

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND R. PHILLIPS,  
COMPLAINANT

v.

SOUTHEASTERN PENNSYLVANIA  
TRANSPORTATION AUTHORITY,  
RESPONDENT

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DOCKET NO. E-26602

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

FINDINGS OF FACT \*

1. The Complainant Raymond R. Phillips is an adult male who is an insulin dependent diabetic with no eyesight in his left eye. (C.E. 1 and 2)
2. Respondent Southeastern Pennsylvania Transportation Authority has at all relevant times employed four or more individuals within the Commonwealth of Pennsylvania. (C.E. 1 and 2)
3. Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission on September 19, 1983, against Respondent at Docket No. E-26602. (C.E. 1 and 2)
4. Commission staff found probable cause to credit the allegations of Mr. Phillips' complaint. (C.E. 1 and 2)
5. Attempts were made by the parties and the Commission to resolve the case through conference, conciliation and persuasion; a public hearing was approved when the attempts were unsuccessful. (C.E. 1 and 2)
6. Complainant's diabetes substantially interferes with the major life activities of eating and working.
7. Complainant's monocularly substantially interferes with the major life activities of working and seeing.
8. Insulin dependent diabetics are at an increased risk of experiencing hypoglycemic episodes which may cause them to be unsafe drivers; because of this risk they pose a demonstrable threat to the health and safety of others when driving trolleys through the city streets.

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\*The Opinion which follows contains additional findings of fact: they are those recitations of factual matters which are followed by references to specific exhibits or pages of the hearing transcript.

The following abbreviations are utilized throughout:

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

9. Mr. Phillips experienced episodes of blurred vision caused by fluctuations in his blood sugar level; in combination with his monocular vision these would have posed a demonstrable risk to the health and safety of others because of the increased risk of accidents had he driven a trolley while employed by SEPTA at Luzerne Depot as a first class mechanic.

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and 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 Act.
4. Respondent is an employer within the meaning of the Act.
5. Complainant has established a prima facie case by proving that:
  - a. He is handicapped within the meaning of the Act and applicable regulations;
  - b. He applied for an available position for which he was otherwise qualified; and
  - c. His application was rejected because of his handicaps.
6. Respondent has established that Mr. Phillips' handicaps are job-related because of the increased, demonstrable risk which he would pose to the health and safety of others as a first class mechanic at the Luzerne Depot.

## O P I N I O N

This case arises on a complaint filed by Raymond R. Phillips ("Complainant") against the Southeastern Pennsylvania Transportation Authority ("Respondent" or "SEPTA") with the Pennsylvania Human Relations Commission ("Commission") on or about September 19, 1983, at Docket No. E-26602. Mr. Phillips alleged that SEPTA discriminated against him on the basis of his non-job related handicaps, diabetes and blindness in the left eye, by refusing to hire him for the position of general rail mechanic, in violation of Section 5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("Act"). By letter dated November 2, 1983, and admitted to the record as Joint Exhibit 1B, SEPTA denied that it had violated the Act and asserted that Mr. Phillips could not safely perform the duties of the position he sought.

Following an investigation, Commission staff found probable cause to credit the allegations of discrimination. The parties and the Commission then attempted to resolve the situation through conference, conciliation and persuasion. When these efforts were not successful, the case was approved for public hearing. The hearing was held in Philadelphia on October 8, 9, 10 and 15, 1986, before Commissioners Loewenstein, Echols and Smith, with Commissioner Loewenstein as Chairperson of the panel.

In April of 1983, Mr. Phillips applied for an available position with SEPTA as a Rail Vehicle and Equipment General Mechanic, First Class (hereinafter "first class mechanic"). (C.E. 1 and 2) The actual opening was at the Luzerne Trolley Depot, where Respondent services part of its trolley fleet. Mr. Phillips successfully completed all but one aspect of SEPTA's pre-employment screening process. It is not disputed that he was rejected only because of his failure to meet the physical requirements for the position.

Either of the bases for this failure (i.e. blindness in one eye and insulin-injection-dependent diabetes) would have been sufficient grounds for rejecting his application under the guidelines in effect at that time. (C.E. 1 and 2) The sole question for resolution here is whether this rejection violated the Act.

Section 5(a) of the Act provides in relevant part:

It shall be an unlawful discriminatory practice. . . for any employer because of the. . . non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required.

43 P.S. 955(a).

Section 4(p) provides the Act's only clarification of the reach of the cited portion of Section 5(a):

The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in.

43 P.S. 954(p).

Applicable regulations promulgated by the Commission provide:

Handicapped or disabled person -- Includes the following:

(i) A person 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.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

- (A) "physical or mental impairment" means a physiological disorder or condition,

cosmetic, disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.

- (B) "major life activities" means 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" means 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 such an impairment" means 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 subparagraph (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.

Non-job-related handicap or disability -- Includes the following:

- (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.

These definitions have been upheld as a valid exercise of the Commission's legislative rule-making authority. Pennsylvania State Police v. PHRC, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 483 A.2d 1039 (1984), reversed on other grounds 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The burden of proof applicable to this case was set forth by Pennsylvania's Commonwealth Court in National Railroad Passenger Corp. (Amtrak) v. PHRC, 452 A.2d 301 (1982). Complainant must first make out a prima facie case, which he has done here by proving:

1. That he was handicapped within the meaning of the Act and applicable regulations at the time of the action he challenges;
2. That he applied for a position for which he was otherwise qualified; and
3. That his application was rejected solely because of his handicaps.

While a Complainant in a case of refusal to hire must generally also prove that the employer continued to seek other qualified applicants, such proof is unnecessary here where there is no dispute as to the reason for the Complainant's rejection. See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

As to the other elements there is no particular dispute on this record. Respondent has admitted that Complainant is an insulin dependent diabetic with no sight in his left eye, that he applied for the general mechanic's position, that the position was available, that he was informed that he had been accepted for employment contingent upon passing a physical examination, and that he was rejected when he failed that examination. (C.E. 1 & 2)



Unquestionably, Complainant is handicapped within the meaning of the Act and applicable regulations. The fact that he was rejected by an employer for medical reasons renders him handicapped because of the impairment of the major life activity of working. Pennsylvania State Police v. PHRC, infra. Further, loss of an eye has been held to be a handicap within the meaning of the Act in National Railroad Passenger Corp. v. PHRC, infra, because of the substantial interference with the major life activity of seeing. And we conclude on this record that diabetes is a disorder of the endocrine system which substantially interferes with such major life activities as eating and working. Because Complainant has made out a prima facie case, we must consider Respondent's explanation for its refusal to hire him.

Commonwealth Court in National Railroad Passenger Corp. v. PHRC, infra, held that a Respondent who defends a charge of handicap discrimination by asserting that the handicap in question is job related, bears the burden of proof as to that assertion. Respondent here agrees with that allocation of the burden of proof. It argues that each of Mr. Phillips' handicaps is job related. Resolution of this question is the heart of this case, and requires careful analysis of both the duties of a first class mechanic and Mr. Phillips' ability to perform those duties.

Light and medium repairs of trolleys are performed at the Luzerne depot. (N.T. 130) In the summer and fall of 1983 the depot operated around the clock, with three eight hour shifts. (N.T. 131-132) Work continued through the weekend, though with smaller crews. (N.T. 134) Had Mr. Phillips been hired, he would most likely have been permanently assigned to the "mid shift" (3:00 p.m. to 11:30 p.m.) after a thirty to sixty day stint on the "day shift" (7:00 a.m. to 3:30 p.m.). (N.T. 131-132, 136)

First class mechanics, in addition to performing repairs on trolleys, were required at all times relevant to this case to test drive the trolleys they were repairing. (N.T. 139) Test runs were done both inside and outside of the depot. (N.T. 140) They also performed car changes: when a call came in about a disabled trolley, a mechanic would drive an empty trolley to the specified location; the passengers would board that trolley and the mechanic would return to the depot with the disabled one. Car changes might take place as much as six miles from the depot. (N.T. 141-143) Finally, first class mechanics drove trolleys on both "push jobs" and "tow jobs": as the terms suggest, these jobs involved a disabled trolley which had to be attached to a second, functioning trolley and either towed or pushed back to the depot. (N.T. 143-144) The distances involved presumably were also as much as six miles. A trolley is roughly fifty feet long and weighs approximately eighteen tons. (N.T. 137) On push and tow jobs, two mechanics did the driving, one in each trolley, communicating by means of hand signals. (N.T. 144) Each type of driving had to be done in all sorts of weather and at anytime of day. (N.T. 144-146) While the amount of a mechanic's time which is spent driving varies with the seasons (with more service calls in winter than in summer), an average of thirty to forty percent of the job involves driving. (N.T. 150)

Disabled trolleys have a variety of problems. They may have defective brakes, missing headlights, or nonfunctioning windshield wipers. (N.T. 145-146) They may have been involved in accidents, including derailments. (N.T. 147-149) In addition to the normal difficulties facing any driver, a mechanic bringing in a disabled trolley must cope with members of the public who are determined to board that trolley and do not wish to be told

why they cannot do so. (N.T. 148) Trolleys of course operate on fixed rails through the city streets, and may have accidents involving other vehicles. (N.T. 149)

While SEPTA also presented testimony about the hazards facing workers in the depot itself, its concern clearly is with the ability of Mr. Phillips to safely perform the driving component of the first class mechanic's position. It argues that each of his handicaps is job-related within the meaning of the regulations cited above because of the ". . . demonstrable threat of harm to the health and safety of others. . ." which would be posed were he allowed to drive a trolley. We consider first the evidence presented by SEPTA relevant to the risk posed by Mr. Phillips' diabetes.

SEPTA presented the expert testimony of Theodore G. Duncan, M.D., head of the section on Diabetes and Metabolism at Pennsylvania Hospital in Philadelphia. Dr. Duncan is also on the teaching staff at the University of Pennsylvania Medical School and consults at Northeastern Hospital in Philadelphia. His practice has been limited to the treatment of diabetes since 1963. (N.T. 172-178, R.E. 20)

Dr. Duncan testified persuasively to the following facts: diabetes is a "sugar problem" in which the body is unable to keep blood sugar within normal limits. (N.T. 179-181) The disease causes many complications, which may be acute or chronic; it is the acute complications which are relevant to this case.

Acute complications may be produced by blood sugar levels which are too low or too high. The symptoms of high sugar, while they may end with a diabetic coma, develop gradually over a period of several days. (N.T. 182)

The symptoms produced by low blood sugar on the other hand come on quickly, within a matter of minutes or hours. (N.T. 243) The brain, deprived of necessary sugar, does not function normally. Symptoms include anxiety, tremors, cold sweats, hostility, and unconsciousness. Frequently the diabetic is unaware that there is a problem, and may forget the episode. (N.T. 182-184) Persons suffering from low blood sugar, or hypoglycemia, may be stuporous or incoherent, causing them to be viewed as inebriated and put in jail. (N.T. 190)

Depending on various factors, diabetes may be treated by diet alone, by oral medicine, or by insulin, in combination with regulation of the diet. (N.T. 180) Individuals taking insulin are far more likely than other diabetics to experience the symptoms of hypoglycemia. (N.T. 189)

Because of the increased likelihood of developing hypoglycemic symptoms, diabetics using insulin are at greater risk of being involved in accidents while driving than are other diabetics or drivers not suffering from diabetes. Manual dexterity and mental acuity are impaired, and as many as 50% of patients with impairment serious enough to cause driving hazards are completely unaware that there is any problem. (N.T. 190-193) In various incidents described by Dr. Duncan, diabetics suffering from hypoglycemic episodes had with them the sugar (as in a candy bar) which would have quickly ended the episode but were unable to think clearly enough to take the sugar. (N.T. 194-195)

For these reasons SEPTA argues that the policy in effect in 1983 which restricted insulin-dependent diabetics from driving any of its vehicles was not discriminatory. At least insofar as that policy was applied to prevent Mr. Phillips from performing those driving duties required of first

class mechanics at the Luzerne depot in 1983, we agree. Specifically we find that his diabetes and insulin dependence posed an increased and demonstrable risk to the health and safety of others because of the increased likelihood that he would experience a hypoglycemic episode with attendant loss of ability to safely drive a trolley. We find it particularly relevant that such episodes are likely to occur without the awareness of the person suffering from low blood sugar. Significantly, Mr. Phillips' treating physician, called to testify on his behalf, agreed that he was at increased risk of a driving accident because of his diabetic condition. (N.T. 530-531)

Respondent also presented extensive testimony about the safety hazards caused by monocular vision. This evidence, while perhaps less compelling in and of itself than that connected with diabetes, must be considered in Mr. Phillips' case along with another factor related to his vision and caused by his diabetes: episodes of blurred vision resulting from fluctuation of blood sugar (N.T. 187), episodes which Mr. Phillips concedes he noted on SEPTA's medical questionnaire and which he admitted during cross examination he had experienced on more than one occasion while driving. (N.T. 64-66, J.E. 1D) We find, and Mr. Phillips concedes, that his monocular vision posed an at least slightly increased risk of an accident while driving because of the obvious possibility that he could fail to see for at least a critical split second stimuli such as a child darting into the street. We further find that this factor coupled with the admitted fact of his problem with blurred vision rendered his visual handicap job related within the meaning of the cited regulations because of the increased risk of harm to the health and safety of others.

As always in cases involving issues of the job-relatedness of

handicaps, we emphasize that this decision is limited to the factual setting in which it arose. With that reminder we conclude that SEPTA has sustained its burden of demonstrating job relatedness, and that Mr. Phillips' complaint must be dismissed. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND R. PHILLIPS,  
COMPLAINANT

v.

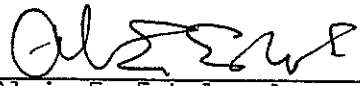
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DOCKET NO. E-26602

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in this case, the Hearing Panel concludes that Respondent did not violate the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission, and the following Final Order entered, pursuant to Section 9 of the Act.

BY:   
Alvin E. Echols, Jr.  
Commissioner

BY:   
Robert Johnson Smith  
Commissioner

COMMONWEALTH OF PENNSYLVANIA  
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DOCKET NO. E-26602

FINAL ORDER

AND NOW, this 9th day of July, 1987, following review of the entire record in this case, including the notes 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 Panel, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

that the complaint in this case be, and the same hereby is, DISMISSED.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

John P. Wisniewski  
John P. Wisniewski  
Secretary