COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENISE L. ROSS, COMPLAINANT

v.

BURNS INTERNATIONAL SECURITY SERVICES, INCORPORATED, RESPONDENT

DOCKET NO. E-20994

STIPULATIONS OF FACT

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RECOMMENDATION OF HEARING PANEL

FINAL ORDER

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STIPULATIONS OF FACT

Complainant, Denise L. Ross ("Complainant"), and Respondent, Burns International Security Services, Inc. ("Respondent"), hereby submit to the Pennsylvania Human Relations Commission ("PHRC") the Stipulations of Fact agreed to by the parties on June 14, 1985, and request that the PHRC enter these Stipulations into the record at the commencement of these proceedings:

1. Complainant was hired by Respondent to perform duties as a watchman at the Beaver Valley Power Station in June, 1980.
2. Complainant was a member of Amalgamated Local #502 of the International Union, United Plant Guard Workers of America ("Union") throughout the tenure of her employment with Respondent.
3. Throughout the tenure of her employment with Respondent, a Collective Bargaining Agreement, dated October 30, 1980, was in effect between Respondent and the Union.
4. On June 11, 1981, Complainant's physician, James C. Amato, M.D. issued to Complainant a sick certificate stating that Complainant could only work eight (8) hours per day due to the nature of her illness.
5. Complainant's last day of work for Respondent was July 23, 1981.
6. Complainant was examined by Wallace Zernich, M.D. on July 30, 1981, and was informed that she was able to work overtime.
7. On August 6, 1981, Respondent advised Complainant in writing that unless she obtained an unrestricted clearance to return to work from her physician, she would be placed on an involuntary medical leave of absence for a maximum period of six (6) months.
8. On August 6, 1981, Complainant also was advised in writing that if she did not obtain unrestricted permission to return to work at the end of her medical leave of absence, her employment would be terminated.
9. In September, 1981, Complainant learned she was pregnant.
10. Complainant filed a Complaint with the Pennsylvania Human Relations Commission on August 31, 1981.
11. Complainant gave birth to a baby on April 27, 1982.
12. On May 18, 1982, Jack Collins, on behalf of Respondent, advised Complainant during a telephone conversation that her medical leave had expired on May 17, 1982. During the

May 18, 1982, telephone conversation, Jack Collins stated that he would have to know if Complainant intended to return from her medical leave of absence.

13. In response to Jack Collins' inquiry regarding her return to the employment of Respondent, Complainant stated that it "was up to the Human Relations Commission."
14. From April 27, 1982, to June 9, 1982, Complainant was temporarily disabled as a result of giving birth to her child on April 27, 1982.
15. Subsequent to July 31, 1981, Complainant filed a claim for unemployment compensation benefits.

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Dated: February 6, 1986

FINDINGS OF FACT

The facts contained in the "Stipulations of Fact" are hereby incorporated herein as if fully set forth. 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:

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

1. In June of 1980, Denise L. Ross, (hereinafter "Complainant") was hired by Burns International Security Services, Incorporated, (hereinafter "Respondent") as a zone monitor at the Beaver Valley Power Station, Unit Number 1, Shippingport, PA. (N.T. 35, 1; S.F. 1)
2. At the time of the Complainant's hire, the Beaver Valley Power Station was a fully operable nuclear power station operated by Duquesne Light Company. (N. T. 504)
3. Shortly after the Complainant’s hire, she and all other zone monitors were reclassified to the position of watchman. (N.T. 35)
4. During the period in question, the Respondent furnished Duquesne Light Company with security guards and watchmen at the Beaver Valley Power Station. (N.T. 12, 345-346, 420, 504)

5. The general duties of a watchman included maintaining access in and out of doors at the facility, surveillance of the site, searching vehicles, and general monitoring of persons moving throughout the nuclear power station. (N.T. 88, 321, 342, 583)
6. Site security guards were armed, however, watchmen were unarmed. (N.T. 508, 560)
7. At the site, there were approximately 45 security posts, most of which were sitting posts, each containing its own distinct post orders which more specifically described the precise duties associated with that post. (N.T. 59, 447, 609, 652)
8. Watchmen were not always assigned to the same post from one shift to the next and often were required to change posts during a shift. (N.T. 391, 504)
9. Respondent's normal operational work schedule included three shifts: 7:00 a.m. - 3:00 p.m.; 3:00 p.m. - 11:00 p.m.; and 11:00 p.m. - 7:00 a.m. (N.T. 141)
10. Over a period of time, watchmen worked all three shifts. (N.T. 142)
11. At times, like during a shut down for nuclear refueling, the Respondent scheduled watchmen on 12 hour shifts. (N.T. 133, 504-505, 522, 588)
12. Quite frequently, when watchmen were on eight hour shifts, the Respondent also required overtime from its watchmen. (N.T. 40, 79, 288, 289, 332, 455-460, 521, 583; R.E. 4)
13. In November of 1980, the Complainant was hospitalized after experiencing severe pains, nausea and cramping, however, nothing was found. (N.T. 36- 37, 104)
14. In December of 1980, the Complainant first saw Dr. Jack Amato, who later performed exploratory surgery on her on or about March 9, 1981. (N.T. 38, 113)
15. Subsequent to the exploratory surgery, Dr. Amato diagnosed the Complainant's condition as endometriosis and prescribed Danocrine and birth control pills in an effort to relieve the symptoms of endometriosis. (N.T. 40-41, 113)
16. Despite taking the prescribed medication, the Complainant continued to experience some less severe symptoms of endometriosis. (N.T. 104)
17. During the 14 week period covering April 17, 1981, through July 23, 1981, the Complainant worked a total of 106 hours of overtime. (C.E. 9)
18. The week ending June 4, 1981, was the only week of these 14 weeks during which the Complainant did not work overtime. (C.E. 9)
19. Because the Complainant and her husband wanted to have a child, Dr. Amato instructed the Complainant to cease taking Danocrine in June of 1981. (N.T. 121, 122)
20. On or about June 6, 1981, the Complainant experienced cramping pains and nausea at work while on the 3:00 p.m. - 11:00 p.m. shift and instructed her supervisor that she was not feeling up to working overtime. (N.T. 42)
21. The Complainant was told she was the only available employee who could work the post, so she remained until relieved at 3:00 a.m., despite the symptoms she was experiencing. (N.T. 43)
22. The following day the Complainant reported off work as sick. (N.T. 44)
23. Several days later, on June 11, 1981, the Complainant visited Dr. Amato who issued the Complainant a certificate which stated: [The Complainant] "[m]ay only work 8 [hours] due to the nature of her illness." (C.E. 2)
24. The Complainant took the sick certificate to work and gave it to Acting Captain McClure who read it and told the Complainant "Okay. That will be fine. There will be no problem." (N.T. 47-48)
25. In the six week period between June 11, 1981, and July 23, 1981, the Complainant worked 33 hours of overtime. (C.E. 9)

26. On July 22, 1981, the Complainant was scheduled to work a 12 hour shift. The post on which she was placed that day had been closing at 2:30 p.m. which would have been 7.5 hours into her scheduled shift. (N.T. 49, 50)
27. On July 22, 1981, the Complainant felt sick off and on throughout the day. (N.T. 50)
28. During her shift, the Complainant asked her morning supervisor if it would be okay if she stayed until the post closed and then went home. The morning supervisor told the Complainant that would be okay. (N.T. 50, 51)
29. When the afternoon supervisor came on at 2:00 p.m., he resisted the Complainant leaving before the 12 hour shift was over. (N.T. 51, 52)
30. Between 3:30 p.m. and 4:00 p.m., the Complainant's post was closed and she was instructed to report to the guardhouse. (N.T. 52)
31. During the Complainant's meeting with her afternoon supervisor's supervisor, Captain Horner, the Complainant asked to use her sick certificate, but the Complainant was instructed that she would have to get an unrestricted work release from her doctor. (N.T. 52-55)
32. On July 23, 1981, the Complainant left work early to see Dr. Amato who issued her a second sick certificate which stated: "Denise should not be on her feet more than eight hours at a time unless she feels okay." (N.T. 55, C.E. 3)
33. The Complainant returned to work and presented the second sick certificate to Captain Horner who told the Complainant he would have to check with the project manager and that the Complainant would have to go see the Respondent's doctor. (N.T. 58, 60)
34. Pending the Respondent's review of the Complainant's sick certificate, she was put on a medical hold and instructed to go home and await a decision. (N.T. 60, 61)
35. July 23,1981, was the last day the Complainant worked for the Respondent. (N.T. 61)
36. Following the Respondent's instructions, the Complainant went to Dr. Zurnich, the Respondent's doctor, who did not examine the Complainant. (N.T. 62, 63)
37. In effect, Dr. Zurnich simply told the Complainant that he was not a gynecologist and did not know much about endometriosis and that in his opinion, he did not see why she could not be at work. (N.T. 63, C.E. 4)
38. The Respondent sent the Complainant a letter dated August 6, 1981, instructing the Complainant that she was placed on an involuntary medical leave of absence for six months and that if she did not receive "unrestricted permission to return to work" her employment would be terminated at the end of the medical leave of absence. (C.E. 4)
39. On August 17, 1981, a Respondent representative, James Hillman, telephoned the Complainant and asked whether she had obtained unrestricted medical clearance to return to work. The Complainant responded by stating "I can't really go against what my doctor wanted and for [Hillman] to do what he had to do." Hillman responded to the Complainant by stating that the Respondent would place the Complainant on involuntary medical leave. (N.T. 67, 68, 139)
40. The Respondent placed the Complainant on medical hold on July 23, 1981, and on an involuntary medical leave on August 6, 1981, because the Respondent perceived the Complainant to have a medical impairment. (C.E.4)
41. On September 10, 1981, the Complainant was given medical confirmation that she was pregnant. (N.T. 69, 85)
42. The Complainant's pregnancy had the effect of putting the Complainant's symptoms of endometriosis in remission. (N.T. 177, 179)

43. Between August 17, 1981, and June 30, 1982, the Complainant did not transmit any information to the Respondent with respect to the status of her physical condition. (N.T. 207)
44. The Complainant delivered her baby on April 27, 1982. (N.T. 69, 73)
45. A representative of the Respondent, Jack Collins, telephoned the Complainant on May 17, 1982, and informed the Complainant that her involuntary medical leave had expired and requested that she return to work. To which the Complainant responded: "It would have to be up to the Human Relations Commission." (N.T. 70, 71)
46. In May of 1982 and earlier, the Complainant never directly provided the Respondent with the fact that she was either pregnant or had given birth on April 27, 1982. (N.T. 187, 188)
47. In a letter dated May 19, 1982, the Respondent notified the Complainant that she was terminated because she failed to return to work at the expiration of her medical leave of absence. (C.E. 6)
48. The Complainant waited until June 30, 1982, after she had been terminated, to inform the Respondent that she had unrestricted permission to return to work. (N.T. 75; C.E. 7)

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 PHRC have fully complied with the procedural prerequisites to a public hearing in this case.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The Respondent is an employer within the meaning of the PHRA.
5. One incident of treatment accorded to a male different from that accorded to a female does not, without more, provide substantial evidence that a female had been a victim of unlawful sex discrimination.
6. The Complainant failed to meet her burden of persuasion that she was discriminated against because of her sex, female.
7. The Complainant has met her initial burden of establishing a prima facie case of handicap/disability-based discrimination by proving that:
    a. The Complainant belongs to a protected class;
    b. The Complainant was qualified for the job;
    c. The Complainant was laid off and placed on an involuntary medical leave; and
    d. That the position remained available after the Complainant's layoff and involuntary medical leave.
8. Since the Respondent regarded the Complainant as having an impairment, the Complainant was a handicapped or disabled person within the meaning of the PHRA and applicable regulations.
9. Respondent failed to meet its burden of introducing sufficient evidence to establish the job-relatedness of the Complainant's medical condition.
10. Complainant has met her ultimate burden of persuasion that her condition was non-job related.
11. The Complainant is entitled to relief including lost wages, with interest of six percent on lost wages.

OPINION

On August 31, 1981, Denise L. Ross, (hereinafter the "Complainant"), filed a complaint with the Pennsylvania Human Relations Commission alleging that Burns International Security Services, Incorporated, (hereinafter the "Respondent"), had discriminated against her because of a non-job related handicap or disability and because of her sex female in violation of §5(a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et. seq., (hereinafter the "PHRA"). The Complainant alleged that the Respondent placed her on layoff on July 24, 1981, and on an involuntary medical leave of absence effective August 17, 1981, because of restrictions on the Complainant working overtime due to endometriosis. The Complainant also alleged that male employees were not subject to the same terms and conditions of employment.

The Commission investigated the allegations, determined that probable cause existed to credit the allegations, and attempted to conciliate the dispute. When conciliation efforts failed, a Public Hearing was scheduled. The PHRC was properly vested with jurisdiction in this matter and all procedural and substantive prerequisites to a Public Hearing were satisfied.

The Public Hearing was convened on February 6, 1986, and was concluded on February 10, 1986. During the course of the Hearing, the parties were given the opportunity to present testimony and other evidence in support of their respective positions. At the close of the Hearing, each party was given the opportunity to present a closing argument. Also, after several extensions, Post Hearing briefs were submitted.

> Section 5(a) of the PHRA provides in relevant part: It shall be an unlawful discriminatory practice...:
>
> (a) For any employer because of the...sex...or non-job related handicap or disability of any individual...to discharge...or to otherwise discriminate against such individual with respect to...terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required...

The Complainant alleged both sex-based and handicap and disability-based discrimination. Accordingly, each separate allegation basis must be evaluated. The majority of evidence presented focused on the Complainant's handicap and disability claim. In fact, very little effort was made to substantiate the Complainant's allegation of sex-based discrimination. The Complainant's post hearing brief serves to illustrate this observation in that only one full paragraph and a portion of several sentences of two additional paragraphs in the Complainant's brief deal in any way with the issue of sex-based discrimination. In the two sentences referred to, the Complainant simply states in a conclusory fashion that male employees were treated in a more advantageous manner.

Although the bulk of this opinion will deal with handicap and disability issues, the sex-based discrimination claim cannot be ignored. However, the issue of sex discrimination in this case can be quickly disposed of.

In support of her sex-based discrimination claim, the Complainant offered the testimony of Charles Wandel. In 1980, Wandel worked for the Respondent as an armed Response Guard at the Beaver Valley Power Station, Unit No.1. In 1980, Wandel was given a three month medical

leave of absence during a period of temporary disability resulting from a kidney stone operation and the period of recuperation immediately following.

When Wandel's doctor gave Wandel clearance to return to work, the doctor issued him a sick certificate which stated that Wandel should not work overtime for three weeks. Unlike the Complainant, Wandel never attempted to use his sick certificate to avoid forced overtime.

Wandel was the only comparison individual offered as a similarly situated male employee who allegedly received more favorable treatment than the treatment received by the Complainant. However, for several reasons, the Complainant cannot successfully base her sex-based discrimination allegation totally on a comparison with Wandel. The first reason Complainant's sex discrimination claim must fail is because, one incident of treatment accorded a male different from the accorded a female does not, without more, provide substantial evidence that a female had been a victim of unlawful sex discrimination. Freeport Area School District v. PHRC, 18 Pa. Cmwlth. 400, 335 A.2d 873,878 (1975).

Secondly, even if this were not the rule in Pennsylvania, the facts, as presented, support that both the Complainant and Wandel were treated in a similar fashion. Wandel, like the Complainant, turned in his sick certificate but did not have an occasion to use it. The Complainant's first sick certificate was dated June 11, 1981, however, she did not attempt to avoid overtime until July 22, 1981, over one month later. Neither Wandel nor the Complainant were adversely affected by the mere act of giving a supervisor their sick certificates.

The Respondent offered testimony that had Wandel attempted to avoid overtime by using a sick certificate, he, like the Complainant, would have been placed on an involuntary medical leave. The Complainant offered no other evidence to dispute the Respondent’s assertion. Accordingly, the Complainant’s sex-based discrimination is unsupported by the evidence.

The remaining handicap and disability-based discrimination claim presents the more complex liability issues in this case. As with any complaint alleging employment discrimination on the basis of handicap/disability, three primary liability issues must be faced:

1. Does the Complainant have a handicap or disability within the meaning of the PHRA?
2. Did the adverse employment action occur because of the handicap/disability?; and
3. Is the handicap/disability job related?

Small v. National Railroad Passenger Corp., Docket No. E-12593 (PA Human Relations Commission, March 3, 1981).

The first issue listed above arises in the context of the Complainant’s initial burden to establish a prima facie case of discrimination. In the leading case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973), the U.S. Supreme Court set forth the basic allocation of burdens and the order of presentation of proof in a Title VII case alleging disparate treatment. Under this formula, which has been adopted by the PA Supreme Court for analyzing evidence in a case under the PHRA, General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976), the Complainant has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. If the Complainant succeeds, the burden then shifts to the Respondent to produce evidence which demonstrates a legitimate, non-discriminatory reason for

the adverse employment decision. 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 burden merges with the Complainant's ultimate burden of persuading the fact finder that he has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 25 FEP 113 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983).

A prima facie case of discrimination, identifying the discriminatory criterion "as the likely reason for the denial of a job opportunity," White v. City of San Diego, 605 F.2d 455, 458, 20 FEP 1649 (9th Cir. 1979), must be established by a preponderance of the evidence. Burdine, 450 U.S. at 252-53. A properly established prima facie case allows an inference of illegal discrimination, creating a legally mandatory, rebuttable presumption against the Respondent. Id. at 254 n. 7; Casillas v. United States Navy, 735 F.2d 338, 343, 34 FEP 1493 (9th Cir. 1984).

McDonnell Douglas set forth the specific elements of a prima facie case of disparate treatment. Under its oft repeated test, a Complainant must show: (1) that he or she belongs to a protected group; (2) that he or she applied for and was qualified for a job for which the Respondent was seeking applicants; (3) that, despite his or her qualifications, he or she was rejected; and (4) that, after the rejection, the position remained open and the Respondent continued to seek applicants from persons of his or her qualifications. McDonnell Douglas, 411 U.S. at 802. It has repeatedly been emphasized that this four part test is not rigid; its satisfaction depends on the facts of each case. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 575-76, 17 FEP 1062 (1978); Spaulding v. University of Washington, 740 F.2d 686, 700, 35 FEP 217 (9th Cir. 1984); White, 605 F.2d at 458; Reed v. Printing Equipment Division of Western Gear, 75 Pa. Cmwlth. 360, 462 A.2d 292 (1983).

Since McDonnell Douglas involved a refusal to hire, not a layoff or involuntary medical leave, the four prong formula must be adapted. In the PHRC case of Oliver et al. v. Miley Security Services, Inc., Docket Nos. E-18942 and E-18943, we outlined the elements of a prima facie case in a case alleging a discriminatory discharge. These elements are:

1. That Complainant belongs to a protected group;
2. That Complainant was qualified for the job;
3. That Complainant was discharged; and
4. That the job remained available after Complainant's discharge.

Citing Ray V. Safeway Stores, 614 F.2d 729, 22 FEP 49 (10th Cir. 1980).

This prima facie adaptation can be even further modified to fit the particular circumstances of this case. The third element simply becomes, that the Complainant was laid off and placed on an involuntary medical leave. Similarly, the fourth element changes to become, that the position remained available after the Complainant's layoff and involuntary medical leave. The exact elements of a prima facie case are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations, Spruill v. PA Dept. of Transportation, Docket No. E-18816 (PA Human Relations Commission, February 28, 1983); Fisher v. Montgomery County Sheriff's Dept., Docket No. E-21522 (PA Human Relations Commission, August 9, 1984); Furnco Construction Corp. V. Waters, 438 U.S. 567 (1978).

The Complainant easily established the third and fourth elements of her prima facie case. Clearly, she was laid off and placed on an involuntary medical leave and her position remained available thereafter. The first two elements are the areas of dispute in this case.

First, the Complainant must establish that she had a handicap or disability within the meaning of the PHRA. The Act nowhere defines "handicap or disability". Regulations supplying definitions were adopted by the Commission and upheld by Commonwealth Court in Pennsylvania State Police v. PHRC and Phyllis Sweeting, 72 Pa. Cmwlth. Ct. 520, 457 A.2d 584 (1983), and Pennsylvania State Police v. PHRC and Governor Williams, 85 Pa. Cmwlth. Ct. 621,483 A.2d 1039 (1984). The PHRC regulations provide in relevant part:

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; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a 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 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.

Under these regulations, the evidence presented in this case clearly supports the conclusion that the Complainant had a handicap or disability. Although the Complainant's condition of endometriosis was not a physical impairment which substantially limited a major life activity. Subclause (i)(C) can be specifically applied to the Respondent’s actions.

In Pennsylvania State Police v. PHRC, 72 Pa. Cmwlth. 520,457 A.2d 584 (1983), the Commonwealth Court held that an applicant for admission to the Pennsylvania State Police Academy had been discriminated against when her application was rejected because the State Police medical officer found the applicant to have an allergic condition which he, the doctor, considered to be permanent and not correctable and which would be aggravated by the required exposure to horses and stables. The Court concluded that the applicant was a handicapped or disabled person because the State Police regarded her as having an impairment and wrote that "[i]f an Employer rejects an applicant for medical reasons, that act under the Commission's regulations is an impairment, per se, of a major life activity, i.e. employment. Id. at 530 n. 12, 457 A.2d at 589 n. 12.

In the present case, the Complainant was clearly laid off and placed on involuntary medical leave because the Respondent perceived that the Complainant's medical condition would affect the performance of her job. It cannot be disputed that the Respondent regarded the Complainant as having an impairment.

Finally, regarding the establishment of a prima facie case, the question of whether the Complainant was qualified must be resolved in favor of the Complainant. At this stage of our analysis, without considering the effect of endometriosis, the Complainant had been working in the position for a year without criticism. The Respondent agreed that the Complainant was a valued employee who would have been retained but for the perceived consequences of her medical condition.

When addressing the qualification portion of a prima facie showing in a handicap/disability case, the question of whether the medical condition is job-related is reserved until after the burden of production shifts to the Respondent, see PA State Police v. PHRC, 72 Pa. Cmwlth. 520,457 A.2d 584, at 589 n. 12 (1983), and National Railroad Passenger Corp. v. PHRC, 70 Pa. Cmwlth. 62, 452 A.2d 301, at 303 (1982), at which point the Respondent must attempt to establish that a Complainant's handicap is job related.

Accordingly, we find that the Complainant has successfully established each element of a prima facie case of handicap/disability-based discrimination. At this point, the Respondent may (and, in order to prevail, must rebut the presumption of discrimination thus created by introducing evidence of a legitimate, non-discriminatory reason for its actions. See Vogt v. Action Industries, Inc., Docket No. E-23851 (PA Human Relations Commission, November 27, 1985), citing Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1980); and PA Dept. of Transportation v. PHRC, 84 Pa. Cmwlth. 98,480 A.2d 342 (1984).

The Respondent attempted to meet its burden by contending that the Complainant's condition was job related. The PHRA by its terms protects only persons whose handicaps are "non-job related":

> 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 persons applies for, is engaged in or has been engaged in. 43 P.S. §954(p).

PHRC regulations provide in relevant part:

> 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.

The Respondent argues that the condition of endometriosis is job-related within the meaning of these sections. Since the Respondent must establish that the Complainant's handicap/disability did "substantially interfere" with her ability to perform the "essential functions of the job," an examination of the job and the "interference" is appropriate.

During the Public Hearing, the Respondent raised two basic functions of the Complainant's job and argued they were adversely affected by the Complainant's condition. First, the Respondent contends that endometriosis prevented the Complainant from working overtime and possibly an eight hour day. Second, the Respondent generally contends that the Complainant's illness interfered with her ability to perform her security job duties. Specifically, the Respondent focused on whether the Complainant's condition would inhibit her ability to utilize self-defense techniques taught by the Respondent and allegedly required by Nuclear Regulatory Commission Regulations.

We find that the Respondent has not met its burden. The record clearly shows that there had been no "substantial" interference with the Complainant’s ability to work either an eight hour day or forced overtime. Instead, the record establishes that between November of 1980, when the Complainant first experienced symptoms of endometriosis, and July 23, 1981, the date she was laid off, the Complainant only asked to be relieved from overtime twice: once on June 11, 1981, and again on July 22, 1981. Astoundingly, the Complainant's records reveals that she worked 106 overtime hours between April 17, 1981, and July 23, 1981. Records prior to April 17, 1981, were not a part of the record.

This factor makes it more likely that it was simply the Respondent's unwillingness to adjust their schedules to accommodate the relatively rare instances that the Complainant's endometriosis rendered her unable to work overtime. Other than the Complainant's two short periods of hospitalization, there were no instances where the Complainant was unable to work an eight hour day. In the Respondent's operations, it was a common occurrence that schedules were changed at the last minute to accommodate a variety of circumstances which made overtime necessary. There is no understandable reason why the Complainant's infrequent requests to be relieved of overtime could not have been accommodated with minimal interference.

The question of whether the Complainant's endometriosis interfered with the Complainant's ability to perform security job duties was not fully answered. It was true that the Complainant experienced varying degrees of the symptoms of endometriosis, i.e. nausea, abdominal cramping pains, and that she suffered these symptoms intermittently and on an unpredictable basis. However, between November of 1980 and July 23, 1981, the Complainant's work was characterized as good without complaint. The Respondent cited only the possibility of the Complainant's work being affected. No specific instances were presented which would serve to support the Respondent's contention. Instead, the Respondent stressed that self defense maneuvers probably could not be performed while someone was experiencing nausea.

It was not established to a certainty that knowledge of and self defense readiness were required job duties. However, even if we were to concede that self defense was an essential job function, the Respondent did not sufficiently establish that the Complainant's abilities to do self defense were "substantially" interfered with.

One further job relatedness argument was submitted by the Respondent. The Respondent argued that because it is generally subject to federal laws and specifically to the rules and regulations promulgated by the Nuclear Regulatory Commission ("NCR"), the Respondent had no choice but to place the Complainant on involuntary medical leave.

The Respondent submitted Appendix B of 10 C.F.R. §73.55 which contains physical qualifications established by the NRC for security personnel at nuclear power stations. The pertinent sections of Appendix B reads as follows:

B. Physical and mental qualifications

1. Physical qualifications:

a. Individuals whose security tasks and job duties are directly associated with the effective implementation of the licensee physical security and contingency plans shall have no physical weaknesses or abnormalities that would adversely affect their performance of assigned security job duties.

b. In addition to a. above, guards, armed response personnel, armed escorts, and central alarm station operators shall successfully pass a physical examination administered by a licensed physician. The examination shall be designed to measure the individual's physical ability to perform assigned security job duties as identified in the licensee physical security and contingency plans. Armed personnel shall meet the following additional physical requirements:

(5) Other physical requirements -- An individual who has been incapacitated due to a serious illness, injury, disease, or operation, which could interfere with the effective performance of assigned security job duties shall, prior to resumption of such duties, provide medical evidence of recovery and ability to perform such security job duties.

Had we found that the Complainant's condition constitutes a physical impairment which substantially limits a major life activity, instead of the condition simply being "regarded as" being a handicap/disability, the doctrine of preemption would have to have been considered. The

language of Section B1a of Appendix B would have arguably been in direct conflict with the PHRA had we found the Complainant's condition to be a physical impairment.

Instead, under the facts as presented, we find that the Complainant's endometriosis neither did nor would adversely affect the Complainant's performance of assigned security job duties, so long as the Respondent would take very minor measures to reasonably accommodate the Complainant.

In essence, the Complainant's doctor, and the Respondent's doctor agreed that there was no reason why the Complainant's endometriosis would adversely affect the Complainant's performance of her security job duties. Dr. Amato's second sick certificate simply read, "Denise should not be on her feet more than eight hours at a time unless she feels okay." There were approximately 45 security posts at the facility, many of which were sitting posts.

The Respondent made no effort to either negotiate a reasonable accommodation or explore the facts regarding the Complainant's condition. Instead, the Respondent appears to have formed its opinion on insufficient information and applied an unreasonable generalization which resulted in the Complainant's layoff and subsequent involuntary medical leave.

The weight of the evidence in this case supports a finding that the Complainant was capable of performing the essential functions of her security job. Because the Respondent has failed to establish job relatedness, a decision for the Complainant is in order.

Section 9 of the PHRA provides that, upon a finding of discrimination:

> ...the Commission shall...issue an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but no limited to...upgrading of employees, with or without backpay...as, in the judgment of the Commission, will effectuate the purposes of this Act...43 P.S. 959.

The obvious purpose of an award is, within the legislative grant of authority, to restore the Complainant to the economic position in which she would have been had it not been for the act of discrimination. In the case at hand, the Complainant's backpay award must be limited because of her failure to properly communicate her medical status to the Respondent after she was placed on an involuntary medical leave.

Both at a meeting on July 23, 1981, and in the Respondent's letter to the Complainant dated August 6, 1981, the Respondent gave the Complainant instructions to obtain unrestricted medical permission to return to work. On August 17, 1981, a Respondent representative called the Complainant and the Complainant told the caller that she could not go against her doctor. At this point, the Complainant was placed on an involuntary medical leave until such time as the Complainant obtained unrestricted medical permission to return to work.

The next communication between the Complainant and the Respondent came in the form of a phone call from the Respondent nine months later on May 17, 1982. The Complainant was angry

with the Respondent because the Respondent had laid her off and put her on an involuntary medical leave.

Very likely, it was this anger which prevented the Complainant from advising the Respondent of significant changes in her physical condition beginning in late August, 1981. First, on or about September 10, 1981, the Complainant learned that she was pregnant. The Complainant knew that the bottom line with the Respondent was that she had to be available on an unrestricted basis. Despite this, she did not advise the Respondent that the symptoms of her endometriosis were in remission beginning in late August of 1981.

In September and October of 1981, Dr. Amato told the Complainant that he expected her pregnancy to put her endometriosis in remission. The Complainant, in fact, experienced no pain from the endometriosis in September of 1981, October, November, December, January, February and March of 1982. Dr. Amato indicated that the Complainant would have been able to work until March 20, 1982, the date on which the Complainant's pregnancy would have temporarily prevented her from working.

As early as September of 1981, the Complainant had a strong hope that her endometriosis symptoms had been alleviated. In October of 1981, her hope slowly grew into an expectation which by November of 1981, the expectation became a certainty. By the end of November of 1981, the Complainant had been symptom free for over three months.

Although the Complainant was fully aware that the Respondent would have taken her off of involuntary medical leave if she would have given the Respondent an update on her condition, the Complainant chose to remain silent. The Complainant's silence in the face of the Respondent's clear instructions has the effect of cutting off the Respondent's backpay liability.

Accordingly, we find that the Complainant is entitled to backpay for the period between July 22, 1981, and December 1, 1981. Since calculations need be only reasonable and realistic, not mathematically precise, PHRC v: Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Cmwlth. 1975), we find that the Complainant was off work as a result of the Respondent’s discrimination for approximately 18½ weeks.

For the 14 week period between July 22, 1981, and October 30, 1981, security watchmen earned $6.25 per hour, and for the 4½ week period between October 30, 1981, and December 1, 1981, the Complainant would have earned $7.45 per hour. At the time of her layoff, the Complainant was employed as a full-time employee working 40 hours per week. In the 14 week period prior to her layoff, the Complainant had also worked 106 hours of overtime. On average she worked approximately 7.5 hours overtime per week.

Based on these figures, the Complainant suffered damages as follows:

July 22, 1981 - October 30, 1981		
14 weeks @ 40 hours per week - $6.25 per hour		
560 hours x $6.25	=	$3,500.00
106 hours overtime x $9.375	=	$ 993.75

October 30,1981 - December 1, 1981		
4½ weeks @ 40 hours per week - $7.45 per hour		
180 hours x $7.45	=	$1,341.00
34 hours overtime x $11.175	=	$ 379.95
Total backpay lost		$6,214.70

Since an award of interest is also appropriate, Goetz v. Norristown Area School District, 328 A.2d 529 (Pa. Cmwlth. 1975) the Complainant's damages are increased as follows:

December 1, 1981 - December 1, 1982		
@ 6% interest on $6,214.70	=	$ 372.88
December 1, 1982 - December 1, 1983		
@ 6% interest on $6,587.58	=	$ 395.25
December 1, 1983 - December 1, 1984		
@ 6% interest on $6,982.83	=	$ 418.97
December 1, 1984 - December 1, 1985		
@ 6% interest on $7,401.80	=	$ 444.11
December 1, 1985 - February, 1986		
@ 1% interest on $7,845.91	=	$ 78.46
Total Backpay plus % award		$7,924.37

The Complainant's brief also seeks reinstatement as a remedy. Several factors lead us to conclude that the Complainant is not entitled to an order of reinstatement. First, the Complainant's complaint was never amended to allege an unlawful discriminatory termination. Instead, the complaint merely addresses the layoff and involuntary medical leave.

Second, had the Complainant notified the Respondent that her medical status had changed in the Fall of 1981, she would not have been terminated in the Summer of 1982. Finally, even if the complaint had been amended, when the Respondent called the Complainant in May of 1982, to inquire whether she was physically able to return to work, she again failed to advise the Respondent of the true nature of her medical status. When the Respondent called, she was actually recovering from a temporary disability associated with the birth of her child on April 27, 1982. For these reasons, an order of reinstatement is not appropriate in this case.

Having concluded that the Respondent discriminated against the Complainant because the Respondent regarded her as having a handicap/disability, in violation of Section 5 of the PHRA, we order relief as described in the order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENISE L. ROSS, COMPLAINANT

v.

BURNS INTERNATIONAL SECURITY SERVICES, INCORPORATED, RESPONDENT

DOCKET NO. E-20994

RECOMMENDATION OF THE HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the view of the hearing panel that Respondent laid off the Complainant and placed her on an involuntary medical leave because the Respondent regarded the Complainant's medical condition as a handicap or disability in violation of §5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the panel's recommendation that the attached Findings of Fact, Conclusions of Law, Opinion, and Order be adopted by the full Pennsylvania Human Relations Commission.

John P. Wisniewski, Chairperson — April 27, 1987
Date

Rita Clark, Commissioner — April 27, 1987
Date

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENISE L. ROSS, COMPLAINANT

v.

BURNS INTERNATIONAL SECURITY SERVICES, INCORPORATED, RESPONDENT

DOCKET NO. E-20994

FINAL ORDER

AND NOW, this 1st day of May, 1987, 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

ORDERS

1. That the Respondent cease and desist from either making prejudgments or forming opinions before knowing sufficient information regarding medical conditions which may prove on examination to be unrelated to job performance or to be nonexistent.
2. That the Respondent shall pay to the Complainant the lump sum of $7,924.37 which represents backpay lost for the period between July 22, 1981, and December 1, 1981, plus interest of 6% per annum calculated up to the month in which the Public Hearing of this matter was held. This amount shall be paid within 30 days of the effective date of this order.
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 Theresa Homisak, Esquire, in the PHRC Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

John P. Kominowski
Secretary