble reports. (Tr. 259)

57. The successful bidder for the December 1977 facility test analyst position, Mr. James Golias (male) had superior credentials to those of the other bidders, including Barbara Kennedy. (R's Ex. 2, Tr. 400-404)

58. As the qualifications of Golias and Kennedy were not substantially the same, seniority did not govern the bid. (R's Es. 2, Tr. 263-265)

59. The awarding of the bid to Golias was the result of a bona fide effort to analyze the credentials of all applicants in order to obtain best able and most competent person for the job. (Tr. 265)

60. On January 22, 1979, Respondent posted a notice of a second job opening for the position of facility test analyst. (Tr. 265)

61. On January 29, 1979, the Complainant duly complied with the requirements for submitting a bid for said position. After analysis of the credentials of all the bidders, the above-referenced position was filled by R.J. Hipp, a male. (S.F. 22)

62. An analysis of the credentials of Hipp show him to have taken AC-DC Theory from Heath, and show that Richard Hipp had knowledge of the outside plant received as a cable splicer, frame maintainer, lineman and had previous experience trouble shooting. (Tr. 266-269)

63. The credentials of Richard were superior to those of Barbara Kennedy for the job of facility test analyst. (Tr. 269-270)

64. As credentials were not equivalent, seniority did not control the outcome of the bids for the position. (C's Ex.3)

65. On or about April 14, 1979, Respondent posted a notice of a job opening for a third position of facility test analyst, and on or about that same date Complainant duly submitted a bid for said position in compliance with the Respondent's bidding practices. (S.F. 24, 25)

66. In examining the credentials of persons for the third job of facility test analyst the person with the best credentials was found to be one K. Leap, a male with experience as a cable splicer, plant clerk and lineman who had an elementary correspondence course in DC Theory. (Tr. 270-271)

67. When Mr. Leap rejected the job the next qualified applicant was found to be David Koeck, as he had cable splicing experience from October 1976 and had 3 years as a splicer with AT&T. (Tr. 272-273)

68. The credentials of David Koeck were superior to those of Barbara Kennedy, and thus seniority did not control the awarding of the third position of facility test analyst. (R's Ex. 4, C's Ex. 3)

69. On or about May 7, 1979 Respondent posted a notice of a job vacancy for the position of facility test analyst. (S.F. 28) for which Complainant duly submitted a bid.

70. An examination of the qualifications of the persons for the job of facility test analyst showed that one J. T. Donnly had been a maintainance man, a frame man, a lineman, an installer-repairman and had courses in basic station installation, AC-DC theory, and subscriber carrier maintainance in addition to working three years in TV repair and two years as an electrician. (R's Ex. 5, Tr. 362-366)

71. Mr. Donnely's credentials were superior to those of Barbara Kennedy and therefore the seniority provisions of the collective bargaining agreement did not control the appointment to the position of facility test analyst. (R's Ex. 5, C's Ex. 3)

72. Courses on AC-DC Theory were available from a number of sources, including the Company's, community colleges (Tr. 382) and the Heath Company (Tr. 77) but Barbara Kennedy failed to take any such course from any source at any time. (Tr. 420, 77)

73. At least as early as her unsuccessful bid in December 1977, Barbara Kennedy had reason to know that basic AC-DC electrical theory was a qualification for the job of facility test analyst, since during her interview, Mr. Wilson asked her whether she had any knowledge of it. (Tr. 24, 76)

74. As early as December 1977 it could have been apparent to Complainant that one of the credentials for the position of facility test analyst was prior craft experience, as that credential was referenced in the Hoffman arbitration award. (Tr. 83)

75. Barbara Kennedy made no effort to bid into any craft position other than facility test analyst until October 13, 1979 when she won the job of frame maintainer. (C's Ex. 13)

76. No evidence has been submitted of record to show that females were discouraged from bidding into craft position or were denied the opportunity to work in craft positions. (C's Ex. 10 and 13)

77. Prior to 1970, the collective bargaining agreement in effect denied females the ability to bid into craft positions by giving a preference for such employment to persons already in some craft group. (C's Ex. 1)

78. However, after June 1970, females had the same opportunity to bid into craft positions as males. (C's Ex. 2 and 3)

79. Therefore, the statistics presented by Complainant which show that of 1,378 females only 9 were working in craft positions does not prove to a standard of substantial evidence that lack of women in craft positions was due to discrimination on the part of the company. (C's Ex. 10)

80. Similarly, the fact that 1,923 males were employed as of 1977, of which 1,258 worked in craft positions does not show that females were discriminatorily denied such positions, as approximately 35% of the males working for the company worked in non-craft positions. (C's Ex. 10)

81. The Kimbal study of 1976 indicates that the Respondent had valid reasons related to business necessities for raising the qualifications required of persons bidding for the facility test analyst position. (Tr. 328-344)

82. Based on the performance evaluations of persons holding the job facility test analyst, the company was justified in requiring as a credential for the position courses in basic electric theory and outside of "craft" experience. (C's Ex. 12)

83. While statistics show that fewer females than males hold craft jobs, there is no evidence of record that a refusal to award such craft jobs to females was the result of any practice or procedure which had the effect of dissuading females from bidding on such jobs from 1971 through 1980.

84. Respondent has a valid business interest in only offering on-the-job training courses to employees who have been awarded that job, as the alternative practice of offering such courses to everyone would be cost prohibitive. (Tr. 270, 295, 305-307)

85. Therefore, the fact that Barbara Kennedy was not given an opportunity to obtain on-the-job training is not due to discrimination based on sex, but rather to a valid business necessity of minimizing the cost of such training courses to the company. (Tr. 295)

86. Any employee could become qualified for facility test analyst by taking training courses, night courses or correspondence courses. (Tr. 318)

BY: 

E. E. Smith
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
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PENNSYLVANIA HUMAN RELATIONS COMMISSION

BARBARA KENNEDY, :
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PROPOSED CONCLUSIONS OF LAW

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

2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter, pursuant to Section 9 of the Act, 43 P.S. §959.

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

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

5. For each of 4 jobs, Complainant has proved to a standard of substantial evidence that she is a member of the minority group, "female", that she applied for an available job, and that a male obtained the job which she sought.

6. Complainant's evidence that she was competent to do the job was rebutted by substantial evidence submitted by Respondent that she was not "best able and most competent."

7. The Complainant's burden of proof is to show that Respondent's facially neutral employment practice of requiring "craft experience" had an unlawful discriminatory impact upon women, not justified by business necessity, as set forth in Griggs v. Duke Power Co., 401 U.S. 424, 3 FEP 175.

8. Complainant's burden is to show to a standard of substantial evidence that the facially neutral standard of craft experience (a) is not significantly related to successful job performance; (b) operates to disqualify females at a substantially higher rate than males.

9. The evidence of record shows that the employer has a business necessity for requiring that applicants for the facility test analyst position have outside, or "craft" experience.

10. Complainant has failed to prove by substantial evidence that the requirement of craft experience is not significantly related to successful job performance.

11. Complainant has failed to prove by substantial evidence that the facially neutral requirement of craft experience operated to disqualify females at a substantially higher rate than males.

12. Had Complainant applied for craft positions prior to 1971, and been denied positions because of the bidding system giving incumbent craft workers a preference, she might have claimed that her failure to be awarded the facility test analyst

job was the result of a facially neutral practice which denied to women an equal opportunity for craft positions and perpetuated the effect of past discrimination.

13. However, since Complainant introduced no evidence as to the number of women who unsuccessfully bid on craft positions, due to existence of the preferential bidding system, no logical inference can be drawn as to whether a facially neutral standard of "craft experience" had an unlawful disparate impact upon females.

14. The fact that other females obtained craft positions during the period 1972 through 1980, indicates that not all women were being denied such craft positions.

15. Since Complainant introduced no expert testimony as to the statistical significance of the small number of women holding craft positions, no conclusion can be drawn as to the veracity of the allegation that the preferential bidding system was a facially neutral standard which resulted in a disparate impact on women.

16. Since Complainant introduced no statistical proof as to the number of women who were denied craft positions because of lack of craft experience, no conclusion can be drawn as to whether the lack of craft experience was a facially neutral standard having a disparate impact upon women.

17. Complainant failed to meet her burden of showing that the employer's practice requiring outside or craft experience as one credential for the position of facility test analyst was a pretextual standard not related to job performance.

18. The company proved to a standard of substantial evidence that the craft experience requirement bore a demonstrable relationship to successful performance of the job of facility test analyst.

19. The Complainant's burden of proof to show by statistical evidence that Respondent's hiring practices had a disparate impact on females is those enunciated in Spurlock v. United Airlines, Inc., 475 F. 2d 215, 5 FEP 17 (10th Cir. 1972)

20. Complainant established by statistics only that fewer females held craft positions than males, but never showed how many qualified females in the applicant pool were rejected for jobs in craft positions. Thus, Complainant has failed to establish a prima facie case of sex discrimination using statistics.

21. Respondent has proven to a standard of substantial evidence that in each of 4 instances in which Complainant bid for the job of facility test analyst, she was not the "best able and most competent" person for the job.

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Docket No. E-13696

O P I N I O N

PART I.

Complainant in this case has alleged a violation of §5(a) of the Pennsylvania Human Relations Act in that Respondent allegedly failed to promote her to a job because of her sex, female. Complainant is an employee with 34 years experience within the telephone company. In May of 1976, Complainant applied for a promotion to a job of facility test analyst. Complainant was in competition for the job with other employees, both male and female, but Complainant was the most senior of the bidders. A collective bargaining agreement was in effect which stated that only when qualifications were substantially equal would seniority control who was to win the bid.

Complainant was passed over for the first vacancy for the facility test analyst job in favor of a less senior male who was thought by Respondent to have superior credentials. Complainant subsequently filed three additional bids for positions of facility test analyst. On each of those occasions, a less senior male received the job over the Complainant. The Respondent

employer's position was that the credentials for the job of facility test analyst included outside "craft" experience and knowledge of basic electrical theory. Complainant had no "outside craft" experience and no training in basic electricity, while the males who were promoted by the company had outside craft experience and some knowledge of electricity.

Complainant's case proceeded on a disparate-impact theory: that is, Complainant alleged that the Respondent's requirement of craft experience, although facially neutral, had a disparate impact on females. Complainant argues that few females were given the opportunity to secure craft experience and that therefore the pool of available females with craft experience was minimal compared to males with such experience. Complainant submits evidence of record that as of 1970 the bidding practices for craft jobs required that a person already be within the craft departments in order to seek a craft job. Complainant argues that this bidding method perpetuated a system whereby only incumbents in the craft position could gain craft experience.

The collective bargaining agreement referenced herein above was, however, changed by the Respondent so as to eliminate the preference for incumbents in craft position bids. Complainant does not allege that during the period 1970 through 1976 she attempted to bid into a craft position and was denied the craft position due to the bidding preference system then in operation. Rather, Complainant's case focuses upon the credentials held by the males who were the eventual winners of the promotions. At no time did either the Complainant or the Respondent submit evidence of record as to how many females

bid for craft jobs but were refused the jobs because of the bidding preference in the collective bargaining agreement. It is therefore impossible to draw a conclusion as to how many females were unlawfully denied craft jobs. Indeed, the only evidence of record is that 4 females (other than the Complainant) who bid for the position of facility test analyst were successful bidders. Therefore, the focus of Complainant's case turns away from a statistical analysis of whether the craft requirement had an unlawful disparate impact upon females and turns to an analysis of the Complainant's credentials versus those of the successful males who received the facility test analyst job.

The burden upon the Complainant is that which has been elucidated in McDonnell-Douglas Corp. v. Greene, 411 U.S. 792 93 S.Ct. 1817, 36 L.Ed. 2d 68 (1973). Under Greene, Complainant's responsibility is to set forth a prima facie case of discrimination by establishing: (a) that she is a member of a protected minority, females, (b) that she applied for a job for which she was qualified, (c) that her application was rejected, (d) and that that employer sought other applicants of equal qualification.

If the Complainant establishes all the elements, the burden then shifts to the employer to justify the employee selections on the basis of job related criteria necessary for the safety and efficiency of the enterprise. In the case at bar, Complainant clearly is a member of a protected group and submitted evidence of record that she applied for 4 jobs for which

she believed herself to be qualified. Complainant submitted evidence of record that her qualifications for the job of facility test analyst included her experience within the telephone system and more particularly her knowledge of the "cable books".

Complainant claims that her knowledge of the cable books is a credential which suits her for employ as a facility test analyst. Assuming this to be so, Complainant nevertheless was rejected for each of the 4 positions for which she applied. Complainant therefore has sustained her burden under McDonnell-Douglas of proving a prima facia case of employment discrimination.

The crux of this case, however, is the selection criteria whereby Respondent filled the jobs of facility test analyst. Complainant claims that the selection criteria, although facially neutral, have a disparate impact on women. Respondent claims that the selection criteria, "knowledge of electrical theory" and "craft experience" are job-related criteria necessary for efficient and safe performance of the job. We turn then to an examination of the evidence of record with respect to the job-relatedness of those criteria.

The shifting of the burden of proof to the Respondent to justify its employee selections upon the basis of job related criteria is that enunciated by the Pa. Supreme Court in General Electric Corp. v. Cmwlth. Human Relations Commission, 469 Pa. 292 365 A. 2d 649 (1976). In General Electric, the female complainants alleged that they were denied the opportunity to transfer into available jobs because of their sex, female

while similarly situated and equally qualified males were transferred. In General Electric, the Supreme Court set forth the burden of the Complainants to establish a prima facie case under McDonnell-Douglas v. Greene. Then, states the Court, "the burden then shifts to the employer to justify his employee selections on the basis of job related criteria which are necessary for the safety and efficiency of the enterprise." General Electric, 365 A. 2d at 655-656. Under General Electric the Respondent now has the burden of proving that each of the selection criteria is a job related criteria and that the male employees who were chosen were better qualified than the Complainant.

There is conflicting evidence of record as to the requirement of the outside craft position. The Complainant and her witnesses indicated a belief that outside craft experience could be equivalent to certain inside experience, such as that which Complainant had by examination of the cable books in her job as cable assigner. Complainant's witness, a female test analyst, indicated that she believed that the inside experience was the equivalent of outside craft experience for purposes of doing the job of facility test analyst. Respondent's witnesses, however, including two incumbent facility test analysts and the supervisor of those positions, indicated that outside or craft experience was essential to adequate performance of the job of facility test analyst, while the cable book knowledge could be easily gained without experience. Respondent presented overwhelming evidence as to the relevance of outside craft experience

to performance of the job of facility test analyst.

A review of the performance evaluations of facility test analysts showed that not one test analyst without craft experience was rated very good, although test analysts with and without such experience could be rated "good". Therefore, Respondent may have a valid reason for requiring craft experience as a credential for the job of facility test analyst, as persons with such experience sometimes perform better. Although there is no absolute predictability that one with outside craft experience will be a "very good" facility test analyst, logic dictates that the knowledge of telephone system operations obtained by outside craft experience would be extremely helpful in the performance of a job involving diagnosis of problems in the telephone network.

Therefore, this Commission cannot say that the craft experience requirement is a frivolous one not related to business necessities of the employer. Rather, craft experience appears to be a logical prerequisite for a job involving diagnosis of problems within the telephone company. Respondent submitted much evidence of record that craft experience was very helpful if not essential in an analyst's ability to pinpoint the site of trouble within the phone system. Respondent's witnesses give numerous examples of how their own outside craft experience had saved the company much time and money in their ability to diagnose where within the phone system a trouble was originating. As this is the essential function of the facility test analyst, it appears to the Commission that a requirement of outside craft experience is indeed a job related criteria necessary for the

safety and efficiency of the enterprise.

We now examine Respondent's additional requirement, a knowledge of electrical theory. Although it is true that not all of the incumbent facility test analysts had electrical theory, evidence was submitted by the Respondent that a knowledge of electrical theory was very helpful in attempting to diagnosis faults within the telephone system. It was apparent from the testimony of incumbent facility test analysts that those who understood basic electrical theory were much better able to explain to the Commission how one would diagnosis faults. Indeed, Complainant's one witness who was a facility test analyst indicated that her lack of knowledge of basic electricity contributed to great difficulties that she had in passing a trouble shooting school conducted on the job by Respondent. Conversely, those facility test analysts who had extensive knowledge of basic electricity seemed better able to explain to the Commission the nature of the diagnostic tests required of them in their positions of facility test analyst. Here again, it stands to reason that knowledge of basic electricity would be very helpful to one whose job function involved the measurement of various electrical voltages and resistances across the telephone system. A knowledge of basic electricity, it would seem, would be fundamental to the performance of the job of facility test analyst, as the company made efforts to give courses in basis electrical theory once one had the job.

Respondent thus has shown to a standard of substantial evidence that its employee selection criteria are job related criteria necessary for the safe and efficient performance of its enterprise. Assuming then, that the selection criteria are valid, we now examine Complainant's credentials versus those of the males selected for the jobs for which she had applied.

Complainant had no outside craft experience at the time that she initially bid for the facility test analyst position in 1977. Complainant also had no knowledge of electricity, and had never taken any course in electrical theory.^{1/} Complainant competed for each of the facility test analyst jobs with males who had extensive outside craft experience and knowledge of basic electricity. For each of the four positions for which Complainant applied, the Company produced documents indicating that its supervisors had made bona fide analysis of the relative credentials of all applicants before determining to whom the job should be awarded. An analysis of the Complainant's credentials versus those of the successful male bidder show that in each of the four instances the Respondent had valid reasons for selecting the male over the Complainant. In that

^{1/} It is of interest to note that several successful bidders for the facility test analyst position had acquired knowledge of electrical theory by attending courses at the community college on their own time or by taking correspondence courses in electrical theory. Presumably, these opportunities were also available to the Complainant.

respect, the Respondent has met its burden of proof of demonstrating that Complainant was not the best able and most competent person to perform the services required.

It may be useful at this time to set forth the Commission's conclusions with regard to this case: Under McDonnell-Douglas, the plaintiff has demonstrated a prima facie case of discrimination. The defendant is then called upon to articulate legitimate non-discriminatory reasons for its action. Under General Electric v. PHRC, the burden is on the employer to show that Complainant was not best able and most competent to perform the services desired. We believe that the Respondent has successfully shown that the Complainant was not the best able and most competent in any of the 4 promotion decisions at issue. Lastly, Complainant is afforded an opportunity to show that the proffered reasons were, in fact, pretextual and were not validly job related. Complainant has offered no evidence to show that the reasons advanced by Respondent were mere pretext. Documents constructed by Respondent's personnel contemporaneous to the employee selection decisions indicate that Respondent's personnel attempted to make a bona fide analysis of each employee's credentials prior to filling the job.

We now turn to an examination of the Plaintiff's claim that the Company's use of a craft experience requirement had a disparate impact upon females. The level of proof required in Griggs v. Duke Power Co., continues as the backbone for any analysis of such requirements. The one unresolved question raised by Griggs is that of the level of statistical proof required. The standard test used by the courts has been the

"80% Rule" or "Rule of 4/5ths". The 80% Rule attempts to determine exactly when the adverse impact on a protected group is significant enough to warrant legal finding of discrimination. We note that the 80% Rule is that which was jointly adopted by the Justice and Labor department, the Civil Service Commission and the EEOC under the Uniform Guidelines on Employee Selection Procedures, effective September 25, 1978, as contained in 43 Fed. Reg. 38290. These guidelines articulate methods of employee selection procedures based upon court decisions and practical experience of the contributing agencies. The "80% Rule" is the standard adopted under those guidelines to determine when the adverse impact is significant enough to warrant intervention in the employers selection practices. When a minority group's selection rate is less than 80% of the majority groups, a statistically significant adverse impact is said to exist. See §§ 4-D and 16-R, 43 Fed. Reg. 38297-98.

The issue then is whether Complainant has met the 80% test with respect to her claim that craft experience is a neutral standard which has unlawful adverse impact upon females as a whole. Using the Rule of 4/5ths, the question becomes one of whether the

success rate for females bidding into the craft jobs is statistically significant compared to that of the successful males. 2/

As there are no Pennsylvania cases directly on point with respect to the degree of adverse impact required, it is of interest to note the standards applied by other courts in the adverse-impact cases. The 80% Rule has been adopted in Jackson v. Nassau County Civil Service Commission, 424 F. Supp 1162, 14 FEP 775 (E. Dist. N.Y. 1976) in which a pass rate for minorities of 83% of that whites was not held to be statistically significant. Compare with Endsly Branch of the NAACP v. Seibels, 14 FEP 670 (N.D. Ala. 1977) where 6.6% of black applicants for police jobs were hired as compared with 23.3% of white applicants, a significant difference. In Harless v. Duck, 14 FEP 1616 (N.D. Ohio, 1977) 58.8% of women but only 4.5% of men failed the agility portion of a police department entrance examination, which was significant.

2/ It is to be noted that the 80% Rule is a rule of thumb. A smaller difference in selection rate may nevertheless constitute adverse impact where such differences are significant in both statistical and practical terms, or where an employer's actions discourage applicants disproportionately on grounds of race or sex. The uniform guidelines recognized that selection ratios that meet the 80% Rule nevertheless may not constitute adverse impact if they are the product of small numbers lacking statistical significance. For example, if only 1% of the protected groups applicants were hired there may be adverse impact under the 80% Rule, but when the sample populations are extremely small, sometimes no conclusions can be drawn. For a more detailed analysis of the use of the 80% Rule in cases where in the statistical figures are borderline see Shoben, Differential Pass/Fail Rates in Employment Testing: Statistical Proof under Title VII, Harv. L. Rev. 793 (1978).

Thus, it appears that at the very minimum, the Complainant's statistical case must involve an analysis of the percentage of females who applied for and were (without good cause) denied a craft position (such as facility test analyst) compared to the number of male applicants who applied for the position but were denied the position. At the outset, we confront the problem in that the statistics which Complainant has placed on the record appear to be incomplete. The only statistic of record indicates that Complainant herself was denied a particular job four times. There are no statistics of record to indicate how many females in the company applied for a craft position but were denied the position. Similarly, no statistics are of record by which it can be shown how many males applied for a craft position and were rejected. Thus, it is impossible for the Commission to compare the success rates of female applicants for craft positions with that of males for similar positions, for no statistical evidence addressing these issues was ever presented by either party.

On the other hand, Respondent produced evidence that 4 other females applied for the facility test analyst craft position and were successful in their bids. Extending this to the Complainant's case, the only evidence of record thus is that 5 females applied for the facility test analyst job, ^{and} 4 were successful in obtaining the job (while Complainant was not.) It appears at the outset that the inadequacy of the statistics presented to the Commission render it impossible for this

Commission to make a determination as to whether the craft requirement has a substantial adverse impact, in violation of the Pa. Human Relations Act.

Courts have been loathe to make a finding based on when the statistical population from which the figures are drawn is too small to be sufficiently reliable. See, e.g., Friend v. Leidinger, 446 F. Supp, 361 (E.D. Va. 1977) wherein 24 blacks took a test for firemen over a ten year period and 53.56% of them passed as compared to 57.96% whites, and Dendy v. Wash. Hospital Center, 431 F. Supp. 873, 14 FEP 1773 (D.C. 1977) wherein a statistical comparison of pass rates for a promotion test based upon a small sample of 35 employees was held to be legally insufficient upon which to base a finding discrimination.

Thus, even had Complainant presented data as to how many males had unsuccessfully applied for craft positions, it may have been that those statistics were insufficient to allow a fact finder to reach a conclusion as to discriminatory impact. See e.g., Lewis v. Bethlehem Steel Corp., 440 F. Supp 949, 16 EPD 8092 (D. Md. 1977) holding that where only 2 of 7 blacks as compared to 24 of 61 whites passed a test, the differing percentages were not sufficient enough to be conclusive on the issue of discriminatory impact. From the statistical information presented at bar, the Commission can only conclude that of the total craft positions, 65% are held by men and the remaining 35% by women.^{3/} If those are the statistics it then becomes necessary to question what the promotion, pass rate was for women applying for craft jobs versus

^{3/} These figures are derived from C's Ex. 10. The EEO-1 report, which breaks down gender of those holding craft positions.

that of men applying for craft jobs. It is the Complainant's burden to adduce sufficient proof of discrimination using statistics to prove that the craft experience requirement had an adverse impact upon females. This burden has not been met, and the Commission has no choice but to rule that Respondent's selection criteria for the craft positions do not appear to have an adverse and discriminatory impact upon females as a group.

We note that the burden is at all times on the Complainant to prove through substantial evidence a violation of the Human Relations Act. Although the Respondent presented no statistical evidence on the issue of adverse impact, the Commission may not utilize Respondent's failure to present other statistics as the basis for determining that a violation of the Act has taken. J. Howard Brant, Inc. v. Cmwlth. of Pa. Human Relations Commission, 15 Pa. Cmwlth. 123, 324 A. 2d 840 (1974). Thus, it is not Respondent's burden to justify its statistics as to the number of females hired into craft positions as compared to the hiring rates for males until Complainant had proved a prima facie case of adverse impact. As Complainant failed to use statistics to prove to a standard of substantial evidence that the craft experience requirement adversely impacted upon females being hired, there is no shifting of the burden to the respondent to further validate the craft experience requirement.

PART II.

CONCLUSION

The Commission finds that Complainant met her initial burden of proof under McDonnell-Douglas: to prove a standard of substantial evidence that Respondent's failure to promote her was based on her sex. The burden of proof then shifted to Respondent to show that Complainant was not the best able and most competent person for the job. In each of the 4 hiring instances, Respondent proved to a standard of substantial evidence that the successful male bidders had far more impressive job-related credentials than Complainant. Complainant then had an opportunity to show either that the credentials advanced by Respondent were not bona fide and were merely pretextual, or that use of the craft experience credential was unlawful as it had an adverse impact on females.

Complainant failed to meet her burden of demonstrating either "pretext" or "adverse impact." Respondent's evidence demonstrated that the craft credentials requirement was a good faith one, reasonably job related. Complainant failed to adduce sufficient statistical information upon which a conclusion could be drawn as to whether the craft experience requirement had an impermissible adverse impact on females.

This is not to say that Respondent's practice (formerly in effect in 1970) of allowing only incumbents to bid on craft positions is legally permissible. Rather it may well be that such a practice perpetuates the effects of past discrimination in that

few women are incumbents in a craft position so as to be able to bid on other craft jobs. But in the absence of convincing proof that restrictive bidding practices resulted ⁱⁿ few women holding craft positions, no conclusions about the bidding system may be drawn.

RECOMMENDATION OF HEARING COMMISSIONER

After due consideration of the transcripts and briefs filed in this matter, the Hearing Commissioner recommends to the full Commission that:

1. The Complaint be dismissed with prejudice.
2. The Findings of Fact and Conclusions of Law submitted herewith be adopted.

BY: 

E. E. Smith
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BARBARA KENNEDY,
Complainant

v.

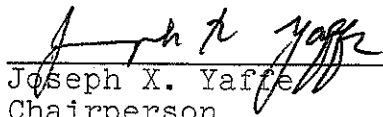
GENERAL TELEPHONE CO.,
Respondent

Docket No. E-13696

RECOMMENDATION TO THE
FULL COMMISSION


AND NOW, to wit this 18th day of September, 1981, it
is hereby O R D E R E D that the Complaints in the above-
captioned matters be and are hereby dismissed with prejudice.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Joseph X. Yaffe
Chairperson

ATTEST:


Elizabeth M. Scott