

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IVAN W. HOMINSKY,
Complainant

v.

C-K COMPOSITES, INC.,
Respondent

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DOCKET NO. E-33268A

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IVAN W. HOMINSKY, :
 :
 Complainant :
 :
 v. : Docket No. E-33268-A
 :
 C-K COMPOSITES, INC., :
 :
 Respondent :

STIPULATIONS

1. The Respondent, C-K Composites, Inc., is an employer as that term is defined under the Pennsylvania Human Relations Act.

2. All procedural prerequisites to the holding of a public hearing have been met.

3. The Respondent purchased certain assets of Permali, Inc. on March 5, 1985 which included a factory in Mt. Pleasant, Pennsylvania. On March 5, 1985, Permali ceased operations at the Mt. Pleasant plant and terminated all of its employees at that facility.

4. On March 5, 1985, each salaried employee of Permali, Inc. received a letter from J. Martin Kent, Chairman of Permali, explaining that the Mt. Pleasant plant would no longer be operated by Permali and that all employees were terminated.

5. Prior to March 5, 1985, the Complainant, Ivan W. Hominsky, had been employed by Permali on a continuous basis since July 1957.

6. The Complainant was employed by Permali as a drafts-person.

7. The shares of C-K Composites, Inc. are owned 100% by Mr. and Mrs. Eugene Carlisle and Mr. and Mrs. F. Patrick Kozbelt.

8. Eugene Carlisle was the President of C-K Composites, Inc. and F. Patrick Kozbelt was the Vice-President of C-K Composites, Inc. at the time C-K Composites, Inc. began operations.

9. Messrs. Carlisle and Kozbelt held similar executive positions with Permali.

10. William Boehmer was the the Complainant's immediate supervisor at Permali from 1980 through March 5, 1985. Boehmer's position was Manager of Engineering.

11. C-K Composites hired Mr. Boehmer as Manager of Engineering when it started operations in March, 1985.

12. Richard L. Jellison's IRS Form 1099 for 1985 shows that he received \$6,412.00.

13. Richard L. Jellison's W-2 Wage and Tax Statement Form shows that he was paid \$5,538.00 by C-K Composites, Inc. in 1985.

14. Richard L. Jellison's W-2 Wage and Tax statement form for 1986 shows that he was paid \$21,595.00 by C-K Composites, Inc.

15. Richard L. Jellison's W-2 Wage and Tax Statement form for 1987 shows that he was paid \$22,921.00 by C-K Composites, Inc.

16. Richard L. Jellison's W-2 Wage and Tax Statement form for 1988 shows that he was paid \$22,294.00 by C-K Composites, Inc.

17. Richard L. Jellison's W-2 Wage and Tax Statement form for 1989 shows that he was paid \$22,011.00 by C-K Composites, Inc.

18. Through August 4, 1990, Richard L. Jellison was paid \$13,436.00 by C-K Composites, Inc.

19. From August 4, 1990 through the present, Mr. Jellison is being paid \$11.22 per hour for 40 hours per week.

20. After the Complainant was terminated by Permali he received \$528 in 1985 from Central Westmoreland Vo-Tech School for substitute teaching, \$472.50 from North Fayette Vo-Tech School for substitute teaching, \$5,512.00 in unemployment compensation benefits, and \$5,000.00 in severance pay from Permali, Inc.

21. In 1986, the Complainant received \$924.00 for substitute teaching at Central Westmoreland Vo-Tech School, \$1,552.50 from North Fayette Area Vo-Tech School for substitute teaching and \$11,229.00 for in state unemployment compensation benefits.

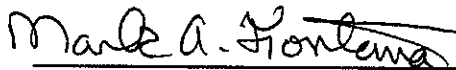
22. In 1987, the Complainant received \$528.00 for substitute teaching at Central Westmoreland Vo-Tech School, \$562.50 from North Fayette Area Vo-Tech School, \$40.00 from Fayette Area Vo-Technical School, all for substitute teaching, and \$7,392.00 from Laurel Highlands Campgrounds, Inc. As of April 1987, Complainant began regular full time employment with Laurel Highlands.

23. In 1988, the Complainant received \$9,722.50 from Laurel Highlands Camplands, Inc. as wages. The Complainant received \$630.00 from North Fayette Area Vocational Technical School.

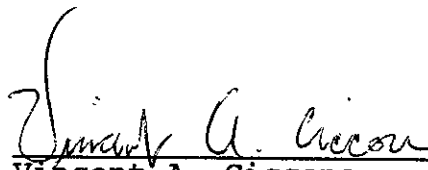
24. In 1989, the Complainant received \$10,540.00 in wages from Laurel Highlands Camplands, Inc. and \$2,632.50 from North Fayette Area Vocational Technical School.

25. In 1990, the Complainant's salary is \$215 per week from Laurel Highlands Camplands, Inc.

26. As of April 1985, Richard Jellison was 35 years of age.



Mark A. Fontana
Counsel for Respondent



Vincent A. Ciccone
Counsel for Complaint

FINDINGS OF FACT

1. From July 1957 until March 5, 1985, the Complainant was employed by Permali, Inc. ("Permali") as a draftsman at its Mount Pleasant plant. (S.F. 5-6)

2. Permali, Inc. was in the business of manufacturing laminated wood products and other fiberglass and epoxy or cast resin insulators, mainly for use in the electrical industry. (N.T. I p. 17-18)

3. Permali manufactured parts and components containing densified resin wood, cast and molded epoxy, and filament wound reinforced plastic tubes. (N.T. II p. 120)

4. Eugene Carlisle, one of the owners of Respondent C-K Composites, was President of Permali, Inc. for approximately five years. (N.T. II p. 119)

5. Eugene Carlisle was responsible for the manufacturing plant in Mount Pleasant and the operation in Canada. He was also responsible for a subsidiary named Russell's Plastic Technology Co. (N.T. II p. 119)

6. When Carlisle was President of Permali, Inc. there were 125 employees. (N.T. II p. 122)

7. The number of employees at Permali, Inc. steadily declined over the next five years until in 1985, only 45 employees remained. (N.T. II p. 122)

Abbreviations:

N.T. I	December 4th Transcript
N.T. II	December 5th Transcript
N.T. III	December 6th Transcript of Hearing
S.F.	Stipulations of Fact
R.Exh.	Respondent's Exhibit

8. This decrease was a result of reduction enforced programs. (N.T. II p. 123)

9. This reduction was necessary because the company (Permal, Inc.) was overstaffed and the business was a lot smaller. (N.T. II p. 123-124)

10. In 1983 and 1984, Carlisle, as President of Permal, Inc. was asked by its parent company (BTR) to develop alternatives in regard to the Permal, Inc. situation. (N.T. II p. 124)

11. The three alternatives explored by Carlisle were: (1) relocating the plant; (2) to try and sell the company; and (3) close the plant. (N.T. II p. 125-127)

12. During this time period, Carlisle decided on a fourth alternative which was to make an offer of his own to buy Permal, Inc. from BTR, the parent company. (N.T. II p. 129)

13. Carlisle began to have discussions about purchasing Permal, Inc. with Patrick Kozbelt, another Permal employee. (N.T. II p. 128)

14. Carlisle and Kozbelt eventually reached an agreement with BTR to purchase the assets of Permal, Inc. (N.T. II p. 129)

15. Before the purchase of the assets of Permal, Carlisle and Kozbelt mentioned their plans to two Permal employees: Bill Boehmer, Manager of Engineering and Bob Patalano, Comptroller. (N.T. II p. 130)

16. Though there was no promise or contract, both individuals indicated interest in working for the new company, which was to be named C-K Composites. (N.T. II p. 130)

17. Once the purchases of assets from Permal, Inc. was complete, there was no longer any further affiliation between C-K Composites and Permal, Inc. or BTR. (N.T. II p. 131)

18. All of the shares of stock in C-K Composites were owned by Mr. and Mrs. Carlisle and Mr. and Mrs. Kozbelt. (N.T. II p. 132)
19. All of the financing for the purchase of Permali assets was done personally by Mr. Carlisle and Mr. Kozbelt. (N.T. II p. 130)
20. Permali, Inc. officially closed all of its operations on March 5, 1985. (N.T. II p. 132)
21. C-K Composites, the Respondent herein, began operations on March 6, 1985. (N.T. II p. 132)
22. The decisions concerning the staffing for C-K Composites were made solely by Patrick Kozbelt and Eugene Carlisle. (N.T. II p. 132)
23. When Respondent C-K Composites advertised for positions, the Respondent did not list a position for a draftsman. (N.T. II p. 135)
24. The Respondent felt that they could start off the company without a draftsman because Patrick Kozbelt and Bill Boehmer could do any drafting that might be needed. (N.T. II p. 141)
25. Mr. Kozbelt had been employed for many years at Permali as a draftsman and a tool designer. (N.T. II p. 141)
26. The Respondent wanted to start their new company with a minimum amount of employees to save money. (N.T. II p. 137)
27. Once C-K Composites identified what positions were to be filled, the first place they looked was at salaried employees who formerly worked at Permali doing similar work. (N.T. II p. 136)
28. Before the closing of Permali, there were 14 salaried employees. (N.T. II p. 137)
29. Out of those 14 ex-Permali employees, 10 were offered positions at C-K Composites. (N.T. II p. 137)

30. Out of the 10 ex-Permali employees offered positions at C-K Composites, four (4) were offered hourly positions and six (6) were offered salary positions. (N.T. II p. 137)

31. Six of the ten ex-Permali employees hired by C-K Composites were over the age of 40 at the time of hire. (N.T. III p. 11)

32. The four ex-Permali employees who were not hired by Respondent C-K Composites were: B. Halligan, J. Scekeres, Harry Leighliter and Ivan Hominsky. (N.T. III p. 12-13 and Resp. Exh. 6)

33. Ms. Halligan and Ms. Scekeres were accounting clerks at Permali, and also worked as receptionists and typists. (N.T. III p. 12)

34. These duties at C-K Composites were filled by the wives of Mr. Carlisle and Mr. Kozbelt. (N.T. III p. 12)

35. The wives did not receive a paycheck. (N.T. III p. 12)

36. These women served in these capacities (clerical/receptionist) for over 2 years. (N.T. III p. 12)

37. The third individual was Harry Leighliter who was a foreman at Permali. (N.T. III p. 13)

38. There was no position available for Mr. Leighliter at C-K Composites. (N.T. III p. 13)

39. The fourth individual not hired was Ivan Hominsky, the Complainant. (N.T. III p. 13)

40. The initial reason given for not hiring a draftsperson was for economic reasons. (N.T. III p. 13)

41. The Respondent was attempting to minimize costs in trying to maintain this new venture. (N.T. III p. 13)

42. Another reason was that it was decided by Carlisle and Kozbelt that if drafting was needed, it could be easily done by Patrick Kozbelt and Bill Boehmer, both of whom had drafting experience. (N.T. III p. 13)

43. In the initial staffing plan for C-K Composites, there was no drafting position included. (N.T. II p. 137)

44. Approximately one month after C-K Composites began operating, C-K Composites retained the services of a contract draftsperson. (N.T. III p. 21)

45. The hiring of a contract draftsperson occurred in April of 1985. (N.T. III p. 21)

46. C-K Composites had not advertised for a draftsperson. (N.T. III p. 22)

47. Richard Jellison sent an unsolicited letter to C-K Composites congratulating them on their new company, and offering his drafting services on a subcontracting basis. (N.T. III p. 22)

48. In April of 1985, because of the increase in C-K Composites' business and orders, it was clear that Mr. Kozbelt and Mr. Boehmer could not complete the drafting duties that were now required. (N.T. III p. 23)

49. There was no written contract entered into by Richard Jellison and C-K Composites to perform drafting services. (N.T. III p. 23-24)

50. From April until August 1985, Richard Jellison would submit invoices to C-K Composites for the number of hours he spent performing drafting services in that particular week. (N.T. III p. 25)

51. There was no restriction placed on Mr. Jellison's right to undertake work for other contractors. (N.T. III p. 25)

52. Mr. Jellison used his own drafting instruments. (N.T. III p. 26)

53. Drafting instruments include: basic tools, compasses, pencils, pencil sharpeners, scales, and triangles. (N.T. III p. 26)

54. In August of 1985, Mr. Jellison approached Bill Boehmer and requested that he become an employee of C-K Composites. (N.T. III p. 27)

55. Mr. Jellison was concerned about hospitalization and other health benefits for his family. (N.T. III p. 27)

56. Mr. Jellison was a tool and mold designer. (N.T. III p. 54)

57. During the time Mr. Jellison was with C-K Composites up to the date of hearing, C-K Composites' business in epoxy mold increased. (N.T. III p. 61)

58. Mr. Jellison is the individual who does the mold designing at C-K Composites. (N.T. III p. 61)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the 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. Ivan W. Hominsky ("Complainant") is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. C-K Composites ("Respondent") is an employer within the meaning of the PHRA.

5. The Complainant has the burden of establishing a prima facie case of age discrimination.

6. In order to establish a prima facie case, the Complainant must show the following:

- a) that he is a member of a protected class;
- b) that he was qualified for a position which was available;
- c) that despite his qualifications, he was rejected;
- d) that an available position was filled by an individual with either less or comparable qualifications who was not a member of the protected class.

7. The Complainant has met his burden of establishing a prima facie case.

8. Once the Complainant establishes a prima facie case, the burden of production shifts to the Respondent to produce evidence of a legitimate non-discriminatory reason for its action.

9. The Respondent has met its burden of production in that the Respondent has produced evidence of legitimate non-discriminatory reasons for its action.

10. Once the Respondent meets its burden of production, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination.

11. The Complainant can succeed in its ultimate burden of persuasion by showing that the Respondent's proffered explanations are unworthy of credence and/or pretextual.

12. The Complainant has failed to establish that the Respondent's articulated reasons for its action were pretextual.

OPINION

This case arises on a complaint filed on or about April 29, 1985, by Ivan W. Hominsky (hereinafter "Complainant") against C-K Composites, Inc. (hereinafter "Respondent"), with the Pennsylvania Human Relations Commission (hereinafter "PHRC"). The complaint alleged that Respondent unlawfully discriminated against him because of his age when it refused to hire him as a draftsman. The complaint alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

PHRC staff investigated the allegations and at the investigation's conclusion, informed Respondent that probable cause existed to credit the complainant's allegation. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion but such efforts proved unsuccessful. Subsequently, the PHRC notified Respondent that it had approved a Public Hearing.

The Public Hearing was held on December 4, 5 & 6, 1990, in Pittsburgh, PA, before Permanent Hearing Examiner Phillip A. Ayers. The case on behalf of the complaint was presented by PHRC staff attorney Vincent A. Ciccone. Mark A. Fontana, Esquire, appeared on behalf of Respondent. Following the Public Hearing, the parties were afforded an opportunity to submit briefs. Both Commission counsel and Respondent counsel filed post-hearing briefs and subsequently reply briefs.

Regarding Complainant's allegation, we recognize that the nature of his claims present an allegation of disparate treatment in regard to age.

The analytical mode of evidence assessment is clearly set forth in a number of recent cases. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the PA Supreme Court clarified the order and allocation of burdens first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The PA 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 production burden, in order to prevail, a 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 persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The PA Supreme Court also indicated that if a Complainant "produces sufficient evidence that, if believed and otherwise unexplained, indicates that more likely than no discrimination has occurred, the [Respondent] must be heard in response." If the Respondent fails to respond the presumption of discrimination created by the prima facie showing stands determinative of the factual issue and the Complainant must prevail. However, when a Respondent offers a non-discriminatory explanation for its actions, the presumption of discrimination drops off. Allegheny Housing Authority, Supra.

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

[A]s 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." Aikens, 460 U.S. at 716, 103 S. Ct. at 1482. The plaintiff is, of course, 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 her evidence does preponderate to prove discrimination. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing Authority, Supra at 319.

In this court designed tripartite burden allocation, the Complainant must, of course, first establish a prima facie case by a preponderance of the evidence. Since McDonnell Douglas, Supra, was a race-based refusal to hire case, the literal phrasing of the prima facie

burden articulated in McDonnell Douglas does not precisely fit the act of harm alleged by the Complainant. Accordingly, the McDonnell Douglas proof pattern must be adapted to fit the factual variance presented by this case.

To establish a prima facie case of a failure to hire Complainant as a draftsman, the Complainant must establish:

1. That he is a member of a protected class;
2. That he was qualified for a position which was available;
3. That despite his qualifications, he was not assigned the position; and
4. That an available position was filled by an individual with either less or comparable qualifications who was not a member of the protected class.

PHRC v. Johnstown Redevelopment Authority, Pa. , 588 A.2d 497 (1991); See also, Stancil v. Clayton, 30 FEP 730 (DCDC 1978); and Garner v. Boorstin, 690 F.2d 1034, 29 FEP 1765 at 17167 n. 4 (D.C. Cir. 1982).

The Complainant in this matter has no problem meeting the first element of the prima facie case, he is a member of a protected class, age, 55. The questions remaining are: whether he was qualified for a position that was available, whether he was assigned the position, and whether the available position was filled by an individual with either less or comparable qualifications who was not a member of the protected class.

An extremely important question in this case is whether there was, in fact, an available position. When the Respondent company was formed, there was no drafting position listed in its advertisements or in its corporation plans. As a matter of fact, when the Respondent's financial

package was submitted to Mellon Bank, there was no indication of a drafting position. In fact, the owners of the Respondent company purposely did not include a drafting position because they felt that any required drafting could be done by two of its own employees. Both Mr. Kozbelt and Mr. Boehmer had experience in drafting. However, soon after the company was formed, there was a recognized need for drafting services that could not be met by the two employees. At this time, approximately in April of 1985, the Respondent began to contract with another individual to perform drafting services. It is at this point that the Complainant alleges that he should have been hired by the Respondent. Given the fact that the prima facie showing should not be onerous, we will hold that a position was available.

Next we move to the third element of the prima facie case; whether the Complainant was given the position. The Complainant satisfies this element in that another individual (Richard Jellison) was chosen to do drafting work. Lastly, we must consider whether the position was filled by an individual with less or comparable qualifications who was not a member of a protected class. In this matter, the person who was doing the drafting services for the Respondent was a draftsman who was not within the protected class. Mr. Jellison was under the age of 40 at the time of this action, and had comparable qualifications.

Once a prima facie case has been established, we look to the Respondent's articulated reasons for not hiring the Complainant. The Respondent has presented evidence of legitimate non-discriminatory reasons for not hiring the Complainant. The reasons are as follows:

- 1) because of financial reasons the Respondent at its inception, intended to operate without a draftsman.

2) there was an increased need for a draftsman who was a tool and mold designer.

3) the Respondent felt that the Complainant could not perform the more complicated and sophisticated design and work being done by the Respondent.

4) the Complainant had previously exhibited poor job performance and lacked commitment to the job.

Once the Respondent has met its burden of articulating a legitimate non-discriminatory reason for not hiring the Complainant, the Complainant still has the ultimate burden of persuasion by showing that the proffered explanation of the Respondent is unworthy of credence and/or pretextual.

We must begin this portion of the analysis by centering on the Respondent's plans when its business began operating. The owners of C-K Composites were clearly concerned with keeping start up expenses at a bare minimum. The Respondent made a business decision not to hire anyone as a draftsman when it began in March of 1985. It did not seek applicants for a drafting position. A major reason for the reduction of expenses and staff was that the owners of the Respondent company had personally financed the company. Therefore, they wanted to begin operations without overstaffing and at a minimum of costs. Also the owners of Respondent Company, (Carlisle and Kozbelt) had knowledge of the potential of operating without a draftsman because Permal's Canadian plant had functioned without a draftsman for some time.

As indicated before when C-K Composites was to begin operations, the owners initially went to ex-Permal employees to construct a new staff.

There were fourteen ex-Permalı salaried employees, ten of whom were offered positions by the Respondent. Out of the ten offered positions, four were offered hourly positions and six were offered salary positions. Also six of the ten ex-Permalı employees hired by Respondent were over the age of 40 at the date of hire. Clearly the Respondent did not have an obligation to hire ex-Permalı employees, but it appears that Respondent endeavored to keep the majority of Permalı employees in their employ. McCloskey v. Nu-Car Carriers, Inc. 387 Pa. Super. 466, 468, 564 A.2d 485 (1989); Appeal Denied 525, 575 A.2d 115 (1990) The Complainant has not shown any evidence that the Respondent's proceeding without a draftsman in the beginning is unworthy of credence.

Secondly, we move to the Respondent's position that after several months, there was an increased need for drafting services in a particular area. As aforementioned, the decision to proceed without a draftsman was based on financial considerations and the fact that could perform the drafting work as needed. However, after approximately one month, it became clear, with an increase in business, that the one of Respondent owners and one employee could not perform all of the work. Evidence was presented by the Respondent (R. Ex. 5) that Richard Jellison contacted C-K Composites in early April. Upon learning of Respondent's new operation, Mr. Jellison sent the owners a letter congratulating them on their new endeavor and offered his services as a draftsman. The record shows that the letter from Mr. Jellison was unsolicited. The Respondent never advertised for a draftsman. Upon being interviewed by Bill Boehmer, Mr. Jellison was hired as an independent contractor to perform drafting services.

There is considerable discussion in the Commission's brief as to the status of Mr. Jellison being an employee at this point in early April as opposed to an independent contractor. However, the record as a whole establishes that Mr. Jellison was an independent contractor. Some of the factors considered are:

- 1) Mr. Jellison set his own fee.
- 2) Mr. Jellison was paid checks based on invoices submitted to Respondent for approval.
- 3) He did not receive any benefits from Respondent.
- 4) Either Respondent or Mr. Jellison could have terminated this arrangement at any time.
- 5) There was no restriction placed on Mr. Jellison's authority to do work for other clients. In fact, Mr. Jellison continued to solicit other work.
- 6) Mr. Jellison provided his own drafting instruments.

Clearly the abundance of evidence in the record indicates that Mr. Jellison was an independent contractor not an employee of Respondent. At a later date in August, Mr. Jellison, because of concern for health benefits for his family, asked to become an employee of Respondent. This request was granted with the recommendation of Bill Boehmer. Having determined that Mr. Jellison was in fact an independent contractor from early April until August, we can now move to the other reasons articulated by Respondent for not hiring the Complainant.

Another reason given by Respondent was that not only was there a need for drafting but there was a particular need for tool and design work.

The owners of C-K Composites had decided that in order to be successful they would have to be more committed to the cast resin and epoxy business. When they got to the point of needing someone to perform drafting, they wanted someone who would be able to perform the complicated mold and design work. The Respondent argues that had Complainant been considered, he would not have been hired because Mr. Jellison was more experienced in tool design work. Mr. Jellison had more than 16 years of experience in tool designing. In regard to the Complainant's experience in this particular area, the record is unclear on this point. This confusion certainly impacts on the credibility of the Complainant in reference to this particular point. The Complainant, in a deposition, testified that he was not a tool and design person, but he did things such as transforming engineering and customers sketches into complete drawings, simple disassembly work and parts drawings, and simple mandrels drawings. Furthermore, in reference to this particular area, the following exchange took place at the Complainant's deposition in reference to his duties at Permal:

Question: But, what you didn't do would be a situation where someone would give you a part and you would develop all the necessary tooling designs needed to manufacture that part that was the design part that you actually did not do?

Answer: Right. However, at the public hearing the Complainant testified that he did perform tool and mold designing work at Permal:

Question: Mr. Hominsky, despite what your

deposition says, if I understand what your testimony is today, you actually did tool and mold designing, is that correct?

Answer: That is correct.

Question: I guess you are telling me that your deposition testimony that we just went over, which occurred in September and which occurred under oath, is incorrect at the time you made it?

Answer: At the time I made it, I wasn't thinking properly, right.

It is highly unlikely that the Complainant, a long time employee of Permali, would be unclear as to what kind of work he had been performing for all those years. While Commission counsel raises a questions as to the Complainant's belief that he was being asked what his job title was, the question remains: How could Complainant "forget" his job duties at his deposition but all of a sudden, remember at the public hearing?

Also, the Complainant relies heavily on the testimony of Bill Boehmer, in that Mr. Boehmer stated that the Complainant had done Permali's tool and mold designing and the Complainant was more qualified than Mr. Jellison to perform the work at C-K Composites.

The testimony of Mr. Boehmer in regard to this issue is also inconsistent. At his deposition, Mr. Boehmer described the Complainant's duties in the same fashion as did Complainant at this deposition. Mr. Boehmer described the Complainant's work as generally redrawing or formalizing an engineer's or customer's sketches. However, at public

hearing, Mr. Boehmer testified that the Complainant did tool and mold designing at Permal.

Also, Mr. Boehmer gave different testimony in regard to his assessment of the Complainant's job performance at Permal. At his deposition, the Complainant was described by Boehmer as an "adequate employee." At public hearing, Mr. Boehmer testified that Complainant was "more than adequate" and was a good employee. These inconsistencies in Mr. Boehmer's testimony are further noted in his displeasure with the owners of Respondent company in not following his recommendation to hire the Complainant. However, a disagreement with the Respondent owners over business decisions is not necessarily an indication of age discrimination. It is well-established that age discrimination laws are "not intended to be a vehicle for judicial second guessing of business decisions," nor are they "intended to transform the courts into personnel managers." Healy v. New York Life Ins. Co., 8160 F.2d 1209, 1216 (3rd Circuit, 1988) cert. denied, 490 U.S. 1098 (quoting Thornbrough v. Columbus and Greenville R.R. 760 F.2d 633, 647) (5th Circuit, 1985).

Also damaging to the Complainant's case is that the Complainant's principle witness, Bill Boehmer, although he disagreed with the decision not to hire Complainant, felt the decision "didn't have anything to do with his age" (N.T. I p. 118) Mr. Boehmer further stated in a letter to Complainant (R. Ex. 18)

...I again want to be clear with you about
what kind of testimony I will be able to provide
just so there is no misunderstanding. I hope you

remember that it has never been my opinion nor do I have any evidence that C-K's reasons for not hiring you had anything to do with your age. In fact, I'm still as puzzled today about why you weren't hired as I was 3 years ago when I stated my side of things to that Theresa [PHRC Investigator Theresa Randleman] woman. You know that if I did have evidence that you were discriminated against, I certainly would be willing to testify about it.

(R. Ex. 18)

This evidence is particularly compelling in that even though Mr. Boehmer indicated much displeasure with Respondent's business decision, he clearly recognized their disputes in regard to Complainant as business-related, as opposed to any inference of age discrimination.

Also, in addition to feeling that the Complainant would not be able to perform the drafting work at C-K Composites, Respondent owner (Carlisle and Kozbelt) had some reservations about the Complainant's job performance and commitment to the job. Both Complainant and Respondent presented witnesses who gave their subjective appraisals of the Complainant's work habits. Several of the Complainant's witnesses (Clark, Ogurchak and Boehmer) had the opportunity to observe the Complainant and his work. They felt that the Complainant was a good employee.

However, Carlisle and Kozbelt, owners of Respondent company felt that the Complainant lacked dedication to his work. Also they felt that the Complainant did not have the work skills or ability to perform at the level they desired for new employees at C-K Composites. The Respondent owners had

the same opportunity to subjectively observe the Complainant as did the Complainant's witnesses. In fact, at the time of the public hearing, Mr. Ogurchak (Complainant witness) had not had any work-related contact with the Complainant since 1978. Another witness (Mr. Clark) had no work-related contact since 1974. Given these circumstances, it would appear that the Complainant has not shown that the Respondent's articulated reason, that the Complainant did not show a sense of dedication to his work, is unworthy of credence or pretextual. The mere fact that an employer may use subjective criteria in business decisions does not render the decision discriminatory. Aguirre-Molina v. New York State Div. of Alcohol Abuse 675 F. Supp. 53, 59 (N.D. N.Y. 1987).

As a whole, the Respondent, in the instant case, has articulated legitimate non-discriminatory reasons for its not hiring the Complainant, and the reasons have not been shown to be pretextual or unworthy of credence.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IVAN W. HOMINSKY,
Complainant

v.

C-K COMPOSITES, INC.,
Respondent

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DOCKET NO. E-33268A

FINAL ORDER

AND NOW, this 30th day of June, 1992, after a 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 the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

O R D E R S

that the instant complaint be, and the same hereby is DISMISSED.

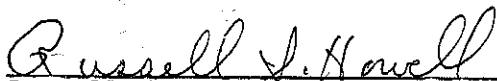
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:



Robert Johnson Smith
Chairperson

ATTEST:


Russell S. Howell, Assistant Secretary