

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN FAUST,
Complainant

v.

ROBERT WHOLEY & COMPANY,
Respondent

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DOCKET NO. E-46398

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

| | | |
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| JOHN FAUST, | : | |
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| Complainant | : | |
| | : | |
| vs. | : | Docket No. E-46398 |
| | : | |
| ROBERT WHOLEY & CO., | : | |
| | : | |
| Respondent | : | |

STIPULATION OF FACTS

The undersigned counsel for the Pennsylvania Human Relations Commission and counsel for the Respondent, Robert Wholey & Co., jointly enter into the following stipulation for purposes of the public hearing scheduled in the above-captioned case:

1. All jurisdictional requirements in this case have been met.
2. The Complainant, John Faust, has been employed by the Company since 1967, and has been a fish cutter since 1973. His duties as a cutter entail standing on wooden pallets for the bulk of his fish-cutting activity, which takes place in the cutting room. The room is damp, cool and wet, which is necessary in the cutting function. The temperature in the room is between 45 to 50 degrees Fahrenheit. The cutter must dress accordingly, including the wearing of a large rubber apron and rubber boots. A fish cutter routinely has his hands in water during the course of the work shift. He constantly uses knives, saws, and other instruments to clean and prepare the fish. He cleans and scrapes the fish, splits and steaks fresh fish and

fillets and skins them. He uses an electric saw to cut portion steaks and chucks from frozen fish. He must constantly wash his hands off in warm water to keep his hands from slipping when he is cutting the fish.

Generally, fish is brought to the cutter by a warehouseman in fifty (50) to one hundred (100) pound boxes. However, fish cutters themselves also enter the cooler and freezer areas of the operation to obtain fish throughout the course of the workshift. In obtaining fish, a fish cutter is required to move and lift fifty-to-one hundred pound boxes of fish. After cleaning, cutting and weighing the fish, the cutter puts the fish back into the cooler for packing and delivery.

3. On November 14, 1987 the Complainant suffered a heart attack.

4. On March 3, 1988 the Complainant's attending cardiologist, Dr. Ronald Monah released him to return to work on March 6, 1988, with the restrictions that he not lift more than 50 pounds and not work in extremes of temperature.

5. By letter to the Complainant dated March 4, 1988, Colleen Ley, Respondent's personnel director, described his job duties and requested that he present this letter to his physician for his use in deciding if the Complainant could return to work. This letter also stated that Ms. Ley had scheduled an appointment with the Respondent's physician, Dr. Gleason, on March 14, 1988. Respondent received no other report from Dr. Monah.

6. Dr. Gleason, an internist who is a member of the Wholey family, examined the Complainant. His report is marked as Exhibit "A".

7. Based on Dr. Gleason's report and Dr. Monah's restricted release, the Respondent refused to return the Complainant to work by letter dated March 25, 1988.

8. In June, 1988, the Complainant was given a thallium stress test by Dr. Barry Harris, a cardiologist the Complainant chose to consult.

9. On July 20, 1988, Dr. Harris gave the Complainant an unrestricted release to return to his job as a fish cutter.

10. On July 25, 1988, Dr. Gleason, after having received a report from Dr. Harris on the thallium stress test, opined that he would advise the Complainant to avoid employment as a fish cutter and would advise him not to return to work.

11. By letter dated July 28, 1988, Dr. Harris again released the Complainant to return to work as of August 1, 1988.

12. On August 1, 1988, the Complainant filed an oral grievance against the Respondent, followed by a written grievance on August 3, 1988 concerning the Respondent's refusal to return him to work.

13. U.F.C.W. Local 23 and the Respondent agreed to select an independent cardiologist, Dr. Richard R. Schneider, to evaluate the Complainant and submit an opinion on his fitness to return to work.

14. Dr. Schneider evaluated the Complainant on October 28, November 30, and December 1, 1988, and give his opinion concerning the Complainant by letter dated December 5, 1988.

15. The Respondent refused to return the Complainant to work as a fish cutter because of risk of injury to himself.

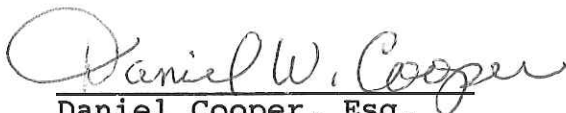
16. On January 17, 1989, the Complainant filed his complaint with the Pennsylvania Human Relations Commission.

17. On February 7, 1989, an arbitration hearing was held concerning the grievance filed on August 3, 1988.

18. The arbitrator sustained the grievance and ordered Respondent to reinstate the Complainant as of August 3, 1988 and make him whole for all salary and benefits lost, with deductions for unemployment benefits received. The Respondent paid this award on April 26, 1989, also deducting taxes from the award amount.

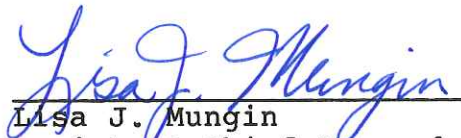
19. The Respondent does not allow employees to return to work after accident, injury or illness until they have full, unconditional medical releases to perform all job duties.

Respectfully submitted,



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Counsel for Complainant

FINDINGS OF FACT*

1. The Complainant, John Faust, resides at 434 Arabella Street, Pittsburgh, PA. (N.T.5)
2. The Respondent is an employer within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
3. The Complainant worked for the Respondent for approximately twenty-four (24) years. (N.T. 5)
4. The Complainant began his employment with the Respondent in 1967. (N.T. 5)
5. The Complainant has been employed as a Fish Cutter for the Respondent since 1973. (N.T. 5)
6. The most important duty of a Fish Cutter was to cut both frozen and fresh fish. (N.T. 5)
7. The cutting of the fish requires that the fish cutter stand on wooden pallets to cut the fish. (S.F. 2)
8. The temperature of the fish cutting room is approximately 45 to 50 degrees fahrenheit. (S.F. 2)
9. The fish cutter uses knives, saws and other instruments to clean and prepare the fish, after cutting the fish. (S.F. 2)
10. The fish cutter then cleans and scrapes the fish, splits and steaks fresh fish, and fillets and skins them. (S.F. 2)

* The foregoing '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 fact shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

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

11. When the fish is frozen, the fish cutter must use an electric saw to cut steaks and chucks from the fish. (S.F. 2)

12. The atmosphere in the fish cutting room is damp, cool and wet in order to conduct the cutting of the fish. (S.F. 2)

13. Generally, the fish is brought to the cutter by a warehouseman in 50-100 pound boxes. (S.F. 2)

14. Other times fish cutters enter the coolers and/or freezers to obtain fish during the course of a work day. (S.F. 2)

15. When a fish cutter does this, he is required to move and lift 50-100 pound boxes of fish. (S.F. 2)

16. After cleaning, cutting and weighing the fish, the fish cutter returns the fish to the cooler or freezer for packing and delivery. (S.F. 2)

17. On November 14, 1987, the Complainant suffered a heart attack. (S.F. 3)

18. Dr. Ronald Monah, a cardiologist, was the Complainant's physician after his heart attack. (N.T. 6)

19. On March 3, 1988, Dr. Monah released the Complainant to return to work on March 6, 1988. (S.F. 4)

20. Dr. Monah released the Complainant to return to work with several restrictions: 1) that Complainant not lift more than 50 pounds; and 2) that the Complainant not work in extreme temperatures. (S.F. 4)

21. On March 4, 1988, Respondent's Personnel Director, Colleen Ley, forwarded a letter to Complainant asking him to present the letter to his physician "in order to obtain a statement from him concerning your ability to perform fully the job of a fish cutter." (C.E. 3)

22. The letter specifically states that the Respondent would need a medical evaluation as to whether or not the Complainant would be able to fully perform all of his duties or whether he would have limitations with regard to his duties. (C.E. 3)

23. The Complainant did not present any further report from Dr. Monah to the Respondent.

24. The letter also scheduled an appointment with Dr. James Gleason on March 14, 1988 at 3:15 p.m. (C.E. 3)

25. Dr. James Gleason, an internist, is a relative of the Wholey family. (S.F. 6)

26. Dr. Gleason's medical report indicates that, in his opinion, the Complainant "could have difficulty performing his described duties as a fish cutter. The working conditions, which include cold damp weather with heavy lifting would appear to be contradicted at this time." (C.E. 5)

27. Based on Dr. Gleason's report and the restrictions indicated by Dr. Monah, the Respondent, via Personnel Director Colleen Ley, refused to return the Complainant to work. (C.E. 6)

28. The Complainant then in June of 1988 consulted Dr. Barry Harris. (N.T. 8)

29. Dr. Barry Harris is a cardiologist. (N.T. 8-9)

30. Dr. Harris, on July 20, 1988, gave the Complainant unrestricted release to return to work as a fish cutter. (S.F. 9)

31. On July 25, 1988, Dr. Gleason, after receiving the report from Dr. Harris, still advised the Complainant to avoid employment as a fish cutter and further advised him not to return to work. (S.F. 10)

32. On July 28, 1988, Dr. Harris once again released the Complainant to return to work as of August 1, 1988. (S.F. 11)

33. On August 1, 1988, Complainant filed an oral grievance against the Respondent, followed by a written grievance on August 3, 1988, regarding Respondent's refusal to return him to work. (S.F. 12)

34. Local 23 and the Respondent agreed to select an independent cardiologist, Dr. Richard R. Schneider, to evaluate the Complainant and submit an opinion as to his fitness to return to work. (S.F. 13)

35. Dr. Schneider evaluated the Complainant on three different occasions: October 28, 1988, November 30, 1988, and December 1, 1988. (S.F. 14)

36. Dr. Schneider gave this opinion regarding the Complainant by letter dated December 5, 1988.

37. Dr. Schneider's opinion was, in relevant part:

"Based upon the patient's symptoms and the results of his Holter monitor and repeat Thallium treadmill test it is my assessment that he is able to perform his duties as a fish cutter as you described to me in your letter, dated October 19, 1988. This is not to imply that he is not at risk for another acute myocardial infarction. The natural history of coronary artery disease is that it will progress, especially in the present of significant hypercholesterolemia in a patient with a strong genetic predisposition to coronary stherosclerosis. It is also true that exposure to cold in association with heavy physical exertion may pre-dispose to coronary spasm and subsequent coronary thrombosis and precipitate an acute myocardial infarction.

I have explained to Mr. Faust that although I believe he is capable of performing his job at the present time it is also true that it may place him at increased risk for a subsequent myocardial infarction. It is not possible to predict with any certainty when and if this will occur."

(C.E. 15)

38. After receipt of this report, the Respondent refused to return the Complainant to work as a fish cutter because of risk of injury to himself. (S.F. 15)

39. On January 17, 1989, the Complainant filed a complaint with the PA Human Relations Commission. (S.F. 16)

40. On February 7, 1989, an arbitration hearing was held concerning the grievance filed on August 3, 1988. (S.F. 17)

41. The arbitrator sustained the grievance and ordered Complainant to be reinstated as of August 3, 1988, and ordered Respondent to make him whole for all salary and benefits lost, with deductions for unemployment benefits received. (S.F. 18)

42. The Respondent's policy is that it does not allow employees to return to work after accident injury or illness until they have full unconditional medical releases to perform all job duties. (S.F. 19; C.E. 12)

43. At the Public hearing, both Commission counsel and the counsel for Respondent agreed that the relevant time period in this matter is March 6, 1988 to August 2, 1988. (N.T. 12-13)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of this case.

2. The parties have complied with the procedural prerequisites to a public hearing.

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. The Complainant has established a prima facie showing of handicapped discrimination by showing that:

- a) he is a member of a protected class;
- b) he was performing the duties of his position until his heart attack;
- c) the Respondent refused to permit him to return to work;
- d) Respondent's refusal to permit Complainant to return to work presents circumstances which give rise to an inference of discrimination.

6. The Respondent has the option of articulating a legitimate non-discriminatory reason for its action or asserting the defense of job-relatedness.

7. The Respondent bears the burden of proving that a handicap/disability is job-related.

8. The Respondent has shown that the Complainant's handicap/disability is job-related because it substantially interferes with his ability to perform the essential functions of his employment.

9. The Complainant has not shown that any reasonable accommodations could have been made by Respondent to allow the Complainant to return to work in another position.

10. The Respondent has shown that it is not reasonable for Respondent to even make the modifications that Complainant might require.

O P I N I O N

The instant case arises from a complaint filed by John Faust ("Complainant or Faust") against Robert Wholey and Company ("Respondent or Wholey") with the Pennsylvania Human Relations Commission ("PHRC"). In his complaint filed on January 17, 1989, Faust alleged that Robert Wholey, in the past and continues through the present, refused to permit him to return to work as a Fish Cutter because of a past handicap/disability, heart attack. This allegation states a violation of Section 5(a) and 5(b)(5) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. ("PHRA")

PHRC staff investigated the allegations and informed Robert Wholey that probable cause existed to credit Faust's allegations. Thereafter, PHRC staff attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, PHRC staff notified Robert Wholey that it had approved a Public Hearing in this matter.

The Public Hearing was held on September 9, 1991 before Permanent Hearing Examiner Phillip A. Ayers. The case on behalf of the complaint was presented by PHRC staff attorney Lisa J. Mungin; Daniel W. Cooper, Esquire, appeared on behalf of Wholey. Following the Public Hearing, the parties were afforded the opportunity to submit post hearing briefs. The post hearing brief on behalf of the complaint was received on November 27, 1991, and the brief on behalf of Wholey was received on December 1, 1991.

The issue before the Commission is whether Respondent unlawfully refused to permit Complainant to return to his position as a Fish Cutter

because of his handicap/disability, heart attack. Generally, in a disparate treatment, handicap/disability discrimination case, the allocation of proof is fairly straight forward. The Complainant is required to establish a prima facie case of handicap discrimination. Once the Complainant has made his prima facie showing, then, under normal circumstances, the burden shifts to the Respondent to simply articulate a legitimate, non-discriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, (1981). However, in the instant case, the Respondent has asserted the defense of job-relatedness. The major case in this area is National Railroad Passenger Corporation (AMTRAK v. PHRC), 70 Pa Cmwlt. 62, 452 A.2d 301 (1982) where it was established that it is the employer's burden to establish job-relatedness. Clearly in the instant case, the Respondent does not dispute the prima facie showing, but relies on the affirmative defense of job-relatedness.

As noted above, it is not necessary to proceed through the McDonnell-Douglas analysis since the Respondent has admitted that the Complainant's handicap was the reason he was not recalled to work. Normally, in a case of this nature, the Respondent has the option of articulating a legitimate non-discriminatory reason for its action or the Respondent may assert the defense of job-relatedness. In the instant case, the Respondent is relying solely on the affirmative defense of job-relatedness. The Respondent must now show that the handicap was job-related.

Commission regulations at 16 Pa Code §44.4 define "non-related handicap disability" as follows:

(i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the

employment which the handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or employee 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 employee 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 employee or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

Therefore, it is clear that a handicap or disability is job-related if it substantially interferes with the employee's ability to perform the essential functions of the particular position. Along with the issue of job-relatedness, there is also the issue of reasonable accommodation. There was no evidence present at the public hearing to indicate another job or position at Respondent's workplace that the Complainant could have performed. Furthermore, there as no evidence presented by Complainant to indicate any present job at Respondent's workplace which could be modified to allow Complainant to return with restrictions. In the instant case, the Complainant was employed as a Fish Cutter. The duties of a Fish Cutter have been stipulated to by the parties in this matter. (S.F. 2) It has also been stipulated after his heart attack on November 14, 1987, that on March 3, 1988, the Complainant's attending physician released him to return to work with several restrictions. The stated restrictions were that the Complainant not lift more than 50 pounds and not work in extreme temperatures. Clearly, th duties of a Fish Cutter included, inter alia, the moving and lifting of 50-100 pound boxes. The position also required that the individual in the

position work in cold temperatures. A review of the record clearly reflects that an individual with these restrictions could not perform the essential functions of the position in question. Consequently, the Complainant could not perform the essential functions of the position as of March 3, 1988, the beginning of the period in which the Complainant alleges he was being discriminated against. Therefore, the handicap/disability is job-related.

Much has been said in this matter in reference to the different doctor's reports on the Complainant's condition. The record reflects that, on March 4, 1988, the Respondent forwarded a letter to the Complainant indicating Complainant's duties, and requested that he present the letter to his attending cardiologist, Dr. Ronald Monah. Said letter also indicated that Complainant would be examined by the Respondent's physician on March 14, 1988. Both parties have stipulated that no additional report was received from Dr. Monah. Also, at the public hearing, the Complainant did not explain why the requested report was not submitted.

As aforementioned, the Respondent, after the restrictive release by Dr. Monah, had the Complainant examined by its own physician on March 14, 1988. Dr. Gleason's report indicated his opinion that the Complainant could not return to work. Based on the Complainant's doctor's own restrictions and Dr. Gleason's report, the Respondent by letter dated March 25, 1988, refused to allow the Complainant to return to work. At this point, the Respondent's reasonable reliance on Dr. Monah's report and Dr. Gleason's report can constitute a good faith defense to the charge of handicap discrimination. Action Industries v. PHRC, 518 A.2d 610 (Pa Cmwlt. 1986), appeal denied, 531 A.2d 433 (1987). As Respondent counsel notes in his brief, even without the report from Dr. Gleason as of March, 1988, the Respondent could reasonably conclude based solely on Dr. Monah's report that the Complainant could not

perform the essential functions of a Fish Cutter. Clearly the temperature of the room could not be changed and there was still lifting to be done by a Fish Cutter.

At this juncture, the Complainant then, on his own, consulted another doctor, Dr. Barry Harris. After an examination, Dr. Harris, on July 20, 1988 and subsequently on July 28, 1988, released the Complainant to return to work without restriction. The second notice released the Complainant to return to work as of August 1, 1988. During the same time period, on July 25, 1988, the Respondent's physician, after a follow-up examination, indicated that for the personal safety of the Complainant he should avoid employment as a Fish Cutter and should not return to work.

The Respondent now is placed in a situation where there are differing reports as to the Complainant's condition. If the instant matter stopped here, then it might be argued that Respondent's absolute reliance on its own doctor would be unreasonable since the doctor is a relative of the family. However, the Respondent agreed to an independent and neutral doctor to conduct an examination of the Complainant. This action on the part of the Respondent is clearly reasonable under the circumstances. An important point in this matter is that both counsel agreed at the public hearing that the relevant time period is March 6, 1988 to August 2, 1988. There is some discussion in the record as to the report submitted by the third doctor, however, the third report was not submitted until after the stipulated time period.

After review of the entire record in this matter, having found that the Complainant's handicap/disability is job-related and further finding that the Complainant did not present any evidence of accommodation, the Respondent has sustained its burden of proving job-relatedness and, therefore, this

matter must be dismissed. As always, in cases involving issue of job-relatedness of a handicap/disability, we must emphasize that this decision be limited to the factual setting in which it arose.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JOHN FAUST,
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ROBERT WHOLEY & COMPANY,
Respondent

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DOCKET NO. E-46398

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, it is the Permanent Hearing Examiner's Recommendation that the Complainant has failed to prove discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner'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, this Permanent Hearing Examiner recommends issuance of the attached Final Order.



Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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JOHN FAUST,
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DOCKET NO. E-46398

F I N A L O R D E R

AND NOW, this 8th day of June, 1993, after a review of the entire record in this case, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion and Final Order recommended by the Permanent Hearing Examiner and hereby

O R D E R S

that the instant complaint docketed at E-46398 be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Robert Johnson Smith
Chairperson

ATTEST:



Gregory J. Cella, Jr.
Secretary