

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EMANUEL J. OAKES, JR.,

Complainant

v.

COMMONWEALTH OF PENNSYLVANIA,
PENNSYLVANIA STATE POLICE,

Respondent

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DOCKET NO. E-22339

FINDINGS OF FACT, CONCLUSIONS OF
LAW, OPINION, RECOMMENDATION OF
HEARING PANEL, AND FINAL ORDER

FINDINGS OF FACT

1. Complainant herein is Emanuel J. Oakes, Jr., an individual within the meaning of the Pennsylvania Human Relations Act ("Act") who resides at 2575 Northwest 207th Street, Miami, Florida. (S.F. 1, N.T. 14).*

2. In 1982, Complainant resided at 1735 Laketon Road, Wilkinsburg, Pennsylvania. (N.T. 14).

3. Respondent herein is the Commonwealth of Pennsylvania, Pennsylvania State Police, an employer within the meaning of the Pennsylvania Human Relations Act, with a place of business at 1800 Elmerton Avenue, Harrisburg, Pennsylvania. (S.F. 2, Complaint).

4. Complainant, on or about March 12, 1982, filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at Docket No. E-22339. (S.F. 3, Complaint).

5. All procedural prerequisites to a public hearing have been complied with in this case.

6. The position of State Police Cadet leads to the position of State Police Officer for virtually all Cadets. (N.T. 161, 179, C.E. 6 at 2-3).

*Explanation of Abbreviations:

F.F. - Finding of Fact
S.F. - Stipulation of Fact
N.T. - Notes of Testimony
C.E. - Complainant's Exhibit
R.E. - Respondent's Exhibit

7. Complainant applied for the position of Pennsylvania State Police Cadet in October, 1981. (N.T. 15).

8. In order to qualify for the position of State Police Cadet, all applicants are required to pass, in sequence:

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

(S.F. 4).

9. Complainant successfully completed all phases of the application process, up to and including the oral interview, with the exception of the vision portion of the medical examination by Respondent's Medical Officer. (S.F. 5).

10. Complainant was eliminated from consideration for the position of Pennsylvania State Police Cadet on or about February 18, 1982, because his uncorrected vision did not meet Respondent's visual acuity standards. (S.F. 6, 7).

11. Respondent's visual acuity standards require that an applicant be able to read:

- a) 20/70 or better with better eye without corrective lenses;
- b) 20/200 or better with poorer eye without corrective lenses;
- c) 20/20 or better with better eye with corrective lenses, if necessary; and
- d) 20/40 or better with poorer eye with corrective lenses, if necessary.

(S.F. 8).

12. Respondent considers its vision standards to be the minimum acceptable level necessary to perform the tasks of a State Police Officer. (N.T. 156-7, 161-2).

13. No bona fide occupational qualification certification has been issued to Respondent with regard to its visual acuity standards by any regulatory agency. (S.F. 9).

14. The results of Complainant's eye examination, taken as part of his application for the position of Pennsylvania State Police Cadet, established that he had a visual acuity of 20/200 in both eyes without correction and a visual acuity of 20/20 in both eyes with correction. (C.E. 2).

15. 96.4% of the population has at least 20/100 uncorrected vision with both eyes open. (N.T. 201-2).

15a. A visual acuity of 20/200 is considered as constituting legal blindness. (N.T. 201, 213, 228, 236, R.E. 2).

16. Complainant has worn soft contact lenses, to correct his vision, since 1979. (N.T. 21).

17. Soft contact lenses are less likely to be dislodged than glasses or hard contact lenses. (N.T. 51-2).

18. Complainant has had a single contact lens dislodged from his eye. (N.T. 23-4).

19. Complainant has torn one of his contact lenses, so that he was unable to wear it. (N.T. 24-5).

20. Soft contact lenses may be dislodged by a blow. (N.T. 203-4).

21. Soft contact lenses may be dislodged by an unanticipated loud noise or impact which causes sudden forced blinking. (N.T. 202, 204).

22. Soft contact lenses may be dislodged if a person has to open his or her eyes under water. (N.T. 119, 120).

23. Soft contact lenses may be dislodged, or have to be removed, due to airborne irritants or to deposits on, or other defects in, the lens material. (N.T. 24-5, 202-3, 205-6).

24. A State Police Officer is more likely to have his or her soft contact lenses dislodged than a member of the population at large. (N.T. 102, 203-4).

25. A State Police Officer may have to perform the duties of the position at any time, whether officially on or off duty. (N.T. 154).

26. A State Police Officer may have to perform the duties of the position in a state of uncorrected vision. (N.T. 164-5).

27. There are certain circumstances or situations which would render a State Police Officer without both contact lenses. (N.T. 70, 98, 102, 203-4).

28. Examples of situations involving vision critical tasks, which raise a risk of having an Officer's soft contact lenses dislodged, or otherwise removed, include civil disturbances, domestic disputes, and the need to rescue a drowning person. (N.T. 131-2, 203-4, 226-7).

29. Respondent commissioned a study by Management Scientists, Inc., entitled Pennsylvania State Police Trooper Job Analysis. (C.E. 6, N.T. 146).

30. The job analysis identified 554 tasks performed by State Police Officers. (C.E. 6).

31. The job tasks are not performed in any particular order, but will vary as the circumstances warrant. (N.T. 162-3, 180).

32. There are 232 job tasks, out of the 554, which would be impaired if they had to be performed with the use of 20/200 uncorrected vision. (N.T. 228-9, C.E. 8).

33. The job analysis gave many of the 232 job tasks a high task value, as computed by taking the product of the average task importance value and the percentage of State Police Officers who performed the task during a one year period. (C.E. 6).

34. A number of the 232 job tasks could result in dislodging, or forcing removal of, both soft contact lenses. (N.T. 225, 232).

35. Once a State Police Officer's soft contact lenses are removed, for whatever reason, he or she may have to perform one or more of the 232 job tasks before the lenses can be replaced, or other correction substituted. (N.T. 162, 165).

36. The risk of harm to the health and safety of the public posed by the employment of Complainant is greater than the risk of harm posed by the employment of other individuals without Complainant's handicap or disability. (N.T. 161-2).

37. If Complainant had been accepted into the March 15, 1982, cadet class, he would have been paid pursuant to the following wage scale:

3-15-82 to 6-30-82 7 pp, 8 days @ \$496.80	\$ 3,875.04
7-1-82 to 7-9-82 7 days @ \$53.68	\$ 375.76
7-10-82 to 7-13-83 26 pp, 3 days @ \$602.40	\$15,843.12
7-14-83 to 12-30-83 12 pp, 2 days @ \$677.60	\$ 8,266.72
1-1-84 to 6-30-84 13 pp @ \$691.20	\$ 8,985.60
7-1-84 to 7-11-84 8 days @ \$71.20	\$ 569.62
7-12-84 to 12-26-84 12 pp @ \$792.00	\$ 9,504.00
	<hr/>
	\$47,419.86
	1,000.00
	<u>\$48,419.86</u>

Clothing Allowance:

1982	\$ 200.00
1983	\$ 400.00
1984	\$ 400.00
	<u>\$1,000.00</u>

(S.F. 10).

CONCLUSIONS OF LAW

1. Complainant is a handicapped or disabled individual within the meaning of the Act.
2. Respondent is an employer within the meaning of the Act.
3. The Commission has jurisdiction over the parties and subject matter of this case.
4. Complainant has the initial burden of establishing a prima facie case of unlawful discrimination.
5. Complainant may establish a prima facie case of unlawful discrimination by producing evidence which shows that he is a handicapped or disabled individual, that he applied to Respondent for a position for which he was otherwise qualified, that he was rejected because of his handicap or disability, and that Respondent continued to seek other qualified applicants.
6. Complainant has established a prima facie case of unlawful discrimination.
7. Once Complainant establishes a prima facie case of unlawful discrimination, the burden shifts to Respondent to establish a legitimate, non-discriminatory reason for failing to hire Complainant.
8. Respondent may establish a legitimate, non-discriminatory reason for failing to hire Complainant by showing that Complainant's handicap or disability is job-related.

9. The burden of establishing that Complainant's handicap or disability is job-related rests with Respondent.

10. A handicap or disability may be job-related if it poses a demonstrable threat of harm to the health and safety of others.

11. Respondent has established a legitimate, non-discriminatory reason for failing to hire Complainant.

12. Respondent has established that Complainant's handicap or disability is job-related because placing him in the position of State Police Cadet/Officer would pose a demonstrable threat of harm to the health and safety of others.

13. If Respondent succeeds in establishing a legitimate, non-discriminatory reason for failing to hire Complainant, Complainant may still prevail if he can show that this reason is only a pretext for unlawful discrimination.

14. Complainant has failed to prove that the legitimate, non-discriminatory reason established by Respondent is a pretext for unlawful discrimination.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Mr. Emanuel J. Oakes, Jr. ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against the Pennsylvania State Police ("Respondent" or "State Police"). The complaint was filed on March 12, 1982. Complainant alleged that Respondent violated the Pennsylvania Human Relations Act ("Act"), Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951 et seq., by refusing to hire him for the position of State Police Cadet/Officer because of his non-job related handicap or disability, consisting of 20/200 uncorrected visual acuity.

Commission staff conducted an investigation into the allegations of the complaint, and determined that probable cause existed to credit the allegations contained therein. The Commission endeavored to eliminate the practices complained about by conference, conciliation and persuasion. These endeavors were unsuccessful, and the case was set for public hearing, which was held on November 15, 1984, in Harrisburg, Pennsylvania. The hearing was conducted at all times by Commissioners Doris M. Leader, Chairperson of the Hearing Panel, Alvin E. Echols, Esq., and Raquel Otero de Yiengst. The

case in support of the complaint was presented by G. Thompson Bell, Esq., Assistant General Counsel to the Commission. Respondent's position was presented by Joseph S. Rengert, Esq., Assistant Counsel to the State Police. Post-hearing briefs and reply briefs were filed by both parties.

II. DISCUSSION

The basic burden of proof in a case of employment discrimination under the Act is well established. Complainant has the initial burden of establishing a prima facie case of unlawful discrimination. This may be done by showing that he is a member of a protected class, that he applied for a position with Respondent for which he was qualified, that he was rejected, and that Respondent continued to look for other applicants of equal qualifications. General Electric Corp. v. Com., Human Relations Commission, 469 Pa. 292, 365 A.2d 649 (1976); Com., Pennsylvania State Police v. Com., Pennsylvania Human Relations Commission, 72 Pa. Cmwlth. 520, 457 A.2d 584 (1983); National Railroad Passenger Corp. (Amtrak) v. Com., Pennsylvania Human Relations Commission, 70 Pa. Cmwlth. 62, 452 A.2d 301 (1982). If Complainant carries this burden, the burden shifts to Respondent to establish a legitimate, non-discriminatory reason for its actions. Id. If Respondent succeeds, Complainant may still prevail if he can show that Respondent's apparently legitimate, non-discriminatory reason is, in reality, a pretext for unlawful discrimination. Harrisburg School District v.

Com., Pennsylvania Human Relations Commission, 77 Pa. Cmwlth. 594, 466 A.2d 760 (1983).

In establishing a prima facie case, the required elements of proof will necessarily vary depending upon the type of discrimination alleged and the factual setting involved.

General Electric Corp., 365 A.2d at 656, n. 11. In the present case, we hold that Complainant may establish his prima facie case by showing that he is a handicapped or disabled individual within the meaning of the Act and the applicable regulations thereunder, that he applied to Respondent for a position for which he was otherwise qualified, that he was rejected because of his handicap or disability, and that Respondent continued to seek other qualified applicants. See Amtrak, 452 A.2d at 303.

In determining whether Complainant has established these elements, it is undisputed that he applied for the position of Pennsylvania State Police Cadet, which leads to the position of Pennsylvania State Police Officer. He successfully completed all phases of the application process, up to and including the oral interview segment, with the sole exception of the vision portion of the medical examination by Respondent's Medical Officer. It is also undisputed that he was eliminated from consideration because his uncorrected vision did not meet Respondent's vision standards, and that Respondent continued to seek qualified applicants after his

rejection. The only remaining issue, in establishing Complainant's prima facie case, is whether Complainant's uncorrected vision constitutes a handicap or disability under the Act, and we need not look far to determine that it does.

At the time Complainant applied for the position of State Police Cadet, he had an uncorrected visual acuity of 20/200 in both eyes, which is considered by visual experts as constituting legal blindness. Commission regulations define a handicapped or disabled person as one who:

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

16 Pa. Code §44.4.

The ability to see has been held to constitute a major life activity. Amtrak, 452 A.2d at 304. A person whose eyesight places him in a visual state of legal blindness, almost by definition, has a physical handicap that substantially limits this activity. The fact that Complainant wears soft contact lenses, which correct his vision to 20/20, does not change this result. His lenses do not eliminate his visual handicap, but rather accommodate for it, allowing him to improve his vision

while he is wearing them.¹

Having determined that Complainant is a handicapped or disabled individual under the Act, we also find that he has established a prima facie case of unlawful discrimination. The burden now shifts to Respondent to establish a legitimate, non-discriminatory reason for rejecting Complainant. Respondent attempts to do this by asserting that Complainant's handicap is either presently, or potentially, job-related or, in the alternative, that Respondent's vision standards constitute a bona fide occupational qualification ("BFOQ"). Because we find that Complainant's specific handicap or disability is presently job-related, we have no need to consider the question of potential job-relatedness or of whether Respondent has established a BFOQ.²

¹It should be noted that, whether or not the Complainant's visual acuity is poor enough to constitute an actual handicap or disability, Respondent chose to reject his application for employment because of it. Rejection for medical reasons constitutes an impairment of the major life activity of employment, which alone is sufficient to establish a handicap or disability under the Act. Pennsylvania State Police v. Com., Pennsylvania Human Relations Commission, Pa. Cmwlth. , 483 A.2d 1039, 1042 (1984); Com., Pennsylvania State Police v. Com., Pennsylvania Human Relations Commission, 72 Pa. Cmwlth. 520, 457 A.2d 584, 589 at n. 11 (1983).

²Concerning the BFOQ issue, the Commission has recently held that "the Act requires analysis of the job-relatedness of the Complainant's handicaps, not an inquiry into whether the absence of such handicaps should be considered to be a bona fide occupational qualification" Lewis, et al. v. Carolina Freight Carriers, Nos. E-19317 to E-19318, slip op. at 9 (Pennsylvania Human Relations Commission, Dec. 20, 1984), appeal docketed, No. 202 C.D. 1985 (Pa. Cmwlth., Jan 1, 1985).

The burden of establishing that Complainant's handicap is job-related lies with Respondent. Amtrak, 452 at 303. The Commission's regulations on handicap and disability define a non-job related handicap or disability as:

- (i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employe insurance plan does not render a handicap or disability job-related.
- (ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.
- (iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

16 Pa. Code §44.4(e).

Complainant does not contend that his uncorrected visual acuity is a non-job related handicap or disability. Brief for Complainant at 10. Rather, he argues that his use of soft contact lenses, which correct his vision to 20/20 in both eyes while he is wearing them, allows him to perform the essential functions of the job. Id. We find this to be an appropriate argument, because the

Commission's handicap regulations specifically state that an applicant for employment must be allowed the opportunity to explain the special efforts the applicant makes, or the reasonable accommodations which can be made, to render a job-related handicap or disability non-job related. 16 Pa. Code §44.11(d). See 43 P.S. §955(h)1. If such special efforts or reasonable accommodations exist, and they do not impose an undue hardship on the employer, the applicant may not be refused employment. 16 Pa. Code §44.5.

According to Respondent's visual acuity standards, a corrected visual acuity of 20/20 in one eye and 20/40 in the other eye is sufficient to do the job of Pennsylvania State Police Officer. Respondent's argument is that, while Complainant may be able to perform satisfactorily while he is wearing his soft contact lenses, the risk that he will be placed in a situation where he will have to perform in his uncorrected state of 20/200 vision is great enough to prevent the accommodation of contact lenses from rendering Complainant's handicap non-job related.

The evidence presented establishes that soft contact lenses are less likely to be dislodged than glasses or hard contact lenses. It also establishes, however,

that a State Police Officer is more likely to have his or her soft contact lenses dislodged than the population at large. In addition, an Officer may be required to perform as a State Police Officer at any time, whether officially on or off duty, which further increases the risk of having to perform in an uncorrected visual state.

The testimony adduced at hearing also shows that soft contact lenses may be dislodged by a blow, by an unexpected loud noise or impact causing sudden forced blinking, or by having to open one's eyes under water. Lenses may be dislodged, or have to be removed, due to airborne irritants or to deposits on, or other defects in, the lens material. Complainant testified that he has had a contact lens dislodged. He also testified that he has torn a lens, so that he was unable to wear it.

Unrelated to this case, Respondent commissioned a detailed job analysis, which identified 554 tasks that may have to be performed by a State Police Officer. Respondent's optometric expert, Dr. Leonard Press, identified 232 tasks, of the 554, which would be impaired if they had to be performed by a person operating with a visual acuity of 20/200 in both eyes. The job analysis assigned many of these 232 tasks a high task value, as computed

by taking the product of average task importance and the percentage of State Police Officers who performed the task during a one year period. Dr. Press also testified that a number of these tasks could result in dislodging, or forcing removal of, both soft contact lenses. Testimony revealed that the tasks are not performed in any particular order, and that once an Officer's lenses are out, for whatever reason, he or she may have to perform any number of vision related tasks before the lenses can be replaced, or other visual correction substituted.

As previously stated, a handicap or disability may be job-related if its existence poses a demonstrable threat of harm to the health and safety of others. 16 Pa. Code §44.4(e)iii. Commonwealth Court has held that the burden of demonstrating this harm is not great, especially where the potential employer is required by law to actively protect others from such harm. Amtrak, 452 A.2d at 304-5.³ The State Police are required, by statute, to

³Commonwealth Court's decision in Amtrak should be contrasted with the same Court's decisions in Pennsylvania State Police v. Com., Pennsylvania Human Relations Commission, Pa. Cmwlth. , 483 A.2d 1039 (1984), and Com., Pennsylvania State Police v. Com., Pennsylvania Human Relations Commission, 72 Pa. Cmwlth. 520, 457 A.2d 584 (1983), in which the issue involved a threat of harm to the employe or applicant, rather than to the health and safety of others, and in which the employers were required to carry a significantly heavier burden of establishing such a threat than the employer in Amtrak.

preserve the peace, prevent and detect crime, and police the highways. 71 P.S. §251. State Police Officers are required, therefore, to directly protect the public from harm to both life and property, and we find that they will necessarily be placed in situations where their actions will affect the health and safety of the public. Examples of such situations include civil disturbances, domestic disputes, and rescuing a drowning person. Many of these situations are unpredictable in nature, and may occur at any time. The evidence discloses that a number of these situations raise a definite risk that both contact lenses will be dislodged, or otherwise removed, and that vision critical tasks will thereafter be impaired if the officer involved has 20/200 uncorrected visual acuity in both eyes.

In conclusion, Complainant has 20/200 uncorrected vision in both eyes, which constitutes legal blindness. The State Police are required by law to protect lives and property, and the evidence establishes that 232 of 554 tasks performed by State Police Officers, or nearly 42% of their potential job duties, will be impaired if performed with 20/200 vision in both eyes. Respondent has demonstrated that Complainant could be required to perform one or more of these tasks in his uncorrected state of vision, and that he could place the health and safety of others in jeopardy as a result.

Given the above facts, we hold that Complainant's handicap or disability of 20/200 uncorrected vision is job-related under 16 Pa. Code §44.4(e)iii. We also find that Complainant has failed to demonstrate that this defense to his prima facie case is pretextual. We must, therefore, dismiss his complaint of unlawful discrimination.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EMANUEL J. OAKES, JR., :
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 COMMONWEALTH OF PENNSYLVANIA, :
 PENNSYLVANIA STATE POLICE, :
 :
 Respondent :

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, the Hearing Panel finds that Respondent did not discriminate against Complainant in violation of the Pennsylvania Human Relations Act, and recommends that the attached Findings of Fact, Conclusions of Law, Opinion and Final Order be finally adopted and issued by the full Pennsylvania Human Relations Commission.

BY: Doris M. Leader
DORIS M. LEADER (miss)
Panel Chairperson

7/15/85
Date

Alvin E. Echols, Jr.
ALVIN E. ECHOLS, JR. (miss)
Hearing Commissioner

7/15/85
Date

Raquel Otero de Yiengst
RAQUEL OTERO de YIENGST
Hearing Commissioner

7/15/85
Date

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

EMANUEL J. OAKES, JR., :
Complainant :
v. : DOCKET NO. E-22339
COMMONWEALTH OF PENNSYLVANIA, :
PENNSYLVANIA STATE POLICE, :
Respondent :

FINAL ORDER

AND NOW, this 31st day of July, 1985,
the Pennsylvania Human Relations Commission hereby adopts
the foregoing Findings of Fact, Conclusions of Law, and
Opinion, in accordance with the Recommendation of the
Hearing Panel and therefore

O R D E R S :

That the complaint in this matter be, and the same
hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST: Elizabeth M. Scott
ELIZABETH SCOTT, Secretary