COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EULA L. MORRIS, Complainant

v.

JOHNSTOWN REDEVELOPMENT AUTHORITY, Respondent

Docket No. E-25389D

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATIONS OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT

To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

1. Ms. Eula L. Morris, (hereinafter the "Complainant"), is an adult Black female who resides at 637 Somerset Street, Apartment #1, Johnstown, Pennsylvania. (N.T. 10)
2. The Johnstown Redevelopment Authority, (hereinafter the "Respondent"), is a Municipal Authority with offices located at 237 Johns Street, Johnstown, Pennsylvania. (C.E. 5)
3. For the 3 year period between 1977 to 1980, the Complainant worked as a Secretary for a local church with such duties as answering phones, maintaining financial records, recording meetings, typing stencils and running a mimeograph machine. (N.T. 11)

4. From December 23, 1980 to July 27, 1981, the Complainant worked as a Secretary for a flood relief project called the Rifle Program where she primarily processed claims for reimbursement for flood damages. (N.T. 12)
5. In July 1981, the Complainant applied and was hired for a Clerk/Typist position with the Respondent. (N.T. 12, 14; C.E. 1)
6. The Complainant's general duties remained the same as the duties she performed when employed with the Rifle Program. (N.T. 13)
7. Although the Complainant's primary job responsibility remained processing flood damage claims, at some point during the Complainant's employment, she was required to assist the Respondent's switchboard operator. (N.T. 13)
8. Between December 1981, and August 1982, the Complainant and other secretaries took turns operating the switchboard when the switchboard operator was either off or at lunch. (N.T. 15, 28)
9. While employed by the Respondent, the Complainant received no complaints regarding her work, instead she was complimented. (N.T. 16).
10. On August 3, 1982, the Complainant was laid off. (N.T. 17)
11. On February 21, 23, and 25, 1983, the Johnstown Tribune-Democrat published a notice announcing that the Respondent would be distributing applications for the position of Switchboard Operator/Typist. (C.E.6)
12. The newspaper announcement listed the qualifications for Switchboard Operator/Typist position as: high school graduate or equivalent, one year experience as office clerical/recorder, switchboard experience and typing of at least 40 words per minutes. (C.E. 6)
13. Shorthand ability was not a qualification requirement for the position. (N.T. 44, 49)
14. The Respondent's governing body was composed for five board members. (C.E. 5)
15. At a regularly scheduled meeting of the board, board member Gentile asked if prior employees had been contacted regarding the Switchboard Operator/Typist opening. (N.T. 42)
16. Despite board member Gentile's concern, the Respondent simply accepted applications from anyone, thereby providing former employees with no special advantage. (N.T. 42)
17. On March 1, 1983, the Complainant submitted an application for the Switchboard Operator/Typist position. (C.E. 4)
18. The Respondent received 43 applications for the position of Switchboard Operator/Typist: Thirty-seven applicants were White, six were Black. (N.T. 98).
19. The Respondent's Executive Director, Ronald Repak; the Administration Manager, Nancy Herald; and the Comptroller, William Meske, collectively reviewed the 43 applications and recommended that four applicants be interviewed. (N.T. 46, 47, 64)
20. The Complainant was not selected to be interviewed. (N.T. 53)
21. Repak, Herald, and Meske based their selections totally on the information contained in the application forms received by the Respondent. (N.T. 66)
22. Applicants were eliminated from consideration if their application was either incomplete or contained insufficient information upon which to evaluate the applicants. (N.T. 67)
23. The Complainant's application was not incomplete and did contain sufficient information upon which to evaluate it. (N.T. 68)
24. Morris met the required qualifications for the position of Switchboard Operator/Typist. (N.T. 57)

25. Both Herald and Meske knew the Complainant prior to March 1983 because they were also Respondent employees and had worked with the Complainant prior to her layoff in August 1982. (N.T. 29, 30, 69, 73)
26. During the Public Hearing, Herald was specifically given an opportunity to compare the Complainant's application with the four individuals selected for interviews and to articulate a reason why the Complainant's application was rejected. (N.T. 79)
27. Herald stated that she could not remember why the Complainant was not selected. (N.T. 79, 80)
28. Deborah Kerr, the person recommended by the Respondent's Executive Director, Administrative Manager, and Comptroller and hired by the board for the Switchboard Operator/Typist position was White. (N.T. 57, 82)
29. Neither Kerr nor the three others selected to be interviewed had prior work experience with the Respondent. (N.T. 55, 56, 57)
30. The position of Switchboard Operator/Typist commenced on April 5, 1983 at a beginning salary of $7,020.00 per year. (C.E. 7)
31. After the Complainant was not hired, she unsuccessfully attempted to find other employment. (N.T. 19)
32. The Complainant testified that after December 1985, she was no longer able to work. (N.T. 19)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
3. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Respondent is an employer within the meaning of the Act.
5. Complainant here has met her burden of making out a prima facie case by proving that:

    a. She was a member of a racial minority;
    b. She applied for and was qualified for a job for which the Respondent was seeking applicants;
    c. She was rejected; and
    d. The rejection was under circumstances which give rise to an inference of discrimination.

6. Respondent has not met its burden of production by articulating non-discriminatory reason for the Complainant's discharge.
7. The Complainant is entitled to relief including lost wages, with interest of six percent on lost wages.

OPINION

This case arises on a complaint filed by Eula L. Morris, (hereinafter "Complainant") against the Johnstown Redevelopment Authority, (hereinafter "Respondent ") on or about April 25, 1983, at Docket Number E-25389D. The Complainant alleged that the Respondent discriminated against

her by refusing to hire her as a Switchboard Operator/Typist because of her race, Black. The Complainant claimed that the Respondent's refusal to hire her violated Section 5(a), of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter the "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on February 18, 1987 in Ebensburg, PA, before Carl H. Summerson, Hearing Examiner.

The resolution of this case deals with fundamental concepts including burden of proof, the nature of proof, presumptions, and the burden of production as it relates to overcoming a presumption. As we so often do, the analysis of these concepts shall begin with a review of certain standards established by the U.S. Supreme Court in the oft cited case of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In this case, the Court concerned itself with the order and allocation of proof in a disparate treatment action challenging employment discrimination. Id. At 800.

Like the present matter the McDonnell Douglas case was factually based on a race-based refusal to hire allegation. The Court noted that the Complainant must carry the initial burden of establishing a prima facie case of racial discrimination. Id. at 802. This may be done by showing:

> (1) That the Complainant belongs to a racial minority;
> (2) That the Complainant applied for a job for which the Respondent was seeking applicants;
> (3) That, despite the Complainant's qualifications, she was rejected; and
> (4) That, after the rejection, the position remained open and the Respondent continued to seek applicants from persons of Complainant's qualifications.

This general four step process was later adopted for use by Pennsylvania Courts in General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976).

General Electric, Id. also adopted the remaining two stages which the U.S. Supreme Court created with respect to dividing the burden-of-proof allocation. Once a prima facie case has been shown, the burden shifts to the Respondent to articulate some legitimate, non-discriminatory reason for the Complainant's rejection. McDonnell Douglas at 802. If the Respondent is successful, the Complainant must have a full and fair opportunity to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. This third stage burden merges with the complainant's ultimate burden of persuading the fact finder that the Complainant has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U. S. 248 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

Factually, although similar, this case differs slightly from the refusal to hire circumstances in McDonnell Douglas. In McDonnell Douglas, the Complainant's application was rejected and the Respondent continued to seek applicants of equal qualifications. In the present matter, the

Respondent ostensibly selected four applicants for interviews from an applicant pool while simultaneously rejecting the Complainant. Obviously, the complainant cannot show that the Respondent "continued to seek applicants."

The McDonnell Douglas Court wisely anticipated that facts of different cases will necessarily vary and that the four prong prima facie requirement articulated will not be applicable to differing factual situations. McDonnell Douglas at 802 n. 13. The Court made it clear that the general process it was creating would appropriately need adaptations to adjust the process to the facts presented. Accordingly, some adaptation of the required prima facie showing must be done in this instance.

At the outset, several things should be noted. First, in Burdine at 250, the U.S. Supreme Court declared, "The burden of establishing a prima facie case of disparate treatment is not onerous." Second, it is apparent that the U.S. Supreme Court intended that the four parts of the prima facie showing are non-subjective and susceptible to objective proof.

Reviewing the McDonnell Douglas prima facie formula it becomes readily apparent that the only portion in need of adjustment here is the fourth element. In a refusal to hire case, the first three factors will invariably remain the same. In my opinion, because of the pool hiring process presented here, the fourth element should simply become: was the rejection under circumstances which give rise to an inference discrimination. See Burdine.

Therefore, having established what the Complaint must first show, we readily see that the Complainant has met her initial burden. There is no question that she belongs to a racial minority, and there is no doubt that she applied for an open position. The Respondent also concedes that the Complainant met the qualifications of the job. Equally clear is the fact that the Complainant was rejected.

The fourth element of the prima facie showing has been met since the Complainant presented evidence that she had been a prior employee of the Respondent who had in fact done the exact job almost on a daily basis for approximately 9 months. None of the four applicants chosen for an interview had ever worked for the Respondent before. Added to this simple fact are the additional circumstances. That two of the reviewing committee members had known the Complainant while she was a prior employee and the Complainant had received no complaints and was complimented on her work performance.

Clearly, the Complainant's evidence constitutes sufficient objective circumstances which give rise to an inference of discrimination.

By establishing a prima facie case, the Complainant has created a mandatory rebuttable presumption that discrimination has occurred. The presumption of discrimination arises because the facts as stated, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. The obligation to make out a prima facie case serves an important function in a case: it eliminates the most common non-discriminatory reasons for a Complainant's rejection. See Burdin citing Teamsters v. United States, 431 U.S. 324 (1977).

In this case, it is important to recognize the warning the U.S. Supreme Court set forth in Burdine: If trier of fact believes the Complainant's evidence, and if the employer is silent in the face of the Presumption, the court must enter judgment for the Complainant because no issue of fact remains in the case. With one very minor exception, this warning directly applies when reaching the ultimate results in this case.

In the Respondent's opening argument, it was asserted that shorthand was a consideration for the position. Additionally, a promise was made that evidence would be introduced to show why the Complainant was not selected to be interviewed for the position. First, it became obvious from four sources that shorthand was not a consideration for the open position: (a) the newspaper ad clearly did not list shorthand as a qualification; (b) the job description did not include shorthand as a consideration; (c) two of the applicants selected for an interview had no shorthand experience; and (d) Ms. Herald testified that shorthand was not a consideration and applicants were told this.

The assertion that the Complainant lacked shorthand skills can be and has been considered as an articulated non-discriminatory reason for the Respondent's failure to select her; however, this assertion is overwhelmingly rebutted by the existing evidence and is clearly pretextual. Only the question of shorthand skills is analyzed in the context of pretext because this was the only argument made during the hearing which referred to the Respondent's reasons for not selecting the Complainant.

Although there were three individuals making the selection recommendation only one testified at the public hearing. During the hearing, Ms. Herald was handed the Complainant's application and the applications of the four persons selected for interviews. Ms. Herald was given a full opportunity to articulate the distinctions between the applications of those selected for interview and the Complainant's, however, absolutely no attempt was made to either subjectively or objectively articulate the Respondent's rationale for its actions.

In my opinion, the Respondent has remained silent in the face of the presumption created by the establishment of a prima facie case.

The Respondent's brief argues that the applications alone establish that the four chosen for interviews were more qualified. In this case, the Respondent could have called witnesses to articulate why it was felt the applicants chosen were more qualified, instead, only Ms. Herald testified. It is also worthy to note that Ms. Herald was not called as Respondent's witness, but instead was called by the Complainant. Again, Ms. Herald was given ample opportunity to articulate why the Complainant was not chosen. In effect, Ms. Herald simply stated she did not remember. Although given full opportunity to do so, no attempt was made to objectively compare applications. The Respondent settled for the conclusory statement that others were better qualified without substantiating why this assessment should be accepted.

On several occasions, the Respondent's brief cites the case of General Electric Corp. v. PHRC, 469 Pa. 292. 365 A.2d 649 (1976), and accurately recognizes that the burden is on the Respondent to demonstrate that the Complainant was not the "best able and most competent to perform the services required." General Electric's support for this requirement included a

pragmatic consideration which suggests that, "where employment decisions have been based upon the employer's subjective assessments, it is the employer alone who can articulate the rationale behind [its] decisions." Id. at 657. As the Hearing Examiner in this case the Respondent in effect asks me to guess why the Complainant was not selected. On the contrary, the Respondent had the burden to articulate its reasons and has failed to do so.

Respondent's only witness attempted to establish evidence that the Respondent's hiring practices did not have a disparate impact on the Complainant. However, this case was quite clearly a disparate treatment case, not a disparate impact case. Respondent argues that it made a genuine effort to attract and hire qualified minority applicants and that it had adopted and implemented an Affirmative Action Plan designed to maximize minority participation and opportunity.

Reasonable minds reviewing the evidence in this case could easily come to the opposite conclusions. The Respondent could be viewed as an employer who simply chose to insure that certain minimum affirmative action goals were accomplished and after that, Blacks and other minorities need not be hired. To defend this action by suggesting that a Black was hired for another vacancy tends to suggest that the Respondent felt that they could disregard Black applicants for the position sought by the Complainant simply because they had already hired a Black.

Basically, a decision on the real motivations of the Respondent's Affirmative Action Plan need not be made in this case. It is sufficient to suggest that there are several ways the Respondent's actions can be viewed. What is critical in this case is that the Respondent failed to meet its burden of producing evidence of a non-discriminatory rationale for failing to select the Complainant. Accordingly, an appropriate remedy shall be discussed.

The record reveals that Ms. Kerr still remains in the Switchboard Operator/Typist position. Furthermore, the record suggests that after the Complainant's rejection she unsuccessfully sought other employment. The only effort made by the Respondent to suggest that the Complainant's efforts to find a job were not reasonable was in its brief. Absolutely no evidence was introduced by the Respondent on this issue at the public hearing.

The only limitation on a backpay award comes from the Complainant herself. The Complainant testified that she was no longer able to work as of December 1985.

The position for which the Complainant was not hired was filled on April 5, 1983 at a salary of $7,020.00 per year. Accordingly, had the Complainant been hired, she would have worked approximately 2 years and 8 months between April 5, 1983, and December, 1985, thereby earning approximately $18,720.00.

The interest on $18,720.00 is calculated as follows:

1983	Lost Wages	$ 4,680.00
	Interest @ 4%	187.20
	Total Lost Wages plus Interest for 1983	$ 4,867.20

1984	Lost Wages	$ 7,020.00
	1983 Lost Wages plus Interest and 1984 Lost Wages	$ 11,887.20
	Interest @ 6%	713.23
	Total Lost Wages plus Interest for 1983 and 1984	$ 12,600.43
1985	Lost Wages	$ 7,020.00
	1983, 1984 Lost Wages plus Interest and 1985 Lost Wages	$19,620.43
	Interest @ 6%	1,177.23
	Total Lost Wages plus Interest for 1983, 1984 and 1985	$ 20,797.66
1986	Interest @ 6%	$ 1,247.86
	SUB-TOTAL	$ 22,045.52
1987	Interest for 2 months @ 1%	$ 220.46
	Total Lost Wages plus Interest up to the date of public hearing	$ 22,265.98

Relief is therefore ordered as described with specificity in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
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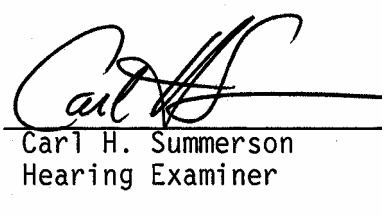
JOHNSTOWN REDEVELOPMENT AUTHORITY, Respondent

Docket No. E-25389D

RECOMMENDATION OF THE HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, it is the view of the Hearing Examiner that the Respondent failed to articulate a legitimate non-discriminatory reason why the Complainant was not hired. Accordingly, the Complainant has proven discrimination in violation of §5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Final Order be adopted by the full Pennsylvania Human Relations Commission.



Carl H. Summerson
Hearing Examiner

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JOHNSTOWN REDEVELOPMENT AUTHORITY, Respondent

Docket No. E-25389D

FINAL ORDER

AND NOW, this 28th day of October, 1987, following a review of the entire record in this matter. including the transcript of testimony, exhibits, briefs, and pleadings, 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 Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore,

ORDERS

1. That the Respondent cease and desist from discriminating on the basis of race.
2. That the Respondent shall pay to the Complainant within 30 days of the effective date of this Order, the lump sum of $22,265.98, which amount represents backpay lost for the period between April 5, 1983, and December, 1985, plus interest of 6% per annum, calculated up to the month during which the Public Hearing of this matter was held.
3. That the Respondent shall pay additional interest of 6% per annum, calculated from the effective date of this Order until payment is made.
4. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Ellen K. Barry, Esquire, in the PHRC Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

John P. Wisniewski
John P. Wisniewski
Secretary