COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHILIP C. BROWN, Complainant	:	
v.	:	Docket No. E-38824
THERMAL GARD, THERMO-GUARD, INC. Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PRESIDING OFFICER

FINAL ORDER

FINDINGS OF FACT*

1. Philip C. Brown, Complainant herein, is an adult individual residing at 936 Main Street, Bloomsburg, Pennsylvania 17815. (Complaint).

2. Thermal Gard, Thermo-Guard, Inc., Respondent herein, is a corporation with offices at 210 Division Street, Kingston, Pennsylvania 18704. (Complaint).

3. Complainant filed a verified complaint with the Pennsylvania Human Relations Commission on or about December 1, 1986, at Docket No. E-38824. (Complaint).

4. Complainant was hired by Respondent as a Sales Representative on or about August 18, 1986. (Complaint; R.E. 3).

5. Complainant's job consisted of calling on sales leads provided by Respondent and making sales of Respondent's products to those leads. (N.T. 211).

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*To the extent the Conclusions of Law or Opinion which follow include necessary findings of fact in addition to those in this section, such findings shall be considered to have been included herein. The following abbreviations have been utilized for reference purposes:

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

6. Complainant could be assigned a lead anywhere within a 100 mile radius of Respondent's Kingston, Pennsylvania, office. (N.T. 210-11).

7. In October, 1986, Jim Scouton was the Branch Manager for the Kingston office. (N.T. 208-9).

8. As Branch Manager, Scouton was responsible for managing the Kingston office, including the complete supervision of the sales force. (N.T. 209-10).

9. In October, 1986, Eberlyn Schwinn was the Lead Manager for the Kingston office. (N.T. 10, 209, 277-8).

10. As Lead Manager, Schwinn was responsible for distributing sales leads to the sales representatives. (N.T. 10, 53).

11. On October 4, 1986, Complainant suffered an injury to his right eye. (R.E. 7, 8).

12. After sustaining the injury, Complainant drove himself to Geisinger Medical Center to seek medical treatment. (N.T. 328).

13. Complainant received treatment for the injury at Geisinger Medical Center on October 4, 1986. (R.E. 7, 8).

14. Complainant's injury was diagnosed at Geisinger Medical Center as a corneal abrasion of the right eye. (R.E. 7, 8).

15. The Radiology Report of the injury stated "Stereo Waters', lateral and Caldwell views of the orbits reveal no evidence of fracture or other significant abnormality. IMPRESSION: Negative right orbit." (R.E. 7).

16. Geisinger Medical Center prescribed that Complainant keep a patch on his right eye for 24 hours, until it was rechecked. (R.E. 7, 8).

17. Geisinger Medical Center also prescribed that Complainant take one or two Tylenol III every four hours for pain. (R.E. 7, 8).

18. Complainant was instructed not to drive, operate machinery, climb ladders or drink alcoholic beverages while on Tylenol III. (R.E. 7, 8).

19. Complainant drove himself home from Geisinger Medical Center upon completion of this medical treatment on October 4, 1986. (N.T. 329).

20. Although Respondent did not really believe that Complainant had been injured, Complainant was not required to accept a lead and work on October 4. (N.T. 21, 74-5, 78-9, 260-1, 321).

21. On October 5, 1986, Complainant drove himself to Geisinger Medical Center for followup treatment. (R.E. 7; N.T. 329, 333, 337-41).

22. The medical report for the October 5 visit stated that the patch was removed from Complainant's eye and that he had mild pain. (R.E. 7).

23. The October 5 medical report also stated that Complainant had a small hematoma and a healed corneal abrasion. (R.E. 7).

24. Complainant was instructed to return to the hospital if pain should return. (R.E. 7; N.T. 341).

25. Complainant drove himself home from Geisinger Medical Center upon completion of this medical treatment on October 5, 1986. (N.T. 329).

26. Complainant was not scheduled to work on October 5, 1986. (N.T. 52, 279, 304).

27. Complainant was required by the Branch Manager, Jim Scouton, to be at a sales meeting in Respondent's Kingston office on October 6, 1986, to discuss the injury. (N.T. 26, 84-5).

28. Complainant drove himself to and from the sales meeting at the Kingston office, which is approximately 45-50 miles from Complainant's home in Bloomsburg. (N.T. 279, 329).

29. After the sales meeting, Complainant provided Scouton with a copy of medical records for his October 4 visit to Geisinger Medical Center.

30. The records provided to Scouton stated that Complainant had been treated on October 4 and 5 for a corneal abrasion of the right eye. (R.E. 8).

31. The records provided to Scouton also indicated that on October 4 Complainant was instructed to keep a patch on his eye for 24 hours until rechecked, was to take one to two Tylenol III every 4 hours for pain, was not to drive, operate machinery, climb ladders or drink alcoholic beverages while on the medication, and was to call his eye doctor or the emergency department if severe pain, redness or blurred vision developed. (R.E. 8).

32. Without discussing these records with

Complainant, Scouton chose to consider them as an excuse for not working on October 4, but not for October 6. (N.T. 240).

33. Scouton never really believed Complainant had been injured on October 4. (N.T. 260-1).

34. Assuming that Complainant had been injured, Scouton did not believe that a "poke in the eye" on October 4 would prevent him from coming to the meeting on October 6, which was two days later. (N.T. 304).

35. Scouton believed Complainant was capable of performing his job on October 6. (N.T. 304, 239).

36. Scouton did not speak with Lead Manager Eberlyn Schwinn on October 6 about how to deal with Complainant if he called for a lead assignment. (N.T. 96, 98).

37. Complainant was willing to work leads that did not require driving long distances. (N.T. 361, 365).

38. Complainant called Schwinn for a lead at about 4 o'clock on October 6. (N.T. 351).

39. Schwinn provided Complainant with a lead in Dixon City, Pennsylvania. (N.T. 34, 104).

40. Dixon City is approximately 65 miles from Complainant's home in Bloomsburg. (N.T. 278-9)

41. Complainant requested a lead closer to his home. (N.T. 33, 106, 360-2).

42. Complainant requested a closer lead because of his eye injury. (N.T. 360-2).

43. Schwinn required that Complainant take the lead in Dixon City because that was the lead she had for him and

she had to send him there. (N.T. 33, 105).

44. Complainant refused the lead because he did not want to drive as far as Dixon City. (N.T. 33, 360-2).

45. Dixon City was within Complainant's sales area. (N.T. 34, 211).

46. Complainant did not call in for any further leads after October 6, 1986.

47. Complainant did not return to Geisinger Medical Center for additional, followup medical treatment for his eye injury until November 21, 1986. (C.E. 5; N.T. 354-5).

48. Complainant returned to Geisinger Medical Center because he was concerned that he was still having some pain in the back portion of his eye. (N.T. 341).

49. The medical report for that visit states that the examination of Complainant resulted in no specific prescription or other course of action. (C.E. 5).

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Act.

2. Respondent is a person and an employer within the meaning of the Act.

3. The Commission has jurisdiction over the parties and subject matter of this case.

4. The parties and the Commission have fully complied with the procedural prerequisites to the preliminary hearing in this case.

5. Complainant was handicapped or disabled under the Act, 43 P.S. §§951 et seq., and applicable regulations, 16 Pa. Code §44.1 et seq., on October 4 and 5, 1986.

6. Complainant was not handicapped or disabled under the Act and applicable regulations on October 6, 1986.

7. Respondent did not regard Complainant as having a physical or mental impairment which substantially limited one or more major life activities.

8. Complainant has the initial burden of estabishing a prima facie case of unlawful discrimination under Section 5(a) of the Act.

9. As part of Complainant's prima facie case, he must establish that he was handicapped or disabled under the Act and applicable regulations at the time of the unlawful discrimination of which he complains.

10. Complainant suffered no adverse employment

action as a result of his being handicapped or disabled on October 4 and 5, 1986.

11. Complainant has failed to establish that he was handicapped or disabled under the Act and applicable regulations at the time his employment with Respondent ended on October 6, 1986.

12. Complainant has failed to establish a prima facie case of unlawful discrimination under Section 5(a) of the Act.

13. The complaint in this case must be dismissed for failure of Complainant to establish a prima facie case.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Philip C. Brown ("Complainant") with the Pennsylvania Human Relations Commission ("Commission") against Thermal Gard, Thermo-Guard, Inc. ("Respondent"). Following investigation, a finding of probable cause to credit Complainant's allegations of unlawful discrimination was made. Prior to the convening of a public hearing, Respondent filed a Motion for Summary Judgment. As a result of this Motion, the Commission issued an Interlocutory Order, dated October 17, 1990. This Order required the convening of a preliminary hearing to receive and evaluate evidence concerning two threshold issues. The first issue to be decided is whether the Complainant's eye injury constituted a handicap/disability under the Pennsylvania Human Relations Act ("Act"). The second issue is whether Complainant was involuntarily terminated by Respondent or voluntarily quit.

II. ANALYSIS

Under the Commission's October 17, 1990, Interlocutory Order, two issues are to be decided as a result of the preliminary hearing. The first is whether Complainant's eye injury constituted a handicap or disability under the Act and applicable regulations. The second is whether Complainant's employment was involuntarily terminated by Respondent or whether he voluntarily quit.

In a case involving allegations of disparate

treatment, such as this one, Complainant has the initial burden of establishing a prima facie case of unlawful discrimination. Allegheny Housing Rehabilitation Corp. v. Com., Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A.2d 315 (1987); General Electric Corp. v. Com., Human Relations Commission, 469 Pa. 292, 365 A.2d 649(1976). In determining the requirements of a prima facie case, the elements are to be adapted to the type of discrimination alleged. Id. In this case, in which Complainant alleges that he was terminated because of his handicap or disability, a prima facie case may be established with proof that:

1) At the time of the action complained of, Complainant was a member of the class of people protected from...discrimination under the Act and applicable regulations;

2) Complainant held a position for which he was qualified;

3) Complainant was discharged;

4) Complainant was terminated under circumstances which give rise to an inference of unlawful discrimination.

Smith v. Universal Refractories, Inc., Docket No. E-40089 (PHRC April 5, 1991).

The first and third elements of this prima facie case are identical to the two issues under consideration herein. Unless Complainant establishes every element of his prima facie case, his complaint must be dismissed. Civil Service Commission of City of Pittsburgh v. Com., Pennsylvania Human Relations Commission, _____ Pa. _____, 591 A.2d 281 (1991); Com., Pennsylvania Human Relatins Commission v. Johnstown Redevelopment Authority, _____ Pa. _____, 588 A.2d

497 (1991). If Complainant's eye injury does not constitute a handicap or disability, under the Act and applicable regulations, he will have failed to establish the first element of his prima facie case. If he voluntarily quit, and was neither actually nor constructively discharged by Respondent, he will have failed to establish the third element.

To be handicapped or disabled under the Act, a person must have a physical or mental impairment which substantially limits one or more major life activities, must have a record of such an impairment, or must be regarded as having such an impairment. 16 Pa. Code §44.4. In this case, Complainant suffered a corneal abrasion of his right eye on October 4, 1986. He had this injury treated at Geisinger Medical Center, where a patch was placed on his eye. This rendered Complainant blind in his right eye. Blindness in one eye is a handicap or disability under the Act. National Railroad Passenger Corporation v. Com., Pennsylvania Human Relations Commission, 70 Pa. Cmwlth. 62, 452 A.2d 301(1982).

Based on the foregoing, Complainant was legally handicapped or disabled while he was medically required to wear the patch on his right eye. Complainant wore the patch for two days, from October 4 until October 5, when he returned to Geisinger Medical Center for followup treatment. At this time the patch was removed. Once the patch was removed, there is no evidence that it was put back on at the hospital, that Complainant was ever required to wear it again, or that

Complainant ever did wear it again.

After the patch was removed, on October 5, the weight of the evidence supports the conclusion that Complainant was no longer handicapped or disabled under the Act. To constitute a handicap or disability under the Act, an impairment must substantially limit one or more major life activities. While seeing is a major life activity, 16 Pa. Code §44.4, there is no evidence that Complainant's injury substantially affected this ability.

Complainant's medical records indicate that, as of October 5, he had only mild pain, a small hematoma, and a healed corneal abrasion. He was instructed to return for further treatment if the pain became severe, or if redness or blurred vision developed. He did not find it necessary to follow this instruction until approximately one and a half months later, on November 21, 1986. At that time, he sought treatment only because he was concerned that he still had "some" pain in the back portion of his eye and not for any other visual deficiency. This visit resulted in no specific prescription being given. There is no evidence he sought any further treatment.

Complainant alleges he was having focusing problems on October 6 which affected his vision. N.T. 330-1. Assuming this is true, it could not have had a substantial affect on his vision since he never had it treated, as he had been specifically instructed to do. Even when he did find it necessary to return for treatment, a month and a half later,

he went only because of some residual pain and not because of blurred vision or focusing problems. There is no other evidence of vision problems, as a result of the injury, or any evidence that his vision was substantially impaired by the injury, once the eye patch was removed on October 5.*

Complainant also alleges that he was handicapped or disabled under the Act until about October 15, 1986, because he was on medication for his injury. When the injury occurred, on October 4, he was prescribed Tylenol III and was instructed not to drive, operate machinery, climb ladders, or drink alcoholic beverages while on the medication. Complainant's job consisted of calling on sales leads provided by Respondent and making sales of Respondent's products to those leads. A lead could be assigned anywhere within about a 100 mile radius of Respondent's Kingston, Pennsylvania, office.

An impairment which substantially limits the ability to work constitutes a handicap or disability under the Act. 16 Pa. Code §44.4. If Complainant's injury prevented him from driving to his leads, because of the medication he was required to take, he would be substantially limited in his

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* There is evidence that Complainant had night vision problems which he corrected by wearing tinted glasses. N.T. 345. Respondent allowed him to wear these glasses, which is a reasonable accommodation to this physical impairment. Id. There is no evidence that Complainant's October 4 eye injury aggravated this condition or prevented him from wearing these glasses once the eye patch was removed.

ability to work. The evidence establishes, however, that Complainant was able to drive. He drove himself to and from Geisinger Medical Center on October 4. He drove himself to and from the Center again on October 5. He also drove approximately 45-50 miles to a sales meeting at Respondent's Kingston office on October 6, and he drove himself home.

Complainant does not dispute his ability to drive with his eye injury. In his complaint, he specifically states that Respondent could have accommodated him by assigning him leads which did not require driving for long distances. What he does dispute is his ability to drive long distances. The evidence shows, however, that he drove 45 to 50 miles twice on October 6. This establishes his ability to drive a reasonably long distance, at least by October 6, and shows that he was physically able to drive such distances.

Having established that Complainant could drive, the issue remains as to the legal effect of his doctor's instructions that he not drive while on Tylenol III. A person who is medically required to take a medication for an impairment, and not to drive while on the medication, is effectively rendered unable to drive while on it. While Complainant was prescribed Tylenol III on October 4, however, no medical testimony or records were presented at the hearing concerning how long he was medically required to take it for his injury. Complainant's October 4 medical records indicate only that he was to take Tylenol III for eye pain, but do not indicate how much he was prescribed or for how long he was to

take it. His October 5 medical records indicate that he was, by then, only in mild pain, and that he was told to return if the pain returned. The October 5 records do not indicate whether he was told to stay on Tylenol III after October 5.

Even if Complainant's testimony is accepted that he was taking Tylenol III until about October 15, there is no credible evidence that he was medically required to take it for eye pain at any time after October 5. Pain severe enough to take a prescription pain reliever like Tylenol III for two weeks would certainly be severe enough to require followup treatment, especially considering his doctor's instructions that he seek such treatment if his eye pain returned. His failure to do so, combined with the lack of medical evidence concerning his need for Tylenol III after October 5, outweighs his unsupported testimony that he was required to take it. There is no credible evidence that he was unable to drive after October 5, either directly because of his eye impairment or indirectly because he had to be on medication which rendered him unable to drive. There is, therefore, no credible evidence that his eye injury substantially limited any major life activity after October 5.

Based on the foregoing, Complainant's October 4, 1986, eye injury constituted a handicap or disability under the Act on October 4 and 5, 1986, but not thereafter. This finding makes it necessary to determine when the alleged unlawful discriminatory action occurred. Complainant alleges, in his complaint, that he was terminated on October 4 and that

the termination was reaffirmed on October 6. The evidence establishes, however, that Complainant remained employed by Respondent until at least October 6, when he refused a lead because he would have to drive further than he wanted to drive because of his injury.

Specifically, Complainant injured his eye on October 4 while he was on the telephone with Respondent's lead manager, Eberlyn Schwinn. Although Respondent did not really believe Complainant was injured, Complainant was not required to accept a lead and work that day. He was instructed to be present at a sales meeting in Respondent's Kingston office on Monday, October 6, to discuss his injury. On October 6, he attended the sales meeting. After the meeting, he provided Respondent's Branch Manager for the Kingston office, Jim Scouton, with a copy of medical records for his October 4 visit to Geisinger Medical Center. Scouton considered these records to be an excuse for not working on October 4. Scouton expected Complainant to run a lead on October 6 and Complainant was provided a lead by Schwinn when he called in for one. The lead provided was in Dixon City, Pennsylvania, which is approximately 60-65 miles from Complainant's home in Bloomsburg, Pennsylvania. Complainant indicated he could not drive that far. Schwinn told him it was his lead, that she had to send him there, and that driving that far was part of the job. Complainant refused, citing health reasons.

This evidence establishes that Complainant was still employed by Respondent on October 6. Respondent wanted and

expected him to work. This finding is further buttressed by Complainant's own testimony, in which he quotes Scouton as saying, on Monday, October 6, "I need you to work. This is a bad time." N.T. 365. There is no credible evidence that he would have been terminated, or otherwise lost his job due to his eye impairment, had he accepted the lead given to him on October 6 and continued to accept leads thereafter.

Based on these facts, the alleged discriminatory action occurred, if at all, on October 6 when Respondent required Complainant to take a lead which Complainant refused because he believed it was too far to drive with his eye impairment. Respondent did not require Complainant to work on October 4 and 5, when he was handicapped or disabled under the Act, and did not terminate him for not working those days. Respondent wanted and expected Complainant to work on October 6, however, and provided him a lead to run. It was only then that Complainant's employment ended when Complainant refused to take the lead because of his eye impairment.

As previously stated, the first prong of Complainant's prima facie case is that, at the time of the action complained of, Complainant was handicapped or disabled under the Act and applicable regulations. Supra at 11. This may be shown, inter alia, by establishing that Complainant's eye impairment was an actual handicap or disability under the Act on October 6, or that Respondent considered it to be one. 16 Pa. Code §44.4. As previously discussed Complainant's eye impairment was not an actual handicap or disability under the

Act on October 6. The evidence also establishes that Respondent did not consider Complainant handicapped or disabled on this date. Scouton never really believed Complainant had been injured at all. When Complainant provided him with medical evidence of his injury, which stated Complainant had a corneal abrasion, was prescribed Tylenol III, and should not drive while on this medication, Scouton considered it to be applicable for Saturday, October 4, but not Monday, October 6. There is no evidence Respondent believed Complainant's eye injury prevented him from driving to a long distance lead on October 6, or that Respondent considered Complainant's eye injury as substantially limiting any major life activity.

Since Complainant's eye impairment did not constitute an actual handicap or disability under the Act on October 6, and Respondent did not consider it to be one, Respondent was under no duty to reasonably accommodate Complainant on October 6. Although Respondent was on notice that it might be dangerous for Complainant to drive on October 6, if he were still taking Tylenol III, it assumed Complainant could drive safely and required him to do so. Having guessed correctly that Complainant was not handicapped or disabled under the Act, Respondent had no duty under the Act to be concerned about any potential danger Complainant's eye injury might present. Right or wrong, the Act's handicap provisions do not require reasonable accommodations for a person who only <u>may</u> be handicapped or disabled, and who may be in physical

danger by a job duty if they are, unless that person has an actual handicap or is considered to have one. See Civil Service Commission of City of Pittsburgh v. Com., Pennsylvania Human Relations Commission, ____Pa.____, 591 A.2d 281, 283(1991). Consequently, since Complainant has failed to establish that he was handicapped or disabled under the Act, or that he was considered to be so, at the time of the alleged unlawful discriminatory action, his complaint must be dismissed for failure to establish a prima facie case of unlawful discrimination.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHILIP C. BROWN, Complainant	:	
v.	:	Docket No. E-38824
TERMAL GARD, THERMO-GUARD, INC.	:	

RECOMMENDATION OF PRESIDING OFFICER

AND NOW, this 12th day of June, 1992, upon consideration of the record in the above-captioned action, the Presiding Officer hereby recommends that the Pennsylvania Human Relations Commission adopt the attached Findings of Fact, Conclusions of Law and Opinion, and issue the attached Final Order as the Final Order of the Commission.

BY: Michael M. Smith
MICHAEL M. SMITH
Presiding Officer

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

PHILIP C. BROWN, Complainant	:	
v.	:	Docket No. E-38824
THERMAL GARD, THERMO-GUARD, INC.	:	

FINAL ORDER

AND NOW, this 30th day of June, 1992, upon consideration of the record in the above-captioned action, the Pennsylvania Human Relations Commission hereby adopts the attached Findings of Fact, Conclusions of Law and Opinion and

ORDERS

that the complaint in this action be, and hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Robert Johnson Smith
ROBERT JOHNSON SMITH
Chairperson

ATTEST:

Russell S. Howell
Russell S. Howell
Assistant Secretary