

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD G. PLEGER,
Complainant

v.

CITY OF OIL CITY,
Respondent

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DOCKET NO. E-52529

JOINT STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

RECOMMENDATION OF PERMANENT HEARING EXAMINER

OPINION

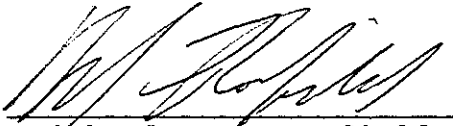
FINAL ORDER


COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD PLEGER, :
 :
 Complainant :
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 vs. : Docket No. E-52529
 :
 CITY OF OIL CITY, :
 :
 Respondent :

JOINT STIPULATIONS OF FACT

1. A complaint Docket No. E-52529 was filed with the Pennsylvania Human Relations Commission on September 21, 1990.
2. The Complainant, Richard Pleger, was an adult individual residing in Pennsylvania at the time of the complaint.
3. Oil City was an employer of more than four employees at the time of the complaint.
4. All procedural requirements necessary for a public hearing have been met.


Michael L. Rosenfield
Counsel for Complainant


Vicki L. Beatty
Counsel for Respondent


Diane Blancett-Maddock
Counsel for Commission

FINDINGS OF FACT *

1. Richard G. Pleger (hereinafter "Complainant") is an adult individual residing in the Commonwealth of Pennsylvania at all times relevant to this complaint. (SF 2.)
2. The City of Oil City (hereinafter "Respondent") is an employer of more than four employees at all times relevant to the complaint. (SF 3.)
3. The Respondent hired the Complainant as a mechanic in May of 1960. (NT 7.)
4. In 1963, the Complainant was promoted to the position of garage mechanic foreman. (NT 8.)
5. The Complainant remained in the capacity of foreman for approximately 27 years. (NT 9.)
6. As foreman, the Complainant kept inspection records, assigned work to the mechanics, ordered and picked up parts and supplies, helped the mechanics, and checked and ordered fuel. (NT 11.)
7. In January 1980, the Complainant underwent heart bypass surgery. (NT 16.)
8. The Complainant returned to work in March of 1980 with a lifting restriction of 50 pounds. (NT 16.)

* The foregoing Joint Stipulations of Fact are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

NT Notes of Testimony
SF Stipulations of Fact

9. The Complainant saw his attending physician, James Houser, M.D., every four months. (NT 17.)
10. On July 3, 1989, the Complainant allegedly was struck by a car in his driveway. (NT 52.)
11. Approximately two weeks later, the Complainant was charged by the City of Oil City Police Department with making a false report to a law enforcement agency. (NT 52.)
12. A jury trial was held in April 1990 wherein the Complainant was found guilty of making a false report to the law enforcement officers. (NT 55.)
13. The Complainant appealed his conviction to the Superior Court where it was upheld. (NT 55-56.)
14. The Complainant then petitioned the Supreme Court which denied his Petition for Allowance of Appeal on April 9, 1992. (NT 55-56.)
15. The Complainant was, in fact, terminated from his position on April 19, 1990, one day after his conviction. (NT 55-56.)
16. From July 3, 1989 until the Complainant's date of termination, the Complainant was out on sick leave. (NT 24.)
17. In the beginning of September 1989, Thomas Rockovich, City Manager, requested medical information from the Complainant's attending physician before he could return to work. (NT 75.)
18. The letter of September 14, 1989 also notified the Complainant of the Respondent's plans to have him examined by a doctor of its choice, pursuant to Section IV-B of the Sick Leave and Bereavement Policy. (NT 75.)

19. Dr. Houser, Complainant's physician, submitted a report to the Respondent dated September 20, 1989, wherein he stated that the Complainant was able to return to work. (NT 76-78.)
20. The Respondent, per Mr. Rockovich, sent Complainant a letter on November 7, 1989, in which Mr. Rockovich indicated that the Respondent planned to have the Complainant submit to an independent medical evaluation. (NT 32, 78.)
21. Pursuant to this arrangement, the Complainant met Dr. Karl Frankovitch in Erie on December 4, 1989 for an evaluation of his condition and his ability to return to work. (NT 78.)
22. Dr. Frankovitch's opinion was that the Complainant could not return to work as a mechanic because of his degenerative back condition. (NT 85.)
23. After receiving two conflicting reports as to the Complainant's ability to return to work, the Respondent did not return the Complainant to his position. (NT 92.)
24. Complainant's attorney then requested that Complainant see a third physician, Dr. Fulton Kornack. (NT 92.)
25. The opinion of Dr. Kornack was that the Complainant was able to return to work. (NT 92.)
26. The report of Dr. Kornack was not received by Respondent until March 1991. (NT 92.)
27. In April of 1989, there were some preliminary discussions between Mr. Rockovich and Mr. Hicks regarding a reorganization of several departments in the City. (NT 118.)

28. During the Complainant's absence of three to four months, the garage was running smoothly and effectively. (NT 117.)
29. In November and December of 1989, there were specific discussions regarding the elimination of garage foreman as part of the reorganization. (NT 117.)
30. Pursuant to City Ordinance No. 2512, the Bureau of Public Services was created combining the Department of Streets, Parks and Recreation, and the City Garage. (NT 116-117.)
31. Prior to the reorganization, each of the three departments had its own foreman. (NT 116-117.)
32. The Complainant had been the foreman at the City Garage. (NT 117.)
33. After the Complainant was terminated on April 19, 1990, the garage foreman position was eliminated, and the City Garage became part of the Bureau of Public Services. (NT 117.)
34. Under the new format, the Director of the Bureau of Public Services was to appoint one foreman and an assistant foreman who would oversee the responsibilities of the Bureau of Public Services. (NT 116-117.)
35. Mr. Miles Truitt, Jr., previously foreman of Parks and Recreation, was made foreman, and a Mr. Robert Kraft was made assistant foreman. (NT 119-120.)
36. The Respondent did not feel that the Complainant had the necessary expertise to oversee all three departments. (NT 123.)

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. Respondent is an employer within the meaning of the PHRA.
3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of this case.
4. All of the procedural prerequisites for a public hearing have been met.
5. The Complainant established a prima facie case of discrimination by showing:
 - a) he is a member of a protected class;
 - b) the Complainant applied to return to his job;
 - c) Complainant's attempt to return was rejected; and
 - d) Respondent sought other applicants.
6. The Respondent produced evidence of legitimate, non-discriminatory reasons for its action.
7. The Complainant has not shown that the proffered explanations of the Respondent are pretextual or unworthy of credence.
8. The Complainant has failed to show by a preponderance of the evidence that he was unlawfully discriminated against in this matter by the Respondent.

OPINION

This case arises on a complaint filed by Richard G. Pleger (hereinafter "Complainant") against City of Oil City (hereinafter "Respondent") on or about September 21, 1990, at Docket No. E-52529. Generally, the Complainant alleges that he was denied the right to return to work and ultimately discharged because of his perceived handicap/disability, back injury. This allegation states a violation of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff investigated the allegations of the complaint and found probable cause to credit the Complainant's allegations. Thereafter, PHRC staff attempted to eliminate the alleged unlawful discriminatory practices through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the case was approved for public hearing.

The public hearing in this matter was held on July 29, 1992 at the PHRC's Pittsburgh Regional Office before Phillip A. Ayers, Permanent Hearing Examiner. The case on behalf of the complaint was presented by Diane Blancett-Maddock, PHRC attorney. Vicki L. Beatty, Esquire, appeared on behalf of the Respondent. Michael L. Rosenfield, Esquire, appeared on behalf of the Complainant. Following the public hearing, all parties were afforded the opportunity to submit post-hearing briefs. Attorney Rosenfield filed his post-hearing brief for the Complainant on September 14, 1992, and Attorney Beatty filed her post-hearing brief for the Respondent on September 11, 1992.

At the public hearing, the focus was placed on a disparate treatment analysis of the allegations made and the evidence received. The order and allocation of proof in a disparate treatment case was first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and clarified by the Pennsylvania Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). 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]." Id at 320. If the Respondent meets this burden of production, the Complainant, in order to prevail, must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. Id at 318. Also, the Complainant can succeed in its ultimate burden of persuasion by showing that the Respondent's proffered reasons are unworthy of credence and/or pretextual.

In order to establish a prima facie showing in a case alleging handicap/disability discrimination, the Complainant must show:

- 1) he is a member of a protected class;
- 2) he applied to return to his job;
- 3) the Respondent refused to permit the Complainant to return to work; and
- 4) the Respondent sought other applicants.

As noted in numerous cases, the burden of establishing a prima facie case should not be an onerous one. The first issue in this case is whether the Complainant is within the protected class of handicap/disability. Commission regulations promulgated under PHRA define a handicapped or disabled person to include the following:

- (i) a person who has or is one of the following:
 - (A) a physical or mental impairment which substantially limits one or more major life activities.
 - (B) a record of an impairment.
 - (C) regarded as having an impairment.
- (ii) As used in subparagraph (i), the phrase:
 - (A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin and endocrine. . .
 - (B) "major life activities" means functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.
 - (C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.
 - (D) "is regarded as having an impairment" means has a physical or mental impairment that does not substantially limit

major life activities but that is treated by an employer or owner, operator or provider of a public accommodation as constituting a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward the impairment; or has none of the impairments defined in subparagraph (i)(A) but is treated by an employer or owner, operator or provider of a public accommodation as having an impairment.

16 Pa. Code §44.4.

In the instant case, the Complainant has alleged that he has been discriminated against because of his "non-job-related disability, back injury." Commission regulations define a non-job-related handicap or disability as:

- (i) a handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in. . .

The Complainant meets the first element of the prima facie showing in that the Respondent clearly perceived him as having a handicap/disability. The Respondent on several occasions sought medical opinions regarding the Complainant because of this perception.

The second element of the prima facie case was met when the Complainant, in September of 1989, applied to return to his job as foreman with the Respondent. The third element is met because the Respondent not only refused to return him to work, but ultimately discharged him.

The final prong of the prima facie showing in this matter is that the Respondent sought other applicants. In the instant case, the Respondent combined three foreman positions into one and hired someone other than the Complainant.

For the reasons stated above, the Complainant has made a prima facie showing of discrimination. As previously indicated, 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." Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). The Respondent has asserted that the Complainant was terminated for two reasons:

1) he was terminated because he was convicted of filing a false report with the City of Oil City Police Department; and

2) because of an overall reorganization of city departments, the Complainant's position was eliminated.

Clearly, the Respondent has produced evidence of legitimate, non-discriminatory reasons for its actions.

The case law is clear that once the Respondent has produced evidence of legitimate, non-discriminatory reasons for its actions, the Complainant, in order to prevail, must show that the proffered reasons are pretextual and/or unworthy of credence. Also, the Complainant, throughout the case, has the ultimate burden of proving discrimination on the part of the Respondent. Upon review of the entire record before the Commission, it is a proof burden that the Complainant failed to carry. Pretext may be shown by persuading the Commission that a discriminatory reason more likely

motivated the employer or by showing that the employer's proffered explanation is unworthy of credence. Action Industries v. Human Relations Commission, 102 Pa. Cmwlth. 382, 518 A.2d 610 (1986).

The record in this matter reflects that the Respondent was contemplating a reorganization as early as April 1989, several months before the events of July 3, 1989. (NT 116-117.) While the Complainant was out on sick leave, his area functioned smoothly, without any problems. The final decision in regard to the Complainant's position was made in April, 1990. Prior to the Respondent's reorganization, the Department of Parks and Recreation, Department of Streets, and Department of the Garage were all separate and had their own foreman. The Complainant was the foreman in the garage area. The City Garage, after the reorganization, became part of the Bureau of Public Services. (NT 119.) Under the new organization, the Director of the Bureau of Public Services had the authority to appoint a foreman and an assistant foreman. These two individuals would supervise the Bureau of Public Services. In making these changes, the Respondent asserts that it is within its business prerogative to reorganize and eliminate positions. The Respondent further asserts that it did not feel that the Complainant had sufficient knowledge to oversee all three departments.

The Respondent's main witness, Thomas Rockovich, also indicated that since the Complainant had been found guilty of filing false reports, it would not be appropriate to have him in the employ of the City.

The Complainant has not been persuasive in indicating that the above explanations of the Respondent are unworthy of credence, or pretextual.

There is also a great deal of evidence in the record regarding medical evaluations of the Complainant. Significantly, two of the evaluations took place during the time the Complainant was on sick leave. The Complainant was on sick leave from July 3, 1989 (date of the alleged accident) until his termination by the Respondent. The first evaluation by Dr. James Houser, Complainant's attending physician, indicated that the Complainant was able to return to work. After receipt of this report, the Respondent informed Complainant that the Respondent had arranged for the Complainant to see an orthopedic specialist for an independent medical evaluation. (NT 78.) This medical report indicated that the Complainant would not be able to return to work, based on his degenerative back condition.

The Respondent's position at this time was they had conflicting medical information and also an ongoing investigation into the Complainant's claim concerning the July 3, 1989 incident. Respondent's reluctance to return the Complainant to work at this time is clearly reasonable. (There was a third medical opinion sought by the Complainant, but the report was not received by Respondent until late March 1991. (NT 92.)) There is no showing by the Complainant of any discriminatory intent in the mind set of the Respondent. Action Industries v. Pennsylvania Human Relations Commission, 518 A.2d 610, 613 (1986). As Respondent counsel notes,

Mr. Rockovich was truly confused as to Mr. Pleger's actual physical condition because a reputable physician was claiming that there was an injury from which Mr. Pleger had healed, and the police department was claiming that there was never an incident from which Mr. Pleger would have sustained an injury.

As noted above, it is reasonable for the Respondent to seek to clarify the situation.

There is some discussion in Complainant counsel's brief concerning the issue of whether Complainant was perceived of as a "foreman" or a "mechanic," in light of Dr. Frankovitch's report. In Dr. Frankovitch's report, he indicates that the Complainant may return to his job as a mechanic, when the Complainant was in fact a foreman. The Complainant has not shown any discriminatory intent on the part of Respondent in regard to Dr. Frankovitch's misperception. In fact, Dr. Houser stated that had he known what the Complainant's full job description was, it would have altered his opinion of whether Complainant should have returned to work.

Also, the record is clear that the Respondent had a past history of accommodating employees with restrictions. The Complainant himself is aware of several situations where employees were injured on the job or off the job and had sustained some restriction or limitation. These individuals were fully accommodated by the Respondent. (NT 59-60.) The Respondent accommodated an employee with cancer who was spending time away from the office receiving treatments. The Respondent accommodated the employee whenever he was home and able to resume employment. Most importantly, the Respondent fully accommodated the Complainant himself after his heart surgery in 1980.

The evidence reflects that the Respondent has articulated legitimate, nondiscriminatory reasons for its actions, and Complainant has not shown these reasons to be pretextual or unworthy of credence.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RICHARD G. PLEGER,
Complainant

v.

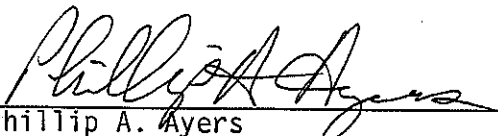
CITY OF OIL CITY,
Respondent

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DOCKET NO. E-52529

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 Joint 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
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RICHARD G. PLEGER,
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DOCKET NO. E-52529

FINAL ORDER

AND NOW, this 25th day of August, 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 Joint 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-52529 be dismissed.

By:



Robert Johnson Smith
Chairperson

ATTEST:


Gregory J. Celia, Jr.
Secretary