

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

CAROL WAYCHOFF, Complainant

v.

JESSOP STEEL COMPANY, Respondent

DOCKET NO. E-46394

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

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PENNSYLVANIA HUMAN RELATIONS COMMISSION

CAROL WAYCHOFF, Complainant

v.

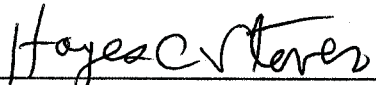
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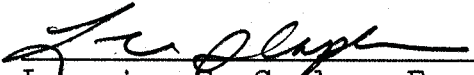
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STIPULATIONS OF FACT

The undersigned stipulate that the following are true and correct:

1. Complainant, Carol Wychoff, is of female gender.
2. A finding of probable cause to credit the allegations of the above-captioned complaint was made by the Commission.
3. Conciliation efforts were unsuccessful.
4. The Commission approved public hearing of the above-captioned complaint.


Hayes C. Stover, Esquire
Counsel for Respondent


Lorraine S. Caplan, Esquire
Assistant Chief Counsel
PA Human Relations Commission

FINDINGS OF FACT

1. The Complainant, Carol Waychoff, is an adult female individual residing at R. D. 5, Box 248, Washington, Pennsylvania 15301. (N.T. 8)
2. The Respondent, Jessop Steel Company, is an employer within the Commonwealth of Pennsylvania employing 4 or more individuals.
3. At all times relevant to this complaint, the Complainant was not employed. (N.T. 9)
4. The Complainant's husband, Ralph Lawrence Waychoff, has been an employee of the Respondent for approximately twenty-five years. (N.T. 14)
5. The Complainant's father-in-law is also a Jessop Steel Company employee. (N.T. 11)
6. The Respondent had a summer employment policy whereby applications were available to any employee who might seek one for a relative. (N.T. 39)
7. Neither the Complainant's husband nor her father-in-law ever procured a summer application for employment for the Complainant. (N.T. 26)

8. The notice of the summer application policy was posted in the Respondent's plant. (N.T.39)

*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:

N.T. Notes of Testimony
S.F. Stipulations of Fact

9. The Complainant's father-in-law and husband had numerous opportunities to get the Complainant a summer application. but failed to do so. (N.T. 27)
10. There is no indication that the Complainant ever submitted an application for summer employment with the Respondent. (N.T. 25-27)
11. The Complainant would have been eligible for the summer program. (N.T. 98)
12. Any individuals interested in permanent employment with the Respondent were referred to the Bureau of Employment Security ("BES") to fill out an application. (N.T. 105)
13. There was no record of the Complainant having filed an application with BES. (N.T. 80)
14. Between the time period (1988) of when the Complainant alleged she signed up with BES and the date of the Public Hearing, the Complainant was never referred to any job by BES. (N.T. 29)
15. The Complainant, between 1988 and the date of the Public Hearing, did not seek any other employment other than newspaper ads. (N.T. 29-30)
16. The Complainant at the Public Hearing was not able to produce any tangible evidence that she applied for a position with the Respondent, Jessop Steel Company. (N.T. 80)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and 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. Carol Waychoff (hereinafter "Complainant") is an individual within the meaning of the Pennsylvania Human Relations Act (" PHRA") .
4. Jessop Steel Company (hereinafter "Respondent") is an employer within the meaning of the PHRA.
5. The Complainant has the burden of establishing a prima facie case for the allegation of sex based discrimination raised in her complaint.
6. 6. The Complainant in order to establish a prima facie case of failure to hire must show:
 - a. she is a member of a protected class;
 - b. she applied for and was qualified for a position for which the Respondent was seeking applicants;
 - c. she was rejected; and
 - d. the Respondent continued to seek applications from others of equal qualifications.
7. The Complainant failed to show that she had applied for a position with the Respondent.

OPINION

This case arises from a complaint filed by Carol Waychoff ("Complainant") against Jessop Steel Company ("Respondent"), Docket No. E-46394, with the Pennsylvania Human Relations Commission ("PHRC"). On January 17, 1989, the Complainant filed her complaint with the PHRC alleging that the Respondent discriminated against the Complainant by failing to hire her as a laborer, because of her sex, female. 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 conducted an investigation and found probable cause to credit the allegation of discrimination. Thereafter, the Commission endeavored to conciliate this matter, and efforts were unsuccessful. Therefore, a Public Hearing in this matter was approved.

The Public Hearing was held on April 13, 1993, before Permanent Hearing Examiner Phillip A. Ayers. Hayes C. Stover, Esquire, appeared on behalf of the Respondent and Lorraine S. Caplan, Assistant Chief Counsel, appeared on behalf of the complaint. Both parties submitted post-hearing briefs. Commission counsel submitted her brief on June 15, 1993, and Respondent counsel submitted his brief on June 14, 1993.

At the Public Hearing, the focus was appropriately 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 PA Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 PA 124, A.2d 315 (1987) No. 32 W.D. Appeal Docket 1986. 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]." Id at 320. If the Respondent meets this production burden, in order to prevail, a Complainant 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.

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). In order to do so, the Complainant need not necessarily offer evidence beyond that offered to establish a prima facie case. Id. at 255 n.10. The trier of fact may consider the same evidence that a Complainant has introduced to establish a prima facie case in determining whether a Respondent's explanation for the employment decision is pretextual. Dial v. American Telephone & Telegraph, 752 F.2d 1356, 1358-59 (9th Cir. 1985).

In McDonnell Douglas the Court noted that a Complainant in a race-based refusal to hire case could establish a prima facie case by showing:

- (1) That the Complainant belongs to a racial minority;

- (2) That the Complainant applied for a job for which the Respondent was seeking applicants;
- (3) That, despite the Complainant's qualifications, he was rejected; and
- (4) That, after the rejection, the position remained open and the Respondent continued to seek applicants from persons of Complainant's qualifications.

This general four-step process was later adopted for use by Pennsylvania Courts in General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976).

The present matter differs from the refusal to hire circumstances in McDonnell Douglas. In McDonnell Douglas, the allegation was race-based, the Complainant's application was rejected and the Respondent continued to seek applicants of equal qualifications.

The McDonnell Douglas Court wisely anticipated that the facts of different cases will necessarily vary and that the four prong prima facie requirement articulated will not be applicable to differing factual situations. McDonnell Douglas at 802 n. 13. The Court made it clear that the general process it was creating would appropriately need adaptations to adjust the process to the facts presented. Accordingly, some adaptation of the required prima facie showing must be done in this instance.

At the outset, several things should be noted. First, in Burdine at 250, the U.S. Supreme Court declared, "The burden of establishing a prima facie case of disparate treatment is not onerous." The PA Supreme Court has adopted this standard in Allegheny Housing Rehab. Corp., Slip at 8. Second, it is apparent that the U.S. Supreme Court intended that the four parts of the prima facie showing are non-subjective and susceptible to objective proof. In other words, the elements set forth in McDonnell Douglas are intended to be flexible, and formulated with the particular facts of the matter.

With this in mind, in the instant case the Complainant must meet her burden of a prima facie case. In order to make a prima facie showing, the Complainant must show:

- 1) she is a member of a protected class;
- 2) she applied for and was qualified for a position for which the Respondent was seeking applicants;
- 3) she was not chosen for the position, and
- 4) the Respondent continued to seek other applicants who were of equal qualification.

Firstly, it is clear that the Complainant is a member of a protected class in that she is a female and, therefore, under the protection of the PHRA.

Secondly, the resolution of this case revolves around the second element of the prima facie showing. The initial issue is whether the Complainant can show she ever applied for a position with the Respondent. The Complainant submitted at Public Hearing that when she called the Respondent's place of business, she was referred to the Bureau of Employment Security (hereinafter "BES"). She also admitted that she knew that all permanent applicants were referred to BES. Also, Respondent's Director of Industrial Relations, Marshall L. Kinney, testified that all applications for permanent employment were referred to BES. It is, therefore, necessary that the

Complainant show that she did file an application with BES. The Complainant alleges that she filed an application for factory work with BES and she updated her application. However, the Complainant did not provide any support for this self-serving assertion. Firstly, the Complainant did not produce any witness who testified as to the filing of the application with BES. Secondly, the Complainant never presented any tangible evidence of any application with BES. Thirdly, the Complainant, even though she allegedly filled out an application, never was referred to any position by BES. Finally, Commission staff concluded that there was no evidence that the Complainant filed with the BES. The only response the Complainant had to the lack of tangible evidence was that BES was lying. Upon review of the above information, it is clear that the Complainant cannot show she applied for a position with the Respondent.

The record also indicates that the Respondent would post applications for summer employment. The Respondent's Director of Industrial Relations testified that applications for summer employment were available to any employee who might seek one for a relative, whether said relative was a son or a daughter. This point is important because the Complainant's husband and father-in-law both worked for the Respondent. Neither her husband nor the father-in-law ever picked up an application for the Complainant. The Respondent presented testimony, through its Director of Industrial Relations, that the Respondent's employment office was open from 7:00 a.m. to 5:00 p.m. each day. Complainant's husband had numerous opportunities to pick up an application for summer employment. Clearly, since the Complainant was not part of the summer applicant pool, she could not be chosen for summer employment.

Commission counsel presented a great deal of statistical evidence indicating the small number of female employees and an alleged preference in hiring sons instead of daughters for summer employment, but the Complainant has not overcome the threshold issue. The Complainant has not shown by a preponderance of the evidence that she ever applied for a position with the Respondent.

Having found that the Complainant has not shown that she applied for a position with the Respondent, and therefore cannot establish a prima facie showing, an appropriate Order follows:

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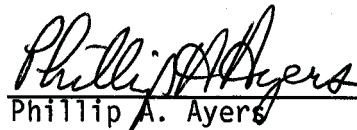
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JESSOP STEEL COMPANY, Respondent

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

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



Phillip A. Ayers
Permanent Hearing Examiner

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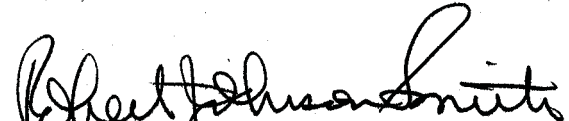
AND NOW, this 29th day of September, 1993, after a review of the entire record in this case, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion and Final Order recommended by the Permanent Hearing Examiner and hereby

ORDERS


that the instant complaint be dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:


Robert Johnson Smith, Chairperson

ATTEST:


Gregory J. Zelia, Jr., Secretary