

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JEFF J. TAYLOR, Complainant
v.
SCULLY COMPANY, Respondent

DOCKET NO. E45897

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Jeff J. Taylor, an adult male, filed a complaint with the Commission, docketed at E-45897, on September 21, 1988, alleging age discrimination. (SF 1 and 2.)
2. On or about April 18, 1989, the Complainant filed an amended complaint, adding an allegation of discrimination based on sex, male. (SF 5.)
3. After investigation, Pennsylvania Human Relations Commission staff notified Respondent that probable cause had been established only with respect to the unlawful sex discrimination allegation. (SF 6.)
4. The Respondent herein is the Scully Company, James Scully, Owner. (SF 2.)
5. The Respondent, at all times relevant to this complaint, employed four or more persons. (SF 3.)

6. The Respondent advertised for a real estate manager in the *Philadelphia Inquirer* on August 21, 1988. (CE 20.)

7. The Complainant responded to the August 21, 1988 advertisement by submitting his resume to the Respondent in September 1988. (SF 10.)

* The foregoing Stipulations of Fact are 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:

CE	Complainant's Exhibit
NT	Notes of Testimony
SF	Stipulations of Fact

8. Respondent Owner James Scully telephoned the Complainant in or about the first week of September 1988 and discussed the Complainant's experience and qualifications. (SF 11.)

9. The position advertised was that of Regional Property Manager for a group of high-rise, 1000+unit buildings, including Parktowne Place Apartments. (NT 251.)

10. Respondent Owner James Scully had no intention of hiring the Complainant for the position of Regional Property Manager because the Complainant's experience was primarily in managing small-scale, multi-family buildings. (NT 237-238.)

11. When James Scully initially contacted the Complainant, it was for the purpose of discerning whether a position commensurate with his qualifications would be available in the future. (NT 238.)

12. At the end of the telephone conversation, James Scully indicated to the Complainant that he would "get back to him." (SF 12; NT 59.)

13. After several weeks, the Complainant contacted Respondent Owner to inquire as to why he had not yet been contacted in regard to an interview. (SF 13.)

14. After several attempts to reach Respondent Owner on the telephone, the Complainant told Mr. Scully's secretary, "You tell him [James Scully] the next time he hears from me it will be through the lawyer." (NT 60.)

15. At that point, James Scully took the Complainant's call and stated that he could hire whomever he pleased. (NT 60.)

16. Respondent Owner never, during the course of telephone conversations, indicated to the Complainant a preference for hiring a woman for the Regional Property Manager position. (NT 60-61.)

17. In September of 1988, Respondent owner also received the resume of Bonnie Carson in response to the newspaper advertisement. (NT 280.)

18. Based on qualifications listed and experience reflected in her resume, Respondent brought Bonnie Carson in for an interview. (NT 280.)
19. Bonnie Carson was ultimately hired by the Respondent as Regional Property Manager and began her employment on December 16, 1988. (NT 245, 290-292.)
20. The Complainant lacked experience in that he had never been an on-site manager for a high-rise building. (NT 65.)
21. The Complainant had very little experience in managing a building with commercial space. (NT 66.)
22. The Complainant's management experience was primarily with garden-type apartments (i.e., three floors or less). (NT 68.)
23. The Complainant had never managed a single building exceeding 200 units. (NT 67.)
24. The Complainant had no experience in dealing with sophisticated security systems, and no experience in supervising a large number of employees. (NT 69, 72-73.)
25. On the other hand, the individual selected (Bonnie Carson) had significant experience in handling a 1000+unit complex in Collingswood, New Jersey. (NT 231.)
26. Ms. Carson also had experience in areas such as performing market studies and analyses, preparing long-range management plans and budget projections, handling commercial accounts, participating in lease negotiations, experience in dealing with unions and union contracts, supervising contractors, and sophisticated security systems and heating systems. (CE 20.)
27. There is a significant difference in the management of a high-rise building versus mid-rise or garden-type apartments with respect to staffing, housekeeping, renovations, mechanical systems, marketing, unions, capital budgets, and the selection of contractors. (NT 223.)
28. The experience indicated on the Complainant's resume was primarily concentrated in the management of buildings on a much smaller scale than the position sought to be filled. (NT 237.)
29. At public hearing, Complainant indicated that he lacked experience in the management of high-rise buildings. (NT 115.)
30. Respondent James Scully made an off-hand remark to Complainant at a fact-finding conference that "my intent was to hire a woman." (NT 62.)
31. The Complainant testified that, other than the "remark," he had no reason to believe that Respondent had discriminated against him based on gender. (NT 137.)
32. Most higher echelon positions at Respondent company are held by males. (NT 260-262.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant, the Respondent, and the subject matter of the complaint, pursuant to Section 9 of the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The Complainant's initial complaint was based on an allegation of age discrimination, with the Complainant later amending his complaint to include a sex discrimination allegation.
3. Commission staff made a finding of no probable cause in regard to the allegation of age discrimination.
4. The parties and the Commission have complied with the procedural prerequisites to a public hearing as set forth in Section 9 of the PHRA.
5. The Respondent is an employer within the meaning of the PHRA.
6. The Complainant is an individual within the meaning of the PHRA.
7. The Complainant has set forth a *prima facie* case of sex discrimination by showing that:
 - 1) the Complainant is a member of a protected class;
 - 2) the Complainant applied for an open position that he was qualified for;
 - 3) the Complainant was rejected; and
 - 4) the employer continued to seek applicants of equal qualifications.
8. The Respondent articulated a legitimate, nondiscriminatory reason for not hiring the Complainant.
9. The Complainant did not prove that the articulated reasons of the Respondent were either pretextual or unworthy of credence. Accordingly, Complainant has not met his ultimate burden of persuasion by demonstrating, by a preponderance of the evidence, that Respondent's actions violated the Pennsylvania Human Relations Act.

OPINION

This matter arises out of a complaint filed by Jeff J. Taylor (hereinafter "Complainant") against Scully Company (hereinafter "Respondent"), Docket No. E-45897. The Complainant alleges that the Respondent violated Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA") by refusing to hire him as a Real Estate Manager because of his sex, male, and age. (Originally the Complainant alleged only age discrimination in this matter. The Complainant later amended his complaint to include an allegation of unlawful sex discrimination.)

After investigation by PHRC staff, the Complainant was notified that probable cause had been established with respect to the allegation of sex discrimination. Conciliation efforts proved unsuccessful, and PHRC staff, by correspondence dated July 14, 1994, informed Respondent that a public hearing had been approved. The public hearing in this matter was held on February 9 and February 10, 1995, before Phillip A. Ayers, Permanent Hearing Examiner. Pamela Darville, Assis-

tant Chief Counsel, represented the Commission's interest in the complaint. Jill E. Jachera, Esquire, appeared on behalf of the Respondent. Both Commission Counsel and Respondent Counsel filed post-hearing briefs.

In reviewing the Complainant's allegations, we recognize the nature of his remaining claim presents an allegation of disparate treatment based on sex discrimination. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a number of cases. 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 v. Green*, 411 U.S. 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 production 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 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).

Following its instruction on the effect of *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:

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."

The Complainant 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 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-designed burden allocation, the Complainant must first establish a *prima facie* case. Here, the proof pattern is adapted to fit the factual variance presented by the instant case. The *prima facie* showing should not be an onerous burden.

In the instant case, a *prima facie* case of sex discrimination can be established by showing that:

- 1) the Complainant is a member of a protected class;
- 2) the Complainant applied for an open position that he was qualified for;
- 3) the Complainant was rejected; and
- 4) the employer continued to seek applicants of equal qualifications.

In the case before the Commission, the Complainant has shown, obviously, that he is a member of a protected class, male. Secondly, the Complainant did apply for a position for which he was qualified (SF 10). The record reflects that the Complainant submitted his resume to the Respondent in September of 1988. Thirdly, the Complainant was rejected for employment with the Respondent. Lastly, the Respondent continued to seek other applicants of equal qualifications. The Complainant has established a *prima facie* case of sex discrimination.

As aforementioned, once the Complainant establishes its showing of a *prima facie* case, then the burden of production shifts to the Respondent to “simply. . . produce evidence of a legitimate, non-discriminatory reason. . . for [its action].” The Respondent at public hearing articulated that the reason for not hiring the Complainant was that the Respondent felt that Bonnie Carson, the individual hired, was more qualified than any of the applicants, including Complainant. Accordingly, the Respondent has met its burden of producing evidence of a legitimate, nondiscriminatory reason for its action in rejecting the Complainant.

Now that the Respondent has met its burden, in order to prevail the Complainant must demonstrate by a preponderance of evidence that the Complainant was a victim of intentional discrimination. The Complainant may succeed in this ultimate burden by showing that the proffered explanation of the Respondent is pretextual, or unworthy of credence. *Burdine, supra*. On the issue of credibility, the Commission has the authority to resolve those issues concerning credibility, conflicts in the evidence presented, and the weight to be accorded the evidence presented. *Pennsylvania State Police v. Com., Pennsylvania Human Relations Commission*, 116 Pa. Cmwlth. 89, 542 A.2d 595 (1988). The crux of the Complainant’s complaint of sex discrimination centers around a remark made by Respondent Owner James Scully at a 1989 fact-finding conference with the Philadelphia Regional Office. (This fact-finding conference was held pursuant to the Complainant’s initial claim of age discrimination. There was a subsequent amendment to include the allegation of sex discrimination. However, after investigation and the fact-finding conference, Commission made a finding of no probable cause as to the age discrimination allegation.) Specifically, the remark made by Respondent Owner was that he preferred a woman in the advertised position. This remark was communicated from Respondent Owner to the Complainant. The Respondent Owner James Scully does not deny making the remark, but rather characterized it as an “off-hand, conciliatory remark” made to the Complainant at the fact-finding conference. A review of the Complainant’s testimony indicates two points:

- 1) that, prior to filing his complaint, it never crossed the Complainant’s mind that he was a victim of discrimination because of gender (NT 115); and
- 2) Complainant’s acknowledgement that, other than this off-hand remark, the Complainant had “no reason to believe” he was a victim of sex discrimination (NT 137).

Upon review of this single statement of the Respondent Owner and the circumstances surrounding it, the foregoing remark does not, by itself, give rise to liability for sex discrimination.

The most significant parts of this case are the position itself, the qualifications of the Complainant, and the qualifications of the person selected. The record is clear that the Respondent placed an advertisement seeking applicants for a “Real Estate Manager” position. The specific position in question was that of regional property manager for a group of high-rise, 1000+unit buildings, includ-

ing Parktowne Place Apartments. From the record, it appears that most of the Complainant's experience is in handling multiple sites for buildings on a smaller scale.

The record reflects that the individual hired for the position had:

- 1) computer literacy for the software and hardware systems used in managing high-rise buildings;
- 2) significant experience in handling a 1000+-unit complex in New Jersey (NT 231);
- 3) received the designation of Certified Property Manager, which involved numerous courses, and is the highest designation given to a property manager by the National Association of Realtors. (NT 291.)

Also, the individual selected had additional experience in the following areas: performing market studies and analysis, preparing long-range management plans, preparing budget projections, handling commercial accounts, lease negotiations, experience with unions and union contracts, supervising contractors, and experience with sophisticated security systems and heating systems (CE 30).

On the other hand, the Complainant himself testified and his resume reflected that his experience was in on-site management of garden apartments and mid-rise buildings. The Complainant also testified to a number of shortcomings in his qualifications:

- 1) he had never been an on-site manager for a high-rise building (NT 65);
- 2) he had little or no experience in managing buildings with commercial space, and he had no experience in leasing commercial space (NT 66, 85-86);
- 3) he had never managed a single building containing over 200 units (NT 67);
- 4) his experience was primarily in garden-type apartments (three floors or less) (NT 68);
- 5) he had never supervised more than five employees (NT 69);
- 6) he had no experience dealing with sophisticated security systems or unions (NT 72-74);
- 7) he had no practical computer experience; and
- 8) he had never prepared comprehensive marketing plans, other than placing advertisements in the newspaper (NT 80).

Certainly the difference in qualifications is significant because of the management skills required in a high-rise versus mid-rise or garden-type building. The management skills needed for a high-rise include responsibility for housekeeping, staffing, renovations, mechanical systems, marketing, unions, and capital budgets.

In addition to the breakdown of the respective skills needed for the position, the Complainant at public hearing conceded that he lacked experience with the duties required of either a regional manager or a site manager (NT 65, 67-78). The Complainant reasoned that his lack of experience would be overcome by referring to the Respondent's "operational manual." However, the Respondent does not maintain an operations manual to solve problems and implement procedures.

At the public hearing, Respondent Owner James Scully credibly testified that the position in question was a regional manager position. There was some confusion in the record because the position of the person selected was changed to Site Manager at Parktowne Place when the existing site manager terminated his employment. The Complainant appeared to contend at public hearing

that he could have been hired as a site manager. However, the position of site manager was not open at the time of Complainant's application, and, secondly, the Complainant's resume indicated that he would not have the required experience to manage high-rise buildings.

A review of the entire record in this matter shows that the Respondent had a legitimate, non-discriminatory reason for not hiring the Complainant. The Complainant has not met his ultimate burden of establishment by a preponderance of evidence that he is a victim of intentional discrimination on the basis of sex.

An appropriate Order follows.

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SCULLY COMPANY, Respondent

DOCKET NO. E45897

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, it is the Recommendation of the Permanent Hearing Examiner that the Complainant has not proven 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.

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FINAL ORDER

AND NOW, this 19th day of September, 1995, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion in accordance with the Recommendation of the Permanent Hearing Examiner, and, pursuant to Section 9 of the Pennsylvania Human Relations Act, it is hereby

ORDERED

that the complaint docketed at E45897 be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION