

COMMONWEALTH OF PENNSYLVANIA

EXECUTIVE OFFICES

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD E. LAW, II,	:	
	:	
Complainant	:	
	:	
v.	:	DOCKET NO. E-16935
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF TRANSPORTATION,	:	
	:	
Respondent	:	

STIPULATIONS OF FACT

1. The Complainant is Richard E. Law, II, an adult male, who resides at 3110 Belmont Avenue, West Lawn, Pennsylvania 19609.

2. The Respondent is the Commonwealth of Pennsylvania, Department of Transportation, with its principal offices at 1200 Transportation and Safety Building, Harrisburg, Pennsylvania 17120.

3. The Complainant, on or about October 30, 1979, filed a notarized complaint with the Pennsylvania Human Relations Commission (Commission) at Docket No. E-16935. A copy of the

formal complaint is attached hereto as Appendix "A" and is incorporated by reference herein as if fully set forth.

4. On November 7, 1979, the Commission staff duly served all parties to this action with a copy of the Complaint described in paragraph three (3) above in a manner which satisfies the requisites of 1 Pa. Code 33.32. A copy of the certificate of service is attached hereto as Appendix "B" and is incorporated by reference herein as if fully set forth.

5. On April 15, 1982, the Commission found that Probable Cause existed to credit the allegations contained in the above-captioned complaint. Respondent was duly notified of the Commission's finding in a letter dated April 19, 1982.

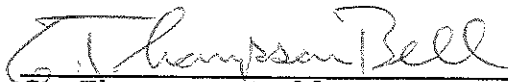
6. Subsequent to the determination of probably cause, the Commission attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion but was unable to do so.

7. On or about October 10, 1974, Complainant was hired by Respondent.


8. On or about September 21, 1979, an opening for the position of Storekeeper II, Maintenance Department, was posted by Respondent.

9. On or about October 5, 1979, Complainant bid for the Storekeeper II position.

The Stipulations of Fact, together with all appendices, the witness list and stipulated exhibits of each party will be incorporated into a Pre-Hearing Order which will become a part of the official record of this case and will be incorporated into the transcript prepared during the course of any subsequent public hearing held in this matter.



G. Thompson Bell
Counsel for Complainant



Michael J. McCaney, Jr.
Counsel for Respondent

4. In 1979, Complainant again injured his back and was placed on permanent light duty by a Dr. Holm through the Bureau of Vocational Rehabilitation. At that time, Complainant was working as an Equipment Operator II. (N.T. 20, 21)

5. After his second back injury, Complainant was assigned to telephone duty until March or April of 1979. (N.T. 22)

6. In March or April of 1979, Complainant was again reassigned. He worked four hours daily in the Berks County Maintenance Department Storeroom. For the rest of the day he worked in the Maintenance Department Garage. (N.T. 22)

7. Complainant was terminated in October of 1979. (N.T. 22, 23; C.E. 7)

8. While working in the Storeroom, Complainant assisted Mr. Sausser who was in charge of the Storeroom. (N.T. 23)

9. Complainant's bid for the Storekeeper II position was rejected. (N.T. 35, 36)

10. Complainant was examined by an orthopedic specialist, Stephen Latman, M.D., on September 27, 1977. Dr. Latman at that time diagnosed arthritis of the lower spine. (D. 4, 5)

11. Dr. Latman examined Complainant on November 8, 1979, and again in January of 1980. On each of these occasions Dr. Latman diagnosed degenerative joint disease of the lumbosacral spine and recurrent back strain. (D. 6, 9)

12. Dr. Latman advised Complainant in 1977 to lift no more than twenty-five pounds (D.5)

13. In November of 1979, Dr. Latman again advised Complainant to lift no more than twenty-five pounds; in addition Mr. Law was told not to operate heavy equipment and to avoid exposure to cold and damp environments. (D. 7)

14. Complainant was seen by a general practitioner, Dr. Longenecker, on the date of his termination, and was advised to avoid heavy labor. (N.T. 37)

15. Throughout 1979, Complainant was unable to perform Equipment Operator II duties because of his back condition. (N.T. 20, 21)

16. Complainant became familiar with the operation of the Storeroom between April and October of 1979. (N.T. 23, 24, 35)

17. Complainant worked in the storeroom by himself in Mr. Sausser's absence. (N.T. 23)

18. Complainant performed his duties in the Storeroom satisfactorily; he improved the inventory system then in use. (C.E. 2, 6; N.T. 82)

19. Complainant had marketing and merchandising courses in high school. (N.T. 35)

20. Prior to his employment with Respondent, Complainant gained experience with inventory and record-keeping systems while assisting in his father's business. (N.T. 35)

21. Complainant received positive recommendations for the Storekeeper II position from three of his superiors: Mr. Sausser, Mr. Wagner, who supervised the garage when Complainant worked there, and Mr. Schnable, former county maintenance manager. (C.E. 2, 6)

22. Complainant was qualified for the Storekeeper II position. (N.T. 23, 24, 35, 82; C.E. 2, 6)

23. The Storekeeper II position in 1979 did not require heavy lifting: Mr. Sausser himself did not perform heavy lifting. Numerous people were available to assist when heavy lifting was required. (N.T. 27, 28, 54, 55, 56, 79, 84)

24. A large portion of the Storekeeper II duties are administrative. (N.T. 91; C.E. 3)

25. Respondent did not promote Mr. Law to the position of Storekeeper II because it was believed that he was unable to perform the job because of his disability. (N.T. 36, 124, 161-163)

26. In October of 1979, Mr. Law was physically able to perform the duties of Storekeeper II. (N.T. 27, 28, 54, 55, 56, 79, 84)

27. Mr. Sammak had no direct experience with the Berks County Maintenance Department Storeroom until after Complainant's bid for the Storekeeper II position had been rejected. (N.T. 151, 152)

28. Following his termination Mr. Law was reinstated with back pay and benefits. Back pay was not awarded for a two-week suspension period. The award of back pay was for Equipment Operator II, a lower pay grade than Storekeeper II. (N.T. 216-217; R.E. 5)

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act, 43 P.S. §§ 951 et seq. ("Act").
2. Respondent is an employer within the meaning of the Act.
3. The Pennsylvania Human Relations Commission ("Commission") has jurisdiction over the parties and subject matter of this case.
4. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
5. Laches as an equitable defense must be proven by the party asserting it. Respondent has failed to do so in that it has proven neither that there was unreasonable delay in bringing this case to hearing nor that its defense was prejudiced by any delay which did occur.
6. Respondent has not established that it was denied due process by the manner in which the public hearing in this matter was conducted.
7. Complainant has the initial burden of establishing a prima facie case of discrimination.
8. Complainant has met his burden by proving that:
 - a. at the time of the challenged employment decision he was a member of a protected class;

- b. he applied for a position for which he was qualified;
- c. his application for the position was rejected; and
- d. the employer continued to search for applicants of equal qualifications.

9. Complainant at the time of his application for the Storekeeper position was a handicapped or disabled person within the meaning of the Act and pertinent regulations.

10. Complainant at the time of his application for the Storekeeper position had a physical condition, degenerative joint disease of the lumbosacral spine and recurrent back strain, which substantially interfered with the major life activity of working. He also at that time had a record of having such an impairment.

11. Once Complainant establishes a prima facie case, the burden shifts to Respondent to prove that it did not violate the Act. In this case it could do so by proving, inter alia, that Complainant's handicap was job related.

12. Respondent has failed to establish that Complainant's handicap was job related.

13. Respondent refused to promote Complainant to the position of Storekeeper II because of Complainant's non-job related handicap or disability.

14. After a finding of discrimination the Commission may award relief which includes wages lost as a result of the unlawful conduct, plus interest at the rate authorized by law.

O P I N I O N

This case arises on a complaint filed by Richard E. Law, II ("Complainant") against the Commonwealth of Pennsylvania, Department of Transportation ("Respondent") with the Pennsylvania Human Relations Commission ("Commission") on or about October 30, 1979, at Docket No. E-16935. Complainant alleged that Respondent refused to promote him to the position of Storekeeper II and terminated him, on the basis of his handicap or disability, back injury, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§ 951 et seq. ("Act"). Commission staff investigated the matter and found probable cause to credit the allegations of the complaint. When attempts at conciliation were unsuccessful, the case was approved for public hearing.

Prior to the hearing, counsel for the parties executed Stipulations of Fact. These Stipulations have been incorporated into the foregoing Findings of Fact. It was also agreed prior to the hearing that the case would be presented before Commissioner Doris M. Leader, Chairperson of the designated hearing panel, sitting alone, on condition that the other two designated panel members, Commissioners Rita Clark and Thomas L. McGill, Jr., Esquire, would review the complete hearing record prior to entering a recommended decision for action by the full Commission. This procedure was followed, and the case was presented before Commissioner

Leader on November 8, 1982 and January 10, 1983, in Harrisburg, Pennsylvania.

Upon motion of Complainant's counsel, Commissioner Leader ordered that the record of the public hearing should remain open after November 8, 1982, for the purpose of admitting to the record the deposition of Complainant's expert witness, Dr. Stephen Latman. Counsel for Respondent objected to presenting evidence until this deposition had been taken and made part of the record. Consequently the hearing was recessed on November 8, 1982 after testimony by seven of Complainant's witnesses. Dr. Latman was deposed on November 12, 1982. The public hearing was reconvened on January 10, 1983, at which time Dr. Latman's deposition was admitted to the record. Complainant then rested, and Respondent presented witness and exhibits.

Respondent argues in its posthearing brief that this procedure denied it due process. This argument is interwoven with a more general assertion that the case should be dismissed because of laches. The issue of laches will be considered below. On the more limited issue of prejudice caused by leaving the record open, Respondent points only to the administrative inconvenience incurred; the rest of its objections go to prejudice it would have suffered had it presented its case prior to completion of Complainant's case-in-chief. This of course did not occur. Respondent had approximately two months after Dr. Latman's deposition was taken to further prepare or supplement its case. We find no denial of due process.

Nor do we agree that the case must be dismissed because of laches. Laches as an affirmative defense must be proven by the party asserting it. Both unreasonable delay in instituting a suit and prejudice in defending the suit as a result of that delay must be established. Siegel v. Engstrom, 427 Pa. 381, 235 A.2d 365 (1967); In re Marushak's Estate, 448 Pa. 605, 413 A.2d 649 (1980). Mere passage of time does not amount to prejudice; Respondent must clearly prove that its ability to establish a defense has been substantially impaired. SEE: EEOC v. Westinghouse Electric Corporation, 592 F.2d 484 (8th Cir. 1979).

Respondent correctly asserts that the public hearing in this case took place more than three years after the complaint was filed. We find that this length of time does not constitute an unreasonable delay. SEE: Pennsylvania Human Relations Commission v. Beaver Valley Geriatric Center, C.A. 240 - 1982, Opinion filed July 2, 1982 (Beaver Co. C.P. 1982), upholding against a claim of laches a Commission investigative subpoena issued more than three years after the filing of a complaint.

Nor do we credit Respondent's assertion of prejudice resulting from the passage of time. In this vein, it is argued that Respondent, not having budgeted back wages for Mr. Law, would be prejudiced by having to pay them. No authority is cited for this proposition and we reject it based on the Legislature's clear indication that we are empowered to award backpay following a finding of discrimination. 43 P.S. §959. Nor are we persuaded by Respondent's

argument that it was prejudiced by the diminution of memory experienced by two of Complainant's witnesses. Far from prejudicing Respondent, memory loss by Complainant's witnesses afforded it an opportunity to argue that we should give reduced weight to their testimony. Respondent's defense was vigorous, and we find that it was in no way prejudiced by the passage of time. We turn therefore to the merits of Mr. Law's claim.

Complainant in this case bears the initial burden of proof. Philadelphia Electric Company v. Pennsylvania Human Relations Commission and Joyce English, Pa. Cmwlth. 448 A.2d 701 (1982). He may meet this burden by establishing that: he was a member of a protected class at the time of the challenged employment decision, that he applied for a position for which he was qualified, and that the employer rejected his application and continued to seek applicants of equal qualifications. If Complainant establishes these elements, the burden shifts to Respondent to show that its conduct did not violate the Act. Philadelphia Electric Company, supra; Pennsylvania State Police v. Pennsylvania Human Relations and Phyllis Sweeting, Pa. Cmwlth. 457 A.2d 584, 1982.

Complainant was hired by Respondent in 1974 as a laborer. He was subsequently promoted to the position of Equipment Operator I; in this capacity he drove a truck and continued to perform laborer's tasks such as working with a jackhammer and pick and shovel. In 1976, while working as an Equipment Operator I, Complainant injured his back. He was placed on light duty restriction, and for a time avoided heavy lifting

and being "jarred around."

In 1979 Complainant again injured his back. He had been promoted to the position of Equipment Operator II, but following the injury was unable to perform Equipment Operator duties and was placed on permanent light duty. He performed telephone duty until March or April of 1979, when he was again reassigned. Until his termination in October of 1979, Mr. Law worked at Respondent's Berks County facility. Half of each workday there was spent assisting the storekeeper in the storeroom, the other half dispensing oil and gas in the facility's garage.

On September 21, 1979, Respondent posted an opening for the position of Storekeeper II, Maintenance Department of Berks County. Mr Law had been assisting the holder of the position, who was about to retire. Mr. Law submitted a timely bid for the position, which was rejected. Shortly thereafter Respondent terminated him, indicating that a permanent light duty assignment was not available.

Throughout this period, Mr. Law received medical attention on several occasions. He was examined by Stephen Latman, M.D., an orthopedic specialist, on September 27, 1977, November 8, 1979, and again in January of 1980. In 1977, Dr. Latman diagnosed arthritis of the lower spine. In 1979 and 1980, Dr. Latman diagnosed degenerative joint disease of the lumbosacral spine and recurrent back strain. As previously noted, Complainant was placed on light duty restriction in 1979 by Dr. Holm. On the date of his termination, Mr. Law was examined by Dr. Longenecker, a

general practitioner. In each instance he was advised to avoid heavy labor. Dr. Latman consistently advised him to lift no more than twenty-five pounds. In November of 1979, Latman also told Complainant not to operate heavy equipment.

The threshold question in this case is whether Complainant suffered a handicap or disability within the meaning of the Act and relevant regulations in October of 1979. The Act does not define "handicap or disability". Commission regulations promulgated prior to the filing of this case define a handicapped or disabled individual as one who:

- (A) has a physical or mental impairment which substantially limits one or more major life activities;
- (B) has a record of such an impairment;
or
- (C) is regarded as having such an impairment.

16 Pa. Code 44.4(d)(i)

Part (A) and (C) of this definition have been upheld by Commonwealth Court in English, supra, and Sweeting, supra.

Additional pertinent regulations include:

- (A) physical or mental impairment - 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 speech organs; cardiovascular; reproductive; digestive; genitourinary; hemis and lymphatic; skin and endocrine, or mental or psychological disorder, such as mental illness, and specific learning disabilities.
- (B) major life activities - functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

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

16 Pa. Code 44.4(d)(ii)

We find that Mr. Law was handicapped or disabled within the meaning of these regulations throughout 1979. His back condition was a chronic disorder affecting his musculoskeletal system which made him unable to perform Equipment Operator duties, interfering with the major life activity of working. Indeed, Respondent in 1979 had placed Mr. Law on permanent light duty restriction. The events of 1976 show that Complainant also had a record of having a physical impairment which substantially limited his ability to work. As noted, he was placed on temporary light duty restriction following a back injury sustained during that year.

It is not disputed that Mr. Law applied for and did not receive the Storekeeper position. The parties vigorously dispute his qualifications for the position.

Mr. Law testified credibly¹ about his qualifications, which most significantly included actual experience in the

Storeroom between April and October of 1979, when he assisted the Storekeeper. Complainant also had relevant educational experience in the form of marketing and merchandising courses. Prior to his employment with Respondent, he had assisted in keeping inventory records in his father's business.

Complainant's witness Scott Schnable, who supervised Mr. Sausser until July of 1979, testified credibly that Complainant performed competently in the Storeroom as Mr. Sausser's assistant and improved the inventory system then in use. Both Mr. Sausser and Mr. Schnable recommended Mr. Law for the Storekeeper position when it became vacant. An additional recommendation came from Harold Wagner, who had supervised Complainant's work in the garage in 1979.

We find that Complainant was well qualified for the position. Complainant has established a prima facie case, and we must consider Respondent's explanation of its decision.

Respondent's argument that Mr. Law was not handicapped need not be reconsidered in light of our finding that he was. It is also argued that he was not qualified for the position, and that, if handicapped, his handicap was job related.

The Act defines "non-job related handicap or disability" in relevant part as "any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for...". The burden of proving job relatedness is on the employer. National Railroad Passenger Corporation (AMTRAK) v. Pennsylvania Human Relations Commission, Pa. Cmwlth. 452 A.2d 301 (1982). Respondent has failed

to carry this burden.

Extensive testimony addressed the physical requirements of the Storekeeper's job. Respondent's witnesses, none of whom had personal familiarity with conditions in the Berks County Storeroom in October of 1979, all indicated that regular lifting of heavy objects is required. We find more credible the testimony of Complainant's witnesses, based on personal knowledge, that the position in 1979 did not involve lifting heavy objects. Consistently the testimony showed that Mr. Sausser did not perform heavy lifting, and that numerous people in addition to the yardman and an assistant were readily available to assist when heavy lifting was necessary.

Further, we credit Mr. Schnable's testimony that a considerable portion of the Storekeeper's duties involved administrative work, namely inventory control. The job description for Storekeeper II under the heading "Required Knowledges, Skills, and Abilities", mentions solely knowledge and ability relating to administrative functions. No reference is made to physical strength or ability to regularly lift heavy objects.

The sole Respondent witness with knowledge of the Berks County facility at the relevant time, Douglas Sammak, did not discuss Complainant's rejection in terms of the physical requirements of the Storekeeper's position. He testified that he did not hire Complainant because he felt Mr. Law lacked initiative and ambition, and indicated dissatisfaction with the condition of the Storeroom under Mr.

Sausser. However, he also indicated that his first "real" experience with the Storeroom inventory took place after Mr. Sausser's retirement and after a brief period when an acting Storekeeper had been in charge, well after the decision to reject Complainant.

We decline to credit this testimony about Mr. Law's lack of initiative in light of testimony from an arbitration hearing in 1980 involving this matter which was read into the record and included an unequivocal statement by Mr. Sammak that he felt Mr. Law was physically incapable of performing the Storekeeper's duties. Mr. Law himself testified credibly that Mr. Sammak made such a statement to him at the time of his unsuccessful bid. And Complainant's witness Ronald Davis testified to similar statements made by Mr. Sammak at meetings concerning Mr. Law's employment status in the presence of Mr. Law, Mr. Davis, and a rehabilitation counselor.

Having determined that Mr. Law was not placed in the Storekeeper position because of his disability² and that his disability was not job related, we must consider appropriate relief. As previously noted, Section 9 of the Act empowers us to award back pay and such other relief as will effectuate the Act's purposes following a finding of discrimination. We therefore order relief as described with specificity in the Final Order which follows.

FOOTNOTES

¹ Respondent argues that Mr. Law's testimony was not credible because of his financial interest in the outcome of this case. No authority for this proposition is cited. We decline to adopt a rule which would automatically discredit the testimony of large numbers of Complainants and Respondents in employment discrimination cases.

² Mr. Law's complaint alleges unlawful termination as well as refusal to promote. The record establishes that he was subsequently reinstated with back pay at a rate lower than that of the Storekeeper position.

COMMONWEALTH OF PENNSYLVANIA
EXECUTIVE OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD E. LAW,
Complainant

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
Respondent

DOCKET NO. E-16935

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this matter, the Hearing Panel concludes that Respondent violated Section 5(a) of the Human Relations Act, and recommends that the attached Findings of Fact, Conclusions of Law, Opinion and Final Order be adopted and entered by the full Pennsylvania Human Relations Commission.

September 26, 1983

DATE

Doris M. Leader

DORIS M. LEADER

Chairperson, Hearing Panel

September 26, 1983

DATE

Rita Clark

RITA CLARK

Hearing Commissioner

September 26, 1983

DATE

Thomas L. McGill, Jr.

THOMAS L. MCGILL, JR.

Hearing Commissioner


4. That Respondent pay to Complainant within thirty (30) days of the date of this Order a lump sum monetary payment in the amount of the difference between his actual earnings since November 2, 1979, and the amount he would have earned had he been placed in the Storekeeper II position on that date, plus simple interest of 6% per annum, calculated from the due date of each unpaid portion of salary which would have accrued between November 2, 1979, and the date of this Order.

As of the date of this Order, the lump sum amount of the interest thereon shall be merged into a combined amount. Simple interest of 6% per annum shall accrue on this combined amount and shall be paid to Complainant if Respondent fails to pay the combined lump sum amount within thirty (30) days of the date of this Order;

5. That Respondent pay to Complainant, at intervals of no more than four (4) weeks, the difference between his present salary and the amount he would have been earning had he been placed in the Storekeeper II position on November 2, 1979. These payments shall continue until such time as Complainant accepts or rejects the offer described in No. 2 above;
6. That Respondent furnish to the Commission, within thirty (30) days of the date of this Order, satisfactory written proof of compliance with the terms of such Order. Should compliance not be complete within thirty (30) days, Respondent shall continue to furnish written reports of the manner of compliance at regular intervals, until such time as Complainant has accepted or rejected the offer described in No. 2 above.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:



JOSEPH X. YAFFE, Chairperson

ATTEST:



ELIZABETH M. SCOTT, Secretary