

FINDINGS OF FACT *

1. The Complainant in this case is Helena Batz (hereinafter "Batz"), an adult female who resides at 667 Greble Road, Lebanon, Pennsylvania. (N. T. 37).
2. The Respondent is Lebanon Seaboard Corporation (hereinafter "Lebanon Seaboard"), a fertilizer manufacturer with a plant located in North Cornwall Township, South Lebanon, Pennsylvania. (N. T. 19, 20, 86).
3. Lebanon Seaboard's operation includes two fertilizer production lines where straight fertilizer is manufactured on one line and fertilizer with pesticides, herbicides, and fungicides added on the other line. (N. T. 87).
4. Lebanon Seaboard's main operation is seasonal, with the most productive months being January, February, March and April. (N. T. 50, 83, 121).
5. Most of Lebanon Seaboard's production line employees are members of the U.S. Steelworker's. (N. T. 20, 84, 91; R.E. 1).
6. Before an employee is able to join the union, they first must have worked 90 days. (N. T. 84).
7. Because Lebanon Seaboard's operation is seasonal, it often uses landscapers and construction workers who have less opportunity to work in the winter. (N. T. 111).

* 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 Facts. The following abbreviations will be utilized throughout these findings of Fact for reference purposes:

N. T. Notes of Testimony
C. E. Complainant's Exhibit
R. E. Respondent's Exhibit

8. Lebanon Seaboard receives employment applications all year, however in the fall of each year. Lebanon Seaboard begins in earnest to review applications and interview perspective applicants that they will hire to supplement their permanent work force during the highest production months of January through April. (N. T. 88, 90, 121).
9. Many of those who apply for seasonal work with Lebanon Seaboard are referred either by Lebanon Seaboard employees, or by Lebanon Seaboard's owner's husband, Bruce Kreider. (N. T. 67, 68, 72, 92, 113, 114, 124, 125; R. E. 13).
10. As part of the union contract, once all union employees are returned from lay off, Lebanon Seaboard was permitted to use temporary employees. (N. T. 104).
11. Hiring decisions for each year's busy season were typically made in the Fall. (N. T. 90).
12. Lebanon Seaboard's Process Manager, David Wright (hereinafter "Wright"), and Production Supervisor, Michael Koch (Hereinafter "Koch"), reviewed employment applications and selected who to interview for the entry level position of Triple Operator. (N. T. 128; C. E. 3).
13. Not everyone who applied was interviewed. (N. T. 128).
14. Some of those interviewed in the Fall of 2001 were told that they would be called in January and if they passed a physical, a drug screening and a pulmonary function test, they would be hired. (N. T. 90, 91, 132).
15. Triple Operators are used to generally support Lebanon Seaboard's fertilizer manufacturing bagging line operations. (C. E. 3).
16. A Triple Operator's duties include:

- a. Assist with bagging operation of material into packaging, including adjusting spout and vacuum bar, setting up boards, setup conveyors, empty hoppers, clean screen etc.
- b. Prepare and adjust bags to enter into closing equipment, such as sewing machine, plastic sealer, paper sealer, or other devices as needed.
- c. Palletize the product
- d. Stack bags
- e. Wrap pallets
- f. Operate forklift
- g. Check for weights
- h. Change tape and thread spools
- i. Set bag weights and scales
- j. Replenish supplies and remove scrap and debris
- k. Operate forklift truck to transport skids, materials, and supplies to and from lines
- l. Assist with materials movement with other forklift drivers
- m. Place cardboard and wraps on skids on line
- n. Operate other packaging equipment as needed
- o. Observe all company safety rules and regulations including clean work areas, use of protective equipment, safety and quality of work.

- 17. In the Fall of 2001, Batz's sister, Lisa Cramer (hereinafter "Cramer"), held a Quality Control position with Lebanon Seaboard. (N. T. 33).
- 18. In the Fall of 2001, Batz was a Press Operator for San Giorgio. (N. T. 38).
- 19. Cramer was aware that the San Giorgio plant was closing and that Batz was losing her job. (N. T. 21, 38).
- 20. Knowing that Lebanon Seaboard was hiring for the position of Triple Operator, Cramer asked Batz if she wanted an application. (N. T. 21).
- 21. Batz indicated that she was interested, so Cramer obtained an application form for Batz. (N. T. 21).
- 22. Batz testified that by December 2001, she was working part-time and receiving unemployment benefits. (N. T. 44).
- 23. On Wednesday January 2, 2002, Cramer turned in Batz's application to Wright, who later forwarded it to Koch. (N., T. 22, 55, 109-110).

24. Besides Batz, no other woman had applied for the position of Triple Operator. (N. T. 127).
25. Five days after turning in Batz's application, Cramer e-mailed Wright, asking if Lebanon Seaboard was still hiring and accusing Wright of not returning a phone call that Batz had purportedly placed on Friday, January 4, 2002. (N. T. 23; C. E. 1).
26. Wright promptly responded to Cramer's e-mail, telling her that Lebanon Seaboard had received many applications since November, and that potential candidates were being reviewed since December 2001, (C. E. 1).
27. Wright also told Cramer that Batz's application had been forwarded to Koch and that he did not have time to return the calls of everyone who called him with employment inquiries. (N. T. 23; C. E. 1).
28. Cramer was told that Batz's application would receive the same courtesy and attention as other applicants. (C. E. 1).
29. Next, on January 7, 2002, Cramer e-mailed Koch asking if he received Batz's application. (C. E. 1).
30. Koch confirmed his receipt of Batz's application. (C. E. 1).
31. Subsequently on January 8, 17, 31, and February 5, Cramer e-mailed Koch, asking "What about my sister's application?"
32. By February 7, 2002, Cramer's tone had changed to frustration, telling Koch, "The question is not that difficult to answer." (C. E. 1).
33. Koch responded, telling Cramer that Batz's application had been reviewed, but that there had been many applications ahead of hers. (C. E. 1).

34. Batz testified that she made one telephone call to Koch, but her call had not been returned. (N. T. 43, 51).

35. The following males began working at Lebanon Seaboard as Triple Operators in 2002:

- a. Daryl Goss – 01/02/2002
- b. Jason M. Heisey – 01/02/2002
- c. Michael P. Shutter - 01/02/2002
- d. Mark W. Taylor - 01/07/2002
- e. Jesse N. Heisey - 01/08/2002
- f. Douglas R. Wagner - 01/10/2002
- g. Michael L. Waltman - 01/16/2002
- h. Wade Hetrick - 02/16/2002
- i. Earl M. Doutrich 03/04/2002

(C. E. 11).

36. Daryl Goss's application is dated December 19, 2001, and Koch testified that he interviewed Goss in the Fall of 2001. (N. T. 118; R. E).

37. Goss had worked for Lebanon Seaboard before and, when interviewed, was told if he passed the three required tests he would be hired. (N. T. 118).

38. Jason Heisey's application is dated December 18, 2001. (N. T. 68-69; C. E.).

39. Jason Heisey's father worked for Lebanon Seaboard and referred him for a job. (N. T. 113).

40. Koch testified that Jason Heisey was interviewed in the Fall of 2001, at which time he was told that he would be hired if he passed the tests. (N. T. 113).

41. Michael Shutter's application is dated December 27, 2001, and he was referred by his Grandfather, an employee of Lebanon Seaboard. (N. T. 116; R. E. 13).

42. Mark Taylor's application is dated December 2, 2001 and he too was referred by an employee of Lebanon Seaboard. (N. T. 115; C. E. 11).

43. Jesse Heisey's application is dated January 1, 2002, and he was referred by the owner of Lebanon Seaboard's husband, Bruce Kreider. (N. T. 67, 68; C. E. 7).

44. Douglas Wagner's application is dated January 4, 2002, and he too was referred by Kreider. (N. T. 71, 92, 114; C. E. 11; R. E. 5).
45. Koch testified that Wagner had submitted an earlier application but that it had been misplaced, that he was interviewed in the Fall of 2001 and that the decision to hire him was also made in the Fall, contingent on Wagner passing the tests. (N. T. 92, 93).
46. Koch testified that 4 or 5 applications that were received in the Fall of 2001 were misplaced. (N. T. 92, 98).
47. Michael Waltman's application is dated January 2, 2002, but Koch says he too had been interviewed in the Fall and told if he passed the tests, he would be hired in January. (N. T. 58, 97; C. E. 5).
48. Earl Doutrich's application is dated September 28, 2001. (N. T. 65; C. E. 6).
49. Wade Hetrick began on January 29, 2002, on assignment as a temporary employee from the temporary employment agency, Temp Force. (N. T. 76; R. E. 18).
50. Lebanon Seaboard utilized two temporary employees in 2002 to supplement its work force. (N. T. 104).
51. On February 8, 2002, Hetrick applied to work for Lebanon Seaboard instead of continuing as a Temp Force employee. (N. T. 105; R. E. 7).
52. The job of Triple Operator normally requires 6 to 8 weeks of training. (N. T. 84).
53. Lebanon Seaboard hired Hetrick because he had proven himself fully capable of doing the job, and he would require minimal additional training. (N. T. 105).
54. Batz was neither interviewed nor hired. (N. T. 109-110).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Batz is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. Lebanon Seaboard is an employer within the meaning of the PHRA.
5. Batz has the initial burden of establishing a *prima facie* case of failure to hire by proving that:
 - a. she is a member of a protected class;
 - b. she applied for an open position for which she was qualified.
 - c. She was not hired; and
 - d. That Lebanon Seaboard continued to seek applicants of equal qualifications.
6. Batz established that, after she applied, Lebanon Seaboard hired one individual with equal or less qualifications.
7. Lebanon Seaboard articulated legitimate non-discriminatory reasons for not hiring Batz.
8. Batz has not proven that Lebanon Seaboard's reasons are pretextual.

OPINION

This case arises on a complaint filed by Helena Batz (hereinafter "Batz") against Lebanon Seaboard Corporation (hereinafter "Lebanon Seaboard"), which alleged a sex based discriminatory refusal to hire Batz for the production laborer position of Triple Operator. Batz alleged that the refusal to hire her violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1995, PL 744, as amended, 43 PS §§951, *et seq.* (hereinafter "PHRA").

PHRC staff initially conducted an investigation and found probable cause to credit Batz's allegation. Subsequently the PHRC and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. These efforts were unsuccessful and Batz's allegation was approved for a public hearing.

The public hearing was held on February 28, 2008, in Lebanon, Pennsylvania, before Phillip A. Ayers, Permanent Hearing Examiner. The post-hearing briefs of the parties were received in late May 2008.

Turning to the general issues arising from the substance of Batz's, sex-based allegation, we initially note that the ultimate question for resolution here is whether Lebanon Seaboard's rejection of Batz violated the PHRA. Section 5(a) of the PHRA states in pertinent part:

It shall be an unlawful discriminatory practice...
[f]or any employer because of the... sex... of
any individual... to refuse to hire or employ...
such individual... or to otherwise discriminate
against such individual... with respect to...
hire... if the individual... is the best able and
most competent to perform the services required.

Batz's sex-based claim alleges that Lebanon Seaboard treated her less favorably than others because of her sex. To prevail, Batz is required to prove that Lebanon Seaboard had a discriminatory intent or motive in failing to hire her. Allegheny Housing Rehabilitation Corp. v. PHRC., 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination". Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Batz must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, supra; McDonnell Douglas Corp. v. Green., 411 U.S. 792, 802 (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. *Id.* At 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id.* It raises an inference of discrimination "only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors". Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

In McDonnell Douglas, the U.S. Supreme Court held that a plaintiff may prove a *prima facie* case of race-based discrimination in a failure-to-hire case by demonstrating:

- (1) that he belongs to a racial minority;
- (a) that he applied and was qualified for a job for which the employer was seeking applicants;
- (b) that, despite his qualifications, he was rejected; and
- (c) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas At 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n.13. They simply represent a “sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination”. Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEP Cases 1018 (6th Cir. 1987).

Here, we must slightly adapt the McDonnell Douglas test because this case involves an alleged sex-based refusal to hire. To establish a *prima facie* case of a sex-based refusal to hire, Batz must show:

1. that she is a member of a protected class;
2. that she applied for and was qualified for a position for which Lebanon Seaboard was seeking applicants;
3. that, despite her qualifications, Batz was denied the position and
4. that after Batz applied, Lebanon Seaboard continued to seek applicants of equal qualifications.

PHRC v. Johnstown Redevelopment Authority., 527 Pa. 71, 588 A.2d 497 (1991).

If Batz establishes a *prima facie* case, the burden of production shifts to Lebanon Seaboard to “articulate some legitimate, nondiscriminatory reason” for its actions. McDonnell Douglas, 411 U.S. at 802. Lebanon Seaboard must rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be “clear and reasonably specific”, *Id.* At 255, and “legally sufficient to justify a judgment” for Lebanon Seaboard. *Id.* At 255. However, Lebanon Seaboard does not have the burden of “proving the absence of discriminatory motive”. Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP Cases 520 (1982).

If Lebanon Seaboard carries this burden of production, Batz must then satisfy a burden of persuasion and show that the legitimate reasons offered by Lebanon Seaboard

were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden now merges with the ultimate burden of persuading us that she has been the victim of international discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that Lebanon Seaboard intentionally discriminated against Batz remains at all times with Batz. *Id* at 253.

At the outset of our analysis, several fundamental observations can be made. First, there was a dramatic paucity of evidence advanced on several critical issues present in this case. Second, there are two distinct hiring points to consider: (a) eight applicants who were hired for production jobs after having been interviewed in the Fall of 2001; and (b) Wade Hetrick's hire from his status as an individual temporarily assigned to Lebanon Seaboard by his employer, Temp Force. Third, no meaningful attempt has been made to show that Lebanon Seaboard's recruitment efforts and techniques amount to disparate impact. Instead, the arguments put forth focus solely on alleged disparate treatment. Finally, many aspects of this case rely heavily on which party bears what evidentiary burden. On this point, fundamentally, Batz bears the initial proof burden with respect to establishing a *prima facie* case and ultimately, she bears the burden to prove she was not hired because she is a female. Lebanon Seaboard's burden in this case is merely one of production not proof and arises only if Batz can establish a *prima facie* case.

With these observations in mind, we turn to the question of whether Batz can establish a *prima facie* case by a preponderance of evidence. In this regard, there is no dispute that Batz makes the required showing with respect to the first and third elements of the requisite *prima facie* case. Clearly, Batz, as a female, is a member of a protected class. Furthermore, Batz was neither interviewed nor offered a position with Lebanon Seaboard.

The post-hearing briefs of the parties suggest that the second element of a *prima facie* case requires Batz to simply show that she was qualified for the position of Triple Operator. In reality, there are two components found in the second required element of a *prima facie*, showing in a failure to hire case. Not only must there be a showing of being qualified, but there must also be a showing that at the time of Batz's application, Lebanon Seaboard was seeking applications. International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 358 (1977); See also, Daves v. Payless Cashways, 27 FEP Cases 706 (5th Cir. 1981); Chavez v. Temple School District, 16 FEP Cases 674 (9th Cir. 1977); Wade v. Virginia Stage Lines, 39 FEP Cases 1784 (W.D. Va. 1986); and Piascik v. Cleveland Museum of Art, 14 FEP Cases 33, (N.D. Ohio 1976).

Under the circumstances of this case, Lebanon Seaboard ultimately hired nine Triple Operators. Unrebutted evidence reveals that of these nine hires, eight were interviewed in the Fall of 2001, as Lebanon Seaboard prepared for the upcoming busy production season that would begin in January. Lebanon Seaboard's Production Supervisor, Michael Koch (hereinafter "Koch"), credibly testified that applications are received all year and that in the Fall, he and Process Manager David Wright (hereinafter "Wright"), gave consideration to and prioritized available applications and then interviewed those whose applications they liked. (N. T. 88, 90, 125). Those interviewees who they felt showed promise would then be told that as long as they passed several tests, they would be called to begin work in January. (N. T. 93, 97, 113, 114, 115, 118).

In other words, by the time Batz's application was submitted on January 2, 2002, eight of the nine openings for Triple Operator positions for the busy season had, in effect, already been filled. The post-hearing brief on behalf of the state's interest in the case

submits that Lebanon Seaboard did not prove that there were interviews in the Fall of 2001.

On this point, it is not Lebanon Seaboard's burden to prove interviews occurred in the Fall and that those interviewed were in effect told that if they passed three required tests, they would begin work in January. If Batz intended to suggest this did not occur, the burden of proof is on her to present evidence that interviews and selections did not occur in the Fall of 2001.

Indeed, as noted earlier, there is a paucity of evidence regarding exactly when interviews did occur, the nature and extent of interviews conducted, how many applications had been reviewed, when they were received, and exactly when each individual hired first submitted their application. Clearly, eight potential witnesses were available to provide testimony regarding when their interviews occurred and what was their expectation regarding coming to work. Since not one of those hired was called as a witness, an adverse inference can be drawn that their testimony would have supported Koch's version of when interviews occurred and when tentative selections were made and communicated to interviewers.

Under the circumstances present here, Batz only proved by a preponderance that one opening was be filled after her application. Interestingly, after seeing job opportunities posted at Lebanon Seaboard, Batz's sister informed Batz of the pending openings in the Fall of 2001, but Batz's application was not submitted until January 2, 2002.

Considering the evidence as a whole, it appears that Batz was informed of openings before December 2001, yet she did not complete her application until after eight individuals had already been interviewed and tentatively selected. Batz's sister, Lisa Cramer (hereinafter "Cramer") testified that she was aware that Batz was losing her job due to a

plant closing, that she knew Lebanon Seaboard was hiring, and that she asked Batz if she wanted an application. (N. T. 21) Batz testified that by December 2001 she was collecting unemployment and only working part-time. (N. T. 44) Apparently, before December 2001, Batz had already lost her job and had already been told by Cramer of the openings with Lebanon Seaboard.

There is nothing in the record to suggest that if Batz's application had been filed earlier, she would not have received the same consideration as the eight applicants who were interviewed and selected in the Fall of 2001. Here, the evidence reveals that Batz may well have failed to timely take advantage of an opportunity. The PHRA is designed to ensure equal opportunity, not to provide a job for all applicants.

Although it was not until January 2002, that Lebanon Seaboard began to call the eight applicants it had previously selected in the Fall of 2001, we find that eight positions had already been filled by the time Batz's application was submitted. Accordingly, Batz cannot rely on any of the eight previously selected positions in support of her effort to establish that there was an opening at the time of her application.

Only Wade Hetrick applied, was interviewed and hired as a Triple Operator after January 2, 2002. Indeed, Hetrick's application was dated February 8, 2002, over a month after Batz's application. (N. T. 105; R.E. 7) Only with respect to Hetrick is Batz able to successfully establish the second element of the requisite *prima facie* showing.

Similar to Batz's problems with the second element, the fourth requisite element of the *prima facie* case poses equally difficult problems for Batz. To successfully establish this element, Batz has to prove that after she applied, Lebanon Seaboard continued to seek applicants of equal qualifications.

The record contains only two applications that are dated after January 2, 2002. Douglas Wagner - January 4, 2002, and Wade Hetrick – February 8, 2002. Once again, with respect to Wagner, un rebutted testimony reveals that Wagner had previously submitted an application but that his earlier application and those of four or five others had been misplaced. Accordingly, the only application received later than Batz's application was that of Hetrick.

In a February 8, 2002 e-mail from Cramer to Koch, Cramer vaguely references "Todd" as someone purportedly called on February 4, 2002 to come in on February 5th to fill out an application. Clearly, no person named Todd was hired by Lebanon Seaboard in 2002. (C. E.11). Further, the record reflects that there were two temporary employees from Temp Force. One was Hetrick and the name of the other person was not offered into evidence. If there was a "Todd" it is entirely possible he was the second temporary employee.

Once again, insufficient evidence was offered regarding the use of "Todd" as evidence of Lebanon Seaboard continuing to seek applicants after Batz's application was received. Again, the only application sought after Batz's application was the application filed on February 8, 2002 by Hetrick. Under the circumstances, by the slightest of margins, Batz established a *prima facie* case. Accordingly, we turn to the question of whether Lebanon Seaboard met its burden of production by offering a legitimate non-discriminatory reason for hiring Hetrick and not Batz.

Lebanon Seaboard offered that the rationale for hiring Hetrick after Batz had applied was because, at the time he applied, Hetrick had already been working at Lebanon Seaboard's plant for several weeks as a temp. Lebanon Seaboard submits that Hetrick had demonstrated his aptitude for the demands of the position of Triple Operator, and had

expressed an interest in becoming a Lebanon Seaboard employee. Further, Lebanon Seaboard offered that when Hetrick expressed interest, it determined that an additional staff person could be used. Finally, Lebanon Seaboard states that, rather than going back to review applications on file, including Batz's application, it decided to hire Hetrick, thereby saving time and money interviewing and more importantly, the cost to otherwise train someone new.

While Lebanon Seaboard did not mention it, one additional factor can be seen. Hetrick was already working at Lebanon Seaboard's facility. By hiring him, the number of employees did not change. The only change was in the status of who Hetrick's employer would be. When Hetrick was hired, there was not an open position. Hetrick simply continued to perform the duties he had been doing. The only difference was that, after being hired, he performed them as a Lebanon Seaboard employee instead of a Temp Force employee. By becoming an employee of Lebanon Seaboard, perhaps his pay would have been more, or perhaps he wanted to be in a position to join the union after a 90 day period. In any event, once again, the evidence presented was minimal regarding Hetrick's status change.

The reasons offered by Lebanon Seaboard for hiring Hetrick meet its burden of production. Accordingly, the burden of proof rests with Batz to establish that the reasons offered are a pretext for discrimination.

During the analysis of the *prima facie* case, we reviewed the fundamental obligation that Batz has to offer proof by a preponderance of the evidence. We concluded that Batz did not establish by a preponderance that interviews were not conducted in the Fall of 2001 for the eight hired as Triple Operators. Also, Batz failed to prove that Lebanon Seaboard did not, in effect, fill eight openings in the Fall of 2001 before Batz applied.

Furthermore, Batz has not attempted to challenge the rationale offered by Lebanon Seaboard with respect to the hiring of Hetrick.

Accordingly, Batz has not proven pretext. An Order dismissing Batz's claim follows.

