COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EILEEN TIANO, Complainant
v.
CITY OF PHILADELPHIA, POLICE DEPARTMENT, Respondent

DOCKET NO. E46771

STIPULATIONS OF FACT

FINDINGS OF FACT

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FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, at the time of her disqualification by the Respondent, was employed by the Respondent as a civilian clerk for the Police Department. (NT 14.)

2. The Complainant worked as a clerk typist with Respondent Police Department until May 1990. (CE 1.)

3. Following her resignation in 1990, the Complainant worked for the School District of Philadelphia. (NT 15-16.)

4. The Complainant, in March 1991, was reinstated into her position with the Police Department and continued in the Respondent's employ until March 11, 1992, when she resigned. (CE 6.)

5. During this period of employment, the Complainant was on military leave of absence from October 14, 1991 through April 1, 1992. (CE 1.)

6. The Complainant resigned because she anticipated remaining on full-time military status, and she wanted to provide the Respondent with an opportunity to fill her position. (NT 43.)

7. Thereafter, funding for the military program was cut, and the Complainant was removed from full-time active duty. (NT 43.)

* The foregoing Stipulations of Fact are incorporated herein as if fully set forth. The following abbreviations will be utilized throughout for reference purposes:

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

8. The Complainant did not seek reinstatement with the Respondent. (NT 43.)

9. The Complainant earned $18,858 in 1989 while working for the Respondent. (CE 7.)

10. The Complainant earned $18,421 in 1990 while employed by the Respondent, and $5,267 while employed by the School District of Philadelphia. (CE 8, 9.)

11. In 1991, the Complainant earned $3,446 while employed by the School District; $8,959 while employed by the Respondent; and $6,007 in active duty wages while in the military. (CE 11-13.)

12. The Complainant earned approximately $6,007 in active duty wages for the time period January 1, 1992 through September 30, 1992. (NT 43.)

13. The Complainant also applied for employment as a police officer in 1989, 1992 and 1994. (NT 35-36.)

14. The Complainant, other than the applications mentioned above, has not applied for other full-time positions subsequent to her March 1992 resignation. (NT 35.)

15. As of the date of public hearing, the Complainant had served approximately twenty-two and one-half years in the military. (NT 34.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the complaint under the Pennsylvania Human Relations Act ("PHRA").

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this matter.

3. The Complainant is an individual within the meaning of the PHRA.

4. The Respondent is an employer within the meaning of the PHRA.

5. The complaint in the instant case satisfies the filing requirements found in the PHRA.

6. The PHRA prohibits employers from refusing to employ individuals because of their age unless age is a *bona fide* occupational qualification for the position in question.

7. The PHRA defines the term “age” to include any person forty years of age or older.

8. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against her because of her age when the Respondent disqualified the Complainant from consideration as a police officer solely because of age.

9. The Respondent has failed to establish that age is a *bona fide* occupational qualification for the job of police officer.

10. The provision of Age Discrimination in Employment Act (“ADEA”) relied upon by Respondent does not preempt the Commission from asserting jurisdiction in this matter.

11. The Respondent has failed to establish as a matter of law that its policy of automatic disqualification of individuals over age thirty-five from consideration was based on either an applicable state or local law in effect on March 3, 1983.

12. The Respondent, as a matter of law, is precluded from relying upon civil service regulations that purport to allow age-based restrictions to the extent that such restrictions are inconsistent with the provisions found in the PHRA.

OPINION

This matter arises out of a complaint filed by Eileen Tiano (hereinafter “Complainant”) against the City of Philadelphia Police Department (hereinafter “Respondent”), Docket No. E46771, with the Pennsylvania Human Relations Commission (hereinafter “the Commission”). On March 3, 1989, the Complainant filed her complaint with the Commission alleging that she was unlawfully discriminated against because of her age, forty-five, when she was disqualified from further consideration for a position as a police officer for the Respondent. 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”).

Commission staff conducted an investigation and found probable cause to credit the allegations of the complaint. Thereafter, Commission staff endeavored to conciliate this matter, and efforts were unsuccessful. Subsequently, a public hearing was approved in this matter.

The public hearing in this matter was convened on June 20, 1994. Alvin E. Echols Jr., Esquire, Commissioner and duly appointed chairperson of the hearing panel, presided at the public hearing. The other members of the panel are Aubra S. Gaston, Esquire, and Dr. Daniel D. Yun, Commissioners. Phillip A. Ayers, Esquire, served as panel advisor to the hearing panel. Michael Hardiman, Assistant Chief Counsel for the Commission, appeared on behalf of the complaint. John Straub, Esquire, Albert L. D’Attilio, Esquire, and E. Jane Hix, Esquire, appeared on behalf of the Respondent. Subsequent to the public hearing, both the Commission and the Respondent submitted post-hearing briefs. Commission Counsel also submitted a reply brief.

In the interest of clarity, it is necessary to discuss, albeit briefly, the factual scenario in the instant case. Most of the factual issues in this matter have been stipulated.

The Complainant, in August of 1987, applied for a police officer position with Respondent. The Complainant was forty-four years old at that time. In November of 1987, the Complainant successfully completed the written examination for the job. (SF 12.) The Complainant's test score was fairly high (93.84), and she was entitled to an additional ten points due to veteran's preference. (SF 25.) Consequently, the Complainant was placed on an eligibility list for continued processing for hire. (SF 25.) Subsequent to that action, the Complainant was notified that she was not eligible for further consideration because of her age. As a result of not being eligible for further consideration, the Complainant was not permitted to complete the three remaining processing steps. Those steps included: a medical examination, a psychiatric examination, and a background investigation. It has been stipulated that had the Complainant been found qualified on the last three remaining steps, her rank on the eligibility list would have been 228.5. (SF 28.) The Complainant, with her ranking on the list, would have been offered and would have accepted a position with the Respondent as a police officer. The Complainant, subsequent to the disqualification, did request an opportunity to complete the application process, and her request was denied by the Respondent.

The Respondent has stipulated that the decision regarding the Complainant because of her age was based on its policy of automatically disqualifying any applicant for a police officer position if they were more than thirty-five years old at the time of the written examination. (SF 15.) The Respondent further asserts that it was legally entitled to engage in this disparate treatment because of a provision found in the Age Discrimination in Employment Act, and because the ADEA preempted the PHRA with respect to age-based restrictions applicable to hiring police officers by the Respondent. (SF 16.) (It should be noted that, effective January 1, 1994, the Respondent discontinued its use of the maximum-hiring-age disqualification policy.)

The initial issue to be resolved in this matter is whether the Respondent's action, in refusing to consider the Complainant for employment because of age, violates the PHRA. It is unlawful under the PHRA for employers to refuse to employ individuals because of their age, unless age is determined to be a *bona fide* occupational qualification (hereinafter "BFOQ") for the position. Commission regulations provide that otherwise unlawful discrimination is valid as a BFOQ only when it is ". . . reasonably necessary to the essence of the normal operation of a particular business or enterprise."

In the instant case, the Respondent admits that the Complainant was rejected solely because of her age. Certainly, this is evidence of the Respondent's motivation and does establish a violation of the PHRA. Furthermore, the Respondent admits that, before rejecting the Complainant,

> 1) it did not have a factual basis sufficient to believe that its age-based disqualification policy was reasonably necessary to the essential operation of the police department;
>
> 2) it did not have any factual basis to believe that all individuals above age forty would be unable to perform the duties of the position safely and efficiently; and
>
> 3) it had not made an individualized assessment of the Complainant's ability to perform the job duties of a police officer, nor did the Respondent know whether the Complainant was not capable because of her age.

Stated succinctly, the Respondent did not attempt to show that age was a BFOQ and has stipulated that age clearly was not a BFOQ in this matter. Consequently, the Respondent has, as a matter of law, violated the PHRA.

The Respondent's defense is that it was permitted to engage in this disparate treatment under federal law, and the existence of that law preempted the PHRA. Our discussion now turns to those issues. The Respondent asserts the initial position that the ADEA permits it to engage in disparate hiring practices based on age in hiring police officers. The relevant section of the ADEA provides:

> "(j) It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State, or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—
>
> "(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> "(2) pursuant to a *bona fide* hiring or retirement plan that is not a subterfuge to evade the purposes of this Act."

Simply stated, the Respondent seeks to use this exemption provision to justify its policy. However, the Respondent must further show:

> 1) the refusal to hire based on age must be based on a state or local law that prohibited hiring above a certain age; and
>
> 2) the law upon which the refusal was based had to be in effect on March 3, 1983.

In the instant case, it should be noted that the Respondent's policy is not based on a state or local law, but rather a regulation adopted by the civil service commission. (SF 15.) Also, the Respondent did not show that the civil service regulation was in effect on March 3, 1983, which is a date specifically indicated in the ADEA. Therefore, the exemption provision does not apply in this case.

In the instant case, the Respondent's reliance on the civil service regulation is based on its Home Rule Charter. The Home Rule Charter allows for the adoption of civil service regulations. The relevant part of the Home Rule Charter reads as follows:

> "(g) The rejection of candidates or eligibles who fail to comply with reasonable requirements in regard to such factors as age, physical condition, training and experience, or who have attempted any deception or fraud in connection with an examination."

Firstly, the Respondent's reliance on this provision is in error, because the Charter only authorizes adopting reasonable requirements. The Respondent has stipulated that it had no factual basis to believe that the age-based cutoff policy was even necessary. The record does not reveal any evidence of reasonableness in the Respondent's reliance on this policy.

Secondly, the General Assembly did not give the Respondent authority to enact legislation. As Commission Counsel notes, the PHRA exists as an exercise of the police powers of the Commonwealth of Pennsylvania. Certainly any law inconsistent with the PHRA would not have any applicability.

Another issue in this case is whether the doctrine of federal preemption has any applicability. Generally, the concept of federal preemption operates to prevent the state from legislating where the federal government has elected to exclusively occupy the entire area. There are a number of cases dealing with federal preemption and its use. For example, *Carolina Freight Carriers v. Cmwlth., Human Relations Commission*, 99 Pa. Cmwlth. 428, 513 A.2d 579 (1986); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977); and *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982).

The ADEA explicitly provides state jurisdiction over age-based discrimination and requires the federal government to give deference to state agency proceedings. The relevant part of ADEA is as follows:

> "(a) Nothing in this Act shall affect the jurisdiction of any State performing like functions with regard to discriminatory employment practices on account of age except that upon commencement of action under this Act such action shall supersede any State action." 29 U.S.C. §633(a), (b). It is quite clear that the Respondent in this matter cannot show that the PHRA should be preempted by ADEA, because the ADEA itself does not present such a barrier.

Next the Respondent, in its brief, raises the issue of whether the Political Subdivision Tort Claims Act renders the City of Philadelphia immune from liability under the PHRA for discrimination claims. This argument is without merit. The PHRA is, in effect, an exercise of the police power of the Commonwealth of Pennsylvania for the protection of the public welfare of the people of Pennsylvania. 43 P.S. §952. Certainly the PHRA forbids employers from refusing to hire individuals because of their age. The term "employer" *expressly* includes the Commonwealth and political subdivisions when either is acting as an employer. Furthermore, the PHRA provides that the provisions of the Act ". . . should be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provisions hereof shall not apply." 43 P.S. §962(a).

The PHRA certainly indicates an intent to forbid both the Commonwealth and its political subdivisions from engaging in unlawful discrimination. Therefore, the PHRA does exist as an express exception to the governmental immunity found in the Political Subdivision Tort Claims Act, Act of October 5, 1980, P.L. 693, No. 142, 42 Pa. C.S. §§8541, *et seq.* ("PSTCA"). Conversely, the Respondent has offered no Pennsylvania judicial authority to support its position. The Respondent cites the case of *Adamietz v. Philadelphia*, Civil Action No. 93-0672 (E.D. Pa. June 23, 1994), but that case is not similar to the instant case. Also, in the case of *Mansfield State College v. Kovich*, 46 Pa. Cmwlth. 399, 407 A.2d 1387 (1979), the Commonwealth Court rejected the argument that sovereign immunity precluded a complainant from proceeding under the PHRA. Even though *Mansfield* involved sovereign as opposed to governmental immunity, the analysis has application in the instant case.

Also, finally, the PHRA provides that any laws inconsistent shall not apply, and the PSTCA does not have a parallel provision. Upon review of the record in this matter, the PSTCA has no applicability in matters of employment discrimination before the Pennsylvania Human Relations Commission.

Upon review of the record in this matter, the Complainant has shown that the Respondent unlawfully discriminated against her. We now move to the issue of appropriate remedy. Section 9 of the PHRA provides, in pertinent part:

> "If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practices as defined in this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to *cease* and *desist* from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay. . ." 43 P.S. §959(f).

This particular section of the PHRA has always been broadly interpreted. In *Murphy v. Cmwlth., Pa. Human Relations Commission*, 506 Pa. 549, 486 A.2d 388 (1985), the Pennsylvania Supreme Court said, "We have consistently held that the Commissioners, when fashioning an award, have broad discretion. . ."

The Commission, in awarding any remedy, has two purposes. The first purpose is to insure that the unlawful discriminatory practice is completely eradicated. The second purpose is to restore the injured party to her pre-injury status and make her whole. *Williamsburg Community School District v. Cmwlth, Human Relations Commission*, 99 Pa. Cmwlth. 206, 512 A.2d 1339 (1986). Certainly in the instant case, the cease and desist portion of Section 9 is somewhat relevant. The Respondent must be directed to cease and desist from automatically disqualifying applicants for employment as police officers because they are forty years of age or older. Also, the Respondent must be directed to cease and desist from utilizing and/or applying the existing civil service regulation that requires the automatic disqualification of applicants who are more than forty years of age. In the instant case, the Respondent, on January 1, 1994, ceased automatically disqualifying applicants for police officer positions because of their age. However, a cease and desist is warranted to prevent any reoccurrence of the Respondent's policy.

With regard to the relief that the Complainant is entitled to, the question remains as to specifically what the Complainant should receive. Firstly, the Complainant should immediately be allowed to complete the application process. Next, if the Complainant is determined to be qualified, she would be entitled to the next available position with all employment-related benefits. (These benefits have been stipulated to. SF 36.)

However, there is a remaining question of whether the Complainant should receive back pay at all, and if so, whether the award should be conditioned upon successful completion of the application process or awarded to the Complainant regardless of whether she completes the process. Certainly in cases involving discrimination, there is a presumption of entitlement to back pay. *Albermarle Paper Company v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed 2d 280 (1975). The burden is squarely on the employer to show that monetary relief is not warranted. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976).

In the instant case, there is some difficulty where the Respondent has unlawfully eliminated a Complainant from consideration before the entire application process is completed. An important case on this particular point is *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977); *cert. denied*, 436 U.S. 913 (1978). In *Rodriguez,* there was an age-based refusal, by virtue of an automatic disqualification, of all applicants. The plaintiff was not permitted to take a civil service examination. The court in *Rodriguez*, after finding that the Respondent had engaged in age discrimination, not only ordered the Respondent to offer the plaintiff an opportunity to take the examination, but also ordered a back pay award, irrespective of examination results. The Third Circuit upheld the unconditional back pay award. The appellate court in *Rodriguez* sets forth very clear rules that are directly applicable to retrospective relief:

> "The case at hand advances us beyond proven liability to the matter of evidentiary rules for the individualized relief phase of ADEA actions. Just as with the underlying liability determination, the twin objectives of monetary relief — deferring discrimination and making victims of discrimination whole — are furthered by judicial recognition of evidentiary presumptions and burdens of proof designed to resolve uncertainties in favor of the aggrieved employee or applicant. Thus, we hold, in view of this record which, *inter alia,* awards back pay only to an individual plaintiff, not to a class of numerous applicants, that an employee who has prevailed in proving that an employer committed a *per se* violation of the ADEA shoulders the initial burden of production to present a *prima facie* case of entitlement to damages. This burden is discharged upon a showing that at the time of the unlawful discrimination, (1) vacancies existed from which plaintiff was impermissibly excluded, and (2) that the plaintiff possessed physical and mental capabilities generally required of employees performing the type of work for which he applied. Upon such a showing, the burdens of production and persuasion shift to the employer to prove that the plaintiff would not have been hired even absent discriminatory age barriers. The defendant must, therefore, adduce evidence of either no job vacancies or plaintiff's lack of qualification for the particular job." 569 F.2d at 1239.

The instant case presents a number of similarities to *Rodriguez*. The Complainant was disqualified after she completed the written examination, but before the medical, psychiatric testing, and background investigation.

However, we must consider in our analysis the Pennsylvania Supreme Court decision in the case of *Pennsylvania State Police v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission* (Williams), 512 Pa. 534, 517 A.2d 1253 (1986). In that case, the Commission decision to award back pay was reversed by the Pennsylvania Supreme Court. The Court's rationale was that the plaintiff was not entitled to a back-pay award because he had not been denied a job position.

The *Williams* case can be distinguished from the instant case in several areas. First, the *Williams* case discusses the difficulty in anticipating whether the Complainant *would have* successfully completed the process. The Court reasoned that neither party should bear the burden for such foretelling of the future. "Suffice it to say that in this type of case it is improper to require any party to establish that the hiring would not have occurred absent the discrimination." *Williams*, *supra.* In the instant case, the Respondent was specifically requested by the Commission to resolve this issue

before the public hearing. Therefore, it is without question that this Respondent had the opportunity to permit the Complainant to complete the application process, and this particular question would have been resolved. Since Respondent chose to ignore resolution of this question, it should not benefit from its refusal to allow Complainant to complete the process.

Secondly, the Respondent's entire defense rested on a federal preemption argument which the defense reasonably knew would not be successful. The Commission, on February 28, 1990, issued an interlocutory order denying Respondent's motion based on the preemption argument. The incurable defects and flaws of the preemption argument were clearly articulated in the interlocutory order. At that point, the Respondent *still* chose not to permit the Complainant to complete the process. There is no question but that this candidate would in all likelihood have been successful, given her then-present employment within the department and her military occupation/status.

Finally, on the issue of back pay, the purpose is to eradicate the unlawful discriminatory practice and to make the Complainant whole. In the instant case, an award of back pay is necessary to deter future discrimination. Simply to order the Respondent to restore the Complainant is insufficient for this Complainant and would not deter future discrimination. There must be an economic consequence for this Respondent who permitted Complainant to embark upon an employment journey and then threw her overboard in midstream, arbitrarily excluding her from the job. The appropriate date of commencement should be the date of the interlocutory order served on the Respondent. That date is February 28, 1990. The record contains the stipulation of the parties as to wage rates. (SF 33-35.) Also, the Complainant has presented evidence of interim earnings as to non-military employment. Certainly, in a case of this nature, the calculation need not be exact but, rather, reasonable. *Williamsburg Community School District*, *supra*.

The most reasonable method of calculation would appear to be the average salary of the individuals ranked before and after the Complainant, with the appropriate deduction of interim earnings for a yearly amount.

The final issue in this matter would be the issue of mitigation of damages. This question is within the discretion of the Commission, and it is the Respondent's burden to establish that the Complainant failed to mitigate damages. *Cardin v. Westinghouse Electric Corp.,* 850 F.2d 996, 1005 (3rd Cir. 1988). The Respondent must show that the Complainant did not exercise reasonable diligence in seeking other employment. In the instant case, the Complainant presented substantial evidence as to her work record and applications for employment. The Respondent did not present any evidence to contradict the position that the Complainant made reasonable efforts to mitigate damages.

Certainly, the record before the Commission justifies both injunctive and monetary relief. Therefore, having found that the Complainant is a victim of unlawful discrimination, an appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

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DOCKET NO. E46771

RECOMMENDATION OF THE HEARING PANEL

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

COMMONWEALTH OF PENNSYLVANIA

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FINAL ORDER

AND NOW, this 24th day of July, 1995, following review of the entire record in this case, including the transcript of testimony, exhibits, and post-hearing briefs and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, and in accordance with the Recommendation of the Hearing Panel, pursuant to Section 9 of the Pennsylvania Human Relations Act, therefore

O R D E R S

1. The Respondent shall cease and desist from discriminating against the Complainant and others because of their age with respect to employment as police officers.

2. The Respondent shall cease and desist from using any pre-employment selection criteria that mandates automatic rejection of applicants for the position of police officer because of the applicant's age, or which otherwise imposes differing qualification criteria based upon age.

3. The Respondent shall cease and desist from using the current civil service regulation relating to the automatic disqualification because of age of applicants for positions of police officer to the extent that such civil service regulation automatically disqualifies individuals who are forty years of age or older.

4. The Respondent shall restore the Complainant into the same position in the application process as she was at the time of her unlawful disqualification.

5. The Respondent, irrespective of whether Complainant is successful in completing the process, shall pay the Complainant an amount equal to the sum she would have earned had she been hired on February 28, 1990, through the date of her instatement, or the date of her refusal of an offer of instatement, or up through the date of her rejection on non-discriminatory grounds.

6. This amount shall be reduced by the interim earnings that could not have been earned if the Complainant had been working as a police officer as of February 28, 1990.

7. The Respondent shall also pay interest of six percent per annum from February 28, 1990, to the date that the payment is made.

8. The Respondent, upon instatement, shall restore or otherwise provide Complainant with all benefits otherwise available to a person who has functioned as a police officer from February 28, 1990 through the present, including but not limited to any necessary pension payments required to be made for that timeframe.

9. Within thirty days of the date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to Assistant Chief Counsel, at the Commission's Philadelphia Regional Office, located at 711 State Office Building, 1400 Spring Garden Street, Philadelphia, Pennsylvania 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION