

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENNIS R. DUFFY,
Complainant

v.

PITT OHIO EXPRESS, INC.,
Respondent

DOCKET NO. E-56433

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENNIS R. DUFFY,	:	
Complainant	:	
	:	
v.	:	Docket No. E-56433
	:	
PITT OHIO EXPRESS,	:	
Respondent	:	

STIPULATIONS

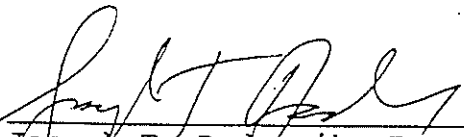
Complainant Dennis Duffy and Respondent Pitt Ohio Express do hereby stipulate that the following facts are true and that no proof thereof shall be required.

1. At all times relevant, Complainant Dennis Duffy ("Complainant") was an adult citizen residing in Milford Square, Pennsylvania.
2. At all times relevant, Respondent Pitt Ohio Express ("Respondent") was an "employer" within the meaning of Section 4(b) of the Pennsylvania Human Relations Act, 43 P.S. § 954(b).
3. Complainant filed the referenced complaint with the Pennsylvania Human Relations Commission on or about September 25, 1991.
4. The complaint was docketed on October 7, 1991 and served on October 16, 1991.
5. On or about January 31, 1995, the Commission's investigator notified Respondent that probable

JX-1

cause exists to credit the allegations of the complaint.

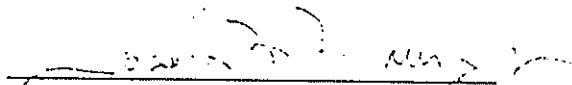
6. A Conciliation Conference was held on April 12, 1995.
7. Conciliation was not successful.
8. On or about June 30, 1995, the Commission notified the parties that the case was approved for placement on the public hearing docket.
9. Complainant wears a prosthesis below his right knee and has worn such device since 1973.
10. Without the benefit of his prosthesis, Complainant is substantially limited in the major life activity of walking.
11. Respondent hired the following persons as City Drivers on the date indicated:
 - a. Edward Schaadt - May 12, 1991
 - b. Mark Koch - May 28, 1991
 - c. Ronald Horos - June 10, 1991
 - d. Donald Stitzer - August 18, 1991
 - e. Lester Walters - August 29, 1991
 - f. Larry Meckes - September 11, 1991
 - g. Donald Muehlbezer - September 17, 1991
 - h. Richard Bartakovits - October 6, 1991
 - i. Michael Buchert - October 7, 1991.



Joseph T. Bednarik, Esquire
Counsel for the Complainant

Date

1/30/96



Joseph M. Maurizi, Esquire
Counsel for the Respondent

Date

11.2.96

COMMONWEALTH OF PENNSYLVANIA

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PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENNIS R. DUFFY,
Complainant

v.

PITT OHIO EXPRESS,
Respondent

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:
:

Docket No. E-56433

STIPULATIONS OF THE PARTIES

Complainant Dennis Duffy and Respondent Pitt Ohio Express do hereby stipulate that the following facts are true and requiring no further proof thereof:

Kenneth Hammel is unable to appear at the hearing scheduled to reconvene in this matter on March 13, 1996.

Had Mr. Hammel been able to appear, he would have provided the testimony summarized in the following paragraphs.

1. At all times relevant in 1991, Kenneth Hammel was a Vice President for Respondent Pitt Ohio Express.

2. Hammel's principal office was located in Baltimore, Maryland.

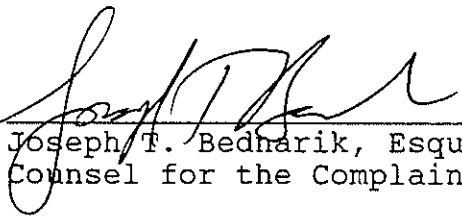
3. Hammel had supervisory responsibilities for Respondent's terminals located in Baltimore, Harrisburg, Norristown, and Center Valley.

4. When needed, Hammel assisted Jay Mannion, Terminal Manager, with the interview of applicants for driver positions at Center Valley.

5. Hammel has no written documents which specifically record his work location during the period April 24 through May 31, 1991.

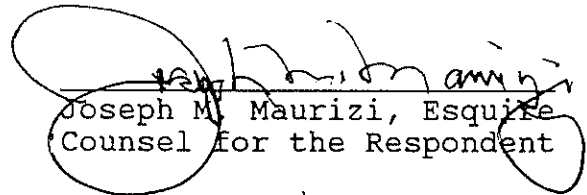
6. Hammel has spent numerous hours talking by telephone to prospective applicants as well as applicants who filed applications with Pitt Ohio and has conducted interviews of applicants when assisting a Terminal Manager.

7. Hammel has no recollection of speaking with Dennis Duffy with Dennis Duffy on or about May 2, 1991.



Joseph T. Bednarik, Esquire
Counsel for the Complaint

3/13/96
Date



Joseph M. Maurizi, Esquire
Counsel for the Respondent

3/13/96
Date

FINDINGS OF FACT *

1. Dennis R. Duffy (hereinafter "Complainant" or "Duffy") filed a written verified complaint against Pitt Ohio Express (hereinafter "Respondent") on September 23, 1991. (CX A.)
2. The complaint alleged that the Respondent refused to hire him as a truck driver because of his disability (amputation below his right knee). (CX A.)
3. In 1973, the Complainant's right leg, which had been amputated below the knee, was fitted with a prosthesis. (JX1 9.)
4. As a result of the amputation, the Complainant is substantially limited in the major life activity of walking. (JX1 10.)
5. In 1991, the Respondent employed approximately 50 persons as truck drivers at the Respondent's Center Valley terminal. (NT 366.)
6. In 1991, Complainant read an advertisement placed by Respondent in the Allentown Morning Call newspaper. (NT 45.)

* The foregoing stipulations of fact (Joint Exhibits 1 and 2) are incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those stipulated here, they shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

CX Complainant's Exhibit
JX1 Joint Exhibit 1 (Stipulations)
JX2 Joint Exhibit 2 (Stipulations of the Parties)
NT Notes of Testimony

7. Complainant's wife Patricia contacted Respondent and was informed that employment applications were available at the Center Valley terminal. (NT 221.)

8. Complainant's phone bill verifies that a call was made from Complainant's number to the Respondent's facility on March 18, 1991. (CX O.)

9. Thereafter, Complainant and his wife went to Respondent's facility and obtained an application. (NT 55-56.)

10. The completed application was personally delivered by the Complainant to the Respondent's facility. (NT 57-58.)

11. Kenneth Hammel (hereinafter "Hammel") is a regional vice president for Respondent, whose office is located in Baltimore, Maryland. (JX2 2.)

12. Dan Fidler (hereinafter "Fidler") was an assistant to the safety director for Respondent and had an office in Pittsburgh, Pennsylvania. (NT 390.)

13. Jan Mannion (hereinafter "Mannion") was Respondent's terminal manager at the Center Valley terminal. (NT 357-358.)

14. Respondent's standard practice was that the terminal manager would interview applicants initially by telephone. (NT 358-359.)

15. In 1991, Mannion was not able to fulfill his interviewing function; that function was assigned to Hammel and Fidler. (NT 373.)

16. Hammel called the Complainant on May 2, 1991. (NT 59.)

17. In that conversation, Hammel described the duties of the position and asked the Complainant if he was still interested. (NT 60.)

18. The Complainant told Hammel that he was still interested in the truck driver position. (NT 60.)

19. No one from the Respondent's office contacted the Complainant again until August 1991. (NT 71.)

20. On May 12, 1991, the Respondent hired Edward Schaadt (hereinafter "Schaadt") as a straight truck driver. (JX1 11.)

21. At that time Respondent's requirements provided that its drivers have a Class 3 commercial driver's license. (NT 289.)

22. Schaadt had a Class 2 license. (CX MM-1.)

23. The Complainant, at that time, held a Class 3 license. (NT 67-70.)

24. Schaadt had less than four years experience as a truck driver, which he had driven approximately 80,000 miles. (CX MM.)

25. During the same time period, Complainant had more than ten years of experience as a truck driver and logged over 225,000 miles. (NT 28-32.)

26. While Schaadt had no experience as a tractor trailer driver, Complainant graduated from the PRIDE of Yellow Trailer Education program at Lehigh Valley Community College and had tractor trailer experience. (NT 36, 37.)

27. The Complainant was more qualified than Schaadt, based upon his employment history, tractor trailer training, and greater number of miles driven. (NT 28-38.)

28. Schaadt was not an amputee and had no physical limitations. (CX MM.)

29. On or about August 12, 1991, "Linda" (Respondent employee, last name unknown) telephoned Complainant's mother-in-law. (NT 244.)

30. The message was that the Respondent was considering Complainant for employment and left a number for Complainant to contact "Dan." (NT 71, 244.)

31. Complainant and his wife each made several telephone calls to speak with "Dan" but were not successful. (NT 88.)

32. On October 6, 1991, Rick Bartakovits (hereinafter "Bartakovits") was hired as a straight truck driver. (JX1 11.)

33. Bartakovits, at the time of his hire, had driven a tractor trailer approximately 8,000 miles and had never driven a commercial straight truck. (CX MM-6.)

34. Bartakovits was not an amputee and had no physical limitations. (CX MM-6.)

35. The Complainant was at least as qualified as Bartakovits for the position of straight truck driver. (NT 28-38, 41-42.)

36. Mannion testified at the public hearing that he attempted to contact Complainant in August or September of 1991. (NT 376.)

37. Mannion further testified that he remembered seeing Complainant's application in the secondary file of applications previously rejected but to be considered for employment in the event a vacancy occurred. (NT 375.)

38. Mannion testified that he did not see Complainant's application again until the first day of public hearing, January 31, 1996. (NT 380.)

39. Mannion, in November 1991, signed a statement indicating that he had no recollection of any telephone conversation with the Complainant. (NT 360-361.)

40. Mannion testified that he called Complainant's number and spoke with a woman who indicated that the Complainant was no longer interested in working with the Respondent. (NT 376.)

41. Mannion indicated that, upon review of the Complainant's application on the first day of public hearing, he recalled the telephone conversations with Complainant's wife. (NT 380.)

42. Mannion spoke with hundreds of applicants as part of his job duties as terminal manager. (NT 380.)

43. Neither Complainant nor his wife had telephone conversations with Mannion. (NT 71.)

44. The employment application in this matter included the question: "Have you ever been granted a waiver under Section 391.49 of the Federal Motor Carrier Safety Regulations pertaining to the loss of foot, leg, hand or arm?" (CX P.)

45. The Complainant answered this question in the affirmative. (CX P.)

46. Also, the application did not provide an opportunity for the Complainant to explain how, despite his disability, he would perform the essential functions of the position with or without reasonable accommodation. (CX P.)

47. At the time of the public hearing, Ronald Uriah (hereinafter "Uriah") was vice president of safety and employee relations for the Respondent. (NT 246.)

48. During the relevant time period for this matter, Uriah was safety director at the Pittsburgh headquarters. (NT 246-247.)

49. Fidler was Uriah's assistant at that time. (NT 410.)

50. Uriah testified that all unsigned applications were considered invalid and thrown away by the Respondent. (NT 338.)

51. Fidler testified that unsigned applications would be returned to the applicant for completion. (NT 408.)

52. During Complainant's telephone conversation with Hammel, there was no mention that his application was not signed. (NT 214.)

53. Complainant signed every other application that he filed with other prospective employers during the relevant time period. (CX I, CX N.)

54. Hammel has no recollection of his conversation with the Complainant. (CX BB.)

55. In Respondent's answer to the complaint, Uriah asserted that Respondent could not hire Complainant because federal regulations prohibited drivers with amputated limbs from hauling hazardous materials, and no reasonable accommodation was possible. (CX AA.)

56. The federal regulations, cited by Respondent, were revised on August 23, 1983, to require an individualized determination of the amputee-driver's ability to perform the essential functions of the position. (CX PP.)

57. When the Respondent filed its answer, Uriah had a copy of the current federal regulations in his office. (NT 338.)

58. In order to obtain a federal waiver, the Complainant was not only required to establish his physical ability to drive a tractor trailer; he also had to pass a comprehensive road test to establish competency to drive a tractor trailer. (CX PP.)

59. The Complainant filed for a federal waiver subsequent to his graduation from the Yellow Freight training facility at Lehigh Valley Community College. (CX F.)

60. The application for federal waiver was supported by the required medical opinion of competency to operate a tractor trailer. (CX F.)

61. The Complainant was issued a federal waiver on January 8, 1991. (CX F.)

62. The federal regulations required an individual to renew their waiver application every two years. (CX PP.)

63. The Complainant's waiver was renewed on January 8, 1993, and again on January 8, 1995. (CX F.)

64. The Respondent, in May of 1991, gave new employees a "Driver/Dockworker Handbook." (NT 370-371.)

65. The Respondent's equal employment opportunity policy, contained in the handbook, does not include persons with disabilities in its coverage. (CX EE.)

66. The Respondent never employed a truck driver who wears a prosthesis due to a limb amputation. (NT 292.)

67. The Respondent sponsored an application for federal waiver for Gerald Reider, an individual with his left arm amputated, only after the Complainant had filed and served the instant complaint. (NT 335.)

68. In order to assist Reider, the Respondent was required to familiarize itself with the federal regulations. (NT 417.)

69. Fidler and Uriah, Respondent employees, assisted Reider with his waiver application. (NT 416-417.)

70. Respondent's assistance to Reider is not consistent with Uriah's contention that he was unaware of the change in the federal regulations before the issuance of the probable cause finding in this matter. (NT 417.)

71. As safety director, Uriah was responsible for the establishment of minimum qualifications for truck drivers employed by Respondent. (NT 386.)

72. During the investigatory process, a Commission investigator requested that Respondent produce copies of applications of hirees between April 26 and December 31, 1991. (NT 267.)

73. In a letter dated December 2, 1994, Uriah stated Respondent had no copies of the requested applications. (NT 267.)

74. Uriah testified at the public hearing that the Commission investigator orally changed the request to copies of all of the applications of non-hirees. (NT 269-270.)

75. The Commission investigator credibly denied that she agreed to change the request. (NT 344-346.)

76. During the period May 1, 1991 through December 31, 1991, Complainant had no source of income. (NT 41-42.)

77. During the year 1992, the Complainant earned \$2,500. (NT 76; CX V.)

78. During the year 1993, the Complainant earned \$6,845.78. (NT 77; CX W.)

79. During the year 1994, the Complainant earned \$16,300.57. (NT 77; CX X.)

80. During the year 1995, the Complainant earned \$26,129.97. (NT 77.)

81. During the period from January 1, 1996 through the date of the public hearing, Complainant had no earned income. (NT 355.)

82. Since the Respondent hired him on May 12, 1991, Schaadt earned the following salaries:

1991	-	\$18,583.27
1992	-	32,371.35
1993	-	33,917.67
1994	-	44,578.12
1995	-	42,633.67

(CX NN; CX Post-Hearing Exhibit.)

83. In 1996, Schaadt earned \$7,786.23 through March 2, 1996. (CX Post-Hearing Exhibit.)

84. Schaadt, throughout his employment, participated in Respondent's profit sharing plan, with contributions based upon Respondent's profitability. (NT 289.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the subject matter and the parties involved in the instant complaint.
2. The Complainant established a *prima facie* case of disability discrimination by showing:
 - A. Complainant had a physical disability;
 - B. Complainant applied for a job with Respondent for which he was qualified;
 - C. Complainant was denied the position in question; and
 - D. Respondent continued to seek applicants of equal or less qualifications than Complainant's.
3. The Respondent then produced evidence of legitimate, nondiscriminatory reasons for its action of not hiring the Complainant.
4. The reasons articulated by the Respondent are pretextual.
5. Respondent violated the record-keeping provisions of the Commission's regulations when it routinely destroyed applications of non-hirees within thirty days of its decision not to hire such applicant(s).
6. Respondent violated Section 5(b)(1) of the PHRA when it asked an illegal question related to an applicant's disability (limb amputation) without affording the applicant an opportunity to explain how such impairment is not job-related.

7. Respondent violated Section 5(a) of the PHRA by maintaining a policy not to hire a driver applicant without a limb without conducting an individualized assessment of the applicant's ability to perform the essential functions of the position.

8. The Pennsylvania Human Relations Commission has broad discretion in fashioning a remedy.

9. Statutory relief may include a cease and desist order, an order to instate, an order for back pay and benefits, and an order to institute record-keeping procedures to minimize the possibility of reoccurrence.

OPINION

This matter arises out of a complaint filed by Dennis R. Duffy (hereinafter "Duffy") against Pitt Ohio Express (hereinafter "Pitt Ohio") on or about September 23, 1991, at Docket No. E-56433. In his complaint, Duffy alleged that the Respondent denied him employment as a truck driver because of his physical disability, amputation below his right knee, in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA").

The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") investigated Duffy's allegations and at the conclusion of the investigation concluded that probable cause existed to credit Duffy's allegations.

Thereafter PHRC attempted to eliminate the alleged discrimination through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing.

The public hearing was held in Allentown, Pennsylvania, on January 31, 1996, February 1, 1996 and March 13, 1996 before a three-Commissioner panel consisting of: Commissioners Russell S. Howell, Raquel Otero de Yienst and Elizabeth C. Umstattd. Phillip A. Ayers, Esquire, was Panel Advisor to the Commissioner panel. Joseph T. Bednarik, Assistant Chief Counsel, represented the state's interest in the complaint, and J. M. Maurizi, Esquire, represented the Respondent. Commission Counsel and Respondent counsel both filed post-hearing briefs in this matter.

In reviewing Duffy's allegations, we recognize that this case deals with the issue of disparate treatment. The analytical mode of evidence assessment in such a matter is clearly set forth in a Pennsylvania Supreme Court case. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 US 792 (1973). The Pennsylvania Supreme Court's guidance indicates that the Complainant must first establish a *prima facie* case of discrimination. If the Complainant establishes a *prima facie* case, the burden of production then shifts to the Respondent to "simply. . . produce evidence of a legitimate, non-discriminatory reason. . . for its action." If the Respondent meets this burden, in order to prevail, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct evidence that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence, or pretextual. Texas Department of Community Affairs v. Burdine, 450 US 248, 256 (1981).

Following its instructions on the effect of a *prima facie* showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The Court stated that:

As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to

be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes."

Complainant Duffy is free to present evidence and argument that the explanation offered by the employer is not worthy of belief, or is otherwise inadequate, in order to persuade the tribunal that the evidence does preponderate to prove discrimination. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing, supra at 319.

In this court-designated burden allocation, Duffy must first establish a *prima facie* case. The *prima facie* showing should not be an onerous burden. In the instant case, a *prima facie* case of disability discrimination can be established by showing that:

- 1) Complainant is a member of a protected class;
 - 2) Duffy applied for the job in question;
 - 3) the Complainant was denied the position for which he was qualified;
- and
- 4) the employer continued to seek applicants of equal or less qualifications than Complainant.

In the instant case, the parties have stipulated that, as a result of his prosthesis, Duffy is substantially limited in the major life activity of walking. (JX1 10.) By regulation, 16 Pa. Code §44.4(ii)(a) and (b), "physical impairment" is defined, among other things, to include an anatomical loss affecting the major life

activity of walking. Clearly Duffy meets the first element of the *prima facie* case in that he qualifies as a person with a disability under the PHRA.

The next element of the *prima facie* case is whether Duffy applied for the job for which he was qualified. Since the Respondent did not retain copies of applications, as required by federal law, we must look at the totality of the circumstances surrounding this particular element. Duffy stated that he personally delivered a completed application to the Respondent's Center Valley terminal. Here, Duffy produced a photocopy of two pages of his completed application (CX P). The application form is identical to those applications of individuals hired on or about the same time.

Next, we turn to whether Duffy was qualified for the position. The specific requirements for a driver were set forth in Respondent's "Revised Driver Hiring Criteria." (NT 287-288.) In order to operate a straight truck, the Respondent required:

- 1) a minimum age of twenty-one;
- 2) one year of driving experience;
- 3) a valid Class 3 commercial driver's license;
- 4) no driver's license suspension or revocation for more than thirty days within a three-year period;
- 5) no citation or conviction for driving-related criminal offenses within a three-year period;

- 6) no citations or convictions for more than four motor vehicle violations within a three-year period;
- 7) no more than two "at-fault accidents" within a three-year period; and
- 8) a Department of Transportation physical examination and possible pre-employment drug screening.

Duffy was forty-two years of age at the time he applied and had possessed a Class 3 Pennsylvania commercial driver's license for sixteen years. In the three years prior to his application, Duffy had no record of moving violations, license suspensions, or "at-fault" accidents.

The next element of the *prima facie* case is easily met in that the Complainant was denied a position by the Respondent. Lastly, we move to the final element of the *prima facie* showing: whether the Respondent continued to seek applicants of equal or less qualifications. The parties have stipulated that subsequent to its refusal to hire Duffy on May 2, 1991, the Respondent hired nine truck drivers. (JX1 11.) A comparison of Duffy's qualifications with individuals hired and retained by Respondent reveals that Duffy is substantively more qualified than the successful applicants. In fact, Duffy had more years of experience as a commercial truck driver, drove more miles, and had a cleaner driving record than Edward Schaadt. Therefore, Duffy meets the last element of the *prima facie* case.

As aforementioned, once the Complainant establishes a *prima facie* case, the burden of production then shifts to the Respondent to "simply. . . produce evidence

of a legitimate, non-discriminatory reason. . . for [its action]." In this matter, the Respondent initially, in its Answer to Complaint, offered two legitimate, non-discriminatory reasons:

- 1) Respondent had no knowledge of Complainant or any application for employment from him; and
- 2) federal regulations prohibited Respondent from hiring Duffy.

However, at the public hearing, the Respondent appeared to abandon these defenses and offered several other reasons as to why Duffy was not hired. These reasons include an incomplete application by Duffy, Duffy withdrew from consideration, and Duffy would not have been hired due to a criminal record. However, it does appear that the Respondent has managed to meet its burden of production.

When a Respondent has met its burden to produce a legitimate, nondiscriminatory reason for its action, the Complainant may show that the articulated reason(s) is actually pretext for discrimination by demonstrating that the explanation is unworthy of belief. Allegheny Housing, *supra* 516 Pa. 124, 532 A.2d 315 (1987). The Complainant still has the ultimate burden of demonstrating by a preponderance of the evidence that he is a victim of intentional discrimination.

In the instant case before the Commission, a review of the record reveals pretext on the part of the Respondent. As stated before, the Respondent had initially offered two defenses for its actions and then appeared to abandon them at the public hearing. Therefore, it is Duffy's burden to demonstrate that the other proffered reasons are pretextual, or unworthy of credence.

At the public hearing, Respondent employee Mannion testified that applications of non-hires were destroyed within thirty days of the decision not to hire. (NT 382-384.) Clearly Commission regulations, at the relevant time period, required that employers retain applications of non-hires for a period of one hundred and twenty days. Certainly, if the regulation had been followed, the Respondent would have a copy of Duffy's application. Therefore the absence of the applications makes it almost impossible to make comparisons.

The Respondent's main defense in this matter was that the Complainant had withdrawn from consideration. According to Respondent witness Mannion, the Complainant informed him, through a third party, that he was not interested in a job as a driver in late August or early September, 1991. Two months later, Mannion stated that he had no recollection of any conversations with Complainant. Amazingly, on the day of the public hearing Mannion "recalled" this conversation. This recall clearly conflicts with the credible testimony of Complainant and his wife, both of whom deny having any conversation with Mannion.

The Respondent also argued that it would not have Complainant, even if he was hired, because of a misdemeanor offense in 1983. As Commission Counsel notes, there was no inquiry on the application to ascertain whether an applicant was ever convicted of a misdemeanor. Duffy correctly answered the question asked as it related to felony convictions: "No." Also the Respondent's "Revised Driver Eligibility Criteria" did not disqualify an applicant based on a misdemeanor. In the instant case, the Complainant's misdemeanor had no relationship to the operation

of a motor vehicle and was eight years in the past. The Respondent's argument in this regard fails.

The Complainant was also able to show the existence of Respondent's illegal pre-employment inquiry which is a violation of Commission regulations. The Commission's regulations prohibit pre-employment inquiries which do not afford an applicant the opportunity to explain why he is qualified for the position, with or without reasonable accommodation:

(d) . . . [P]re-employment inquiries that are intended to reveal or that might have the tendency to reveal the existence of a present or recurring handicap or disability shall be limited to those necessary to determine whether the handicap or disability is job-related; however an employee or applicant to whom an oral or written inquiry is directed shall be provided the opportunity to explain why the handicap or disability is non job-related, including what special efforts the employee or applicant makes or what reasonable accommodations can be made to render the handicap or disability non job-related.

16 Pa. Code §44.11(d). Certainly this inquiry indicates that the Respondent wanted to know if someone had a disability. Also the Respondent, in May of 1991, published a Driver/Dockworker Handbook. In that handbook (CX EE), the Respondent indicated its equal employment policy statement. Said statement did not cover persons with disabilities or its obligation to reasonably accommodate applicants and employees with disabilities.

Having found that the Complainant has proven pretext by showing that the proffered reasons are unworthy of credence, we now move to the issue of remedy. Section 9 of the PHRA provides that the Commission may award back pay and order reinstatement of the Complainant. As Commission Counsel notes, in Murphy v. PHRC,

506 Pa. 549, 486 A.2d 388 (1985), the Pennsylvania Supreme Court said, "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." There are essentially two purposes in awarding a remedy. First we must ensure that the unlawful discriminatory practice is eradicated, and secondly, we must restore the injured party to his pre-injury status and make whole. In regard to the mitigation of damages, it is the Respondent's burden to show that the Complainant did not exercise reasonable diligence in seeking substantial equivalent employment. Cardin v. Westinghouse Electric Corp., 850 F.2d 1005 (3rd Cir. 1988). At the public hearing, the Respondent did not produce any evidence showing that the Complainant did not exercise reasonable diligence in seeking employment. Duffy's own testimony establishes his numerous attempts at employment and clearly demonstrates that he made every effort to seek employment. The Complainant followed through on each potential job as a truck driver.

In order to properly determine back pay in this matter, we must compare Duffy with Edward Schaadt. Mr. Schaadt was the driver hired at the same time the Complainant was interviewed. During the period of May 12, 1991 through March 2, 1996, Schaadt earned \$179,870.31. (CX NN and CX Post-Hearing Exhibit.) During the same time period, Duffy earned \$51,776.32. Therefore, the difference is \$128,093.99. Also, Duffy shall receive the contribution that the Respondent would have made into its profit sharing plan at a rate which varied with the profitability of the company.

Having found in favor of the Complainant Duffy, an appropriate Final Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENNIS R. DUFFY,
Complainant

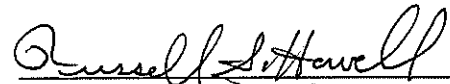
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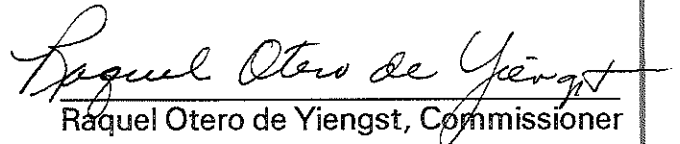
DOCKET NO. E-56433

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above-captioned case, it is the Hearing Panel's recommendation that Complainant Duffy has proven discrimination in violation of the Pennsylvania Human Relations Act. It is therefore the Hearing Panel's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Final Order be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Hearing Panel recommends issuance of the attached Final Order.



Russell S. Howell, Commissioner



Raquel Otero de Yiengst, Commissioner

(dissented)

Elizabeth C. Umstattd, Commissioner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DENNIS R. DUFFY,
Complainant

v.

PITT OHIO EXPRESS, INC.,
Respondent

DOCKET NO. E-56433

FINAL ORDER

AND NOW, this 24th day of February, 1997, after review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves, in accordance with the Recommendation of the Hearing Panel, the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, and hereby

ORDERS

1. Respondent shall cease and desist from discriminating on the basis of physical disability.
2. Respondent shall pay Complainant, within thirty days of the effective date of this Order, the lump sum of \$128,093.99, which amount represents wages lost from May 12, 1991 through March 2, 1996.
3. Respondent shall pay Complainant additional interest of six percent per annum on the above back-pay award.

4. Respondent shall offer Complainant instatement into the next available position of straight truck/city driver.

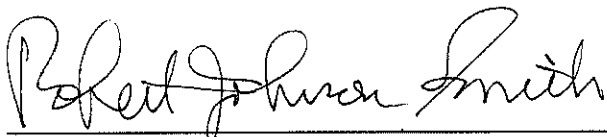
5. If Complainant accepts an instatement offer, then Respondent shall make appropriate contributions to its pension and profit sharing plan as if Complainant had been continuously working for Respondent since May 12, 1991.

6. Respondent shall comply with the record-keeping provisions of 16 Pa. Code §41.81.

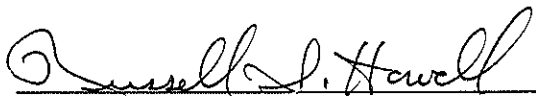
7. Respondent shall comply with the PHRA and its regulations with respect to nondiscrimination policies and with respect to all application forms.

8. Within thirty days of the effective date of this Order, Respondent shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Joseph T. Bednarik, Esquire, at PHRC's Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Robert Johnson Smith, Chairperson

Attest:


Russell S. Howell; Assistant Secretary