

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

**JAMES D. WHITMAN,**  
**Complainant**

**v.**

**BUCKWALTER CONSTRUCTION, INC.,**  
**Respondent**

**DOCKET NO. E-67927-H**

**STIPULATIONS OF FACT**

**STIPULATIONS OF FACT, SET 2**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

James D. Whitman, :  
 :  
 Complainant :  
 :  
 v. : Docket No. E67927H  
 :  
 :  
 Buckwalter Construction, Inc., :  
 :  
 Respondent :

STIPULATIONS OF FACT

1. The Complainant-- James D. Whitman ("Whitman")-- is a competent adult who, at all times relevant, resided at 1211 E. Lehman Street, Lebanon, Pennsylvania 17046.
2. The Respondent-- Buckwalter Construction, Inc. ("Buckwalter")-- is a building contracting firm with its principal offices located at 2025 Singletree Lane, Lancaster, Pennsylvania 17602 and, at all times relevant, employed four or more persons in the Commonwealth of Pennsylvania.
3. The employment action challenged in the Complaint occurred in Lancaster County.
4. Whitman filed his Pennsylvania Human Relations Commission Complaint in the above-captioned matter on February 17, 1994.
5. Pennsylvania Human Relations Commission Staff docketed the Complaint on March 16, 1994.
6. Commission Staff served Respondent with a true and correct copy of the Complaint on March 24, 1994.

7. Commission Staff conducted a Fact Finding Conference on May 16, 1994, which was attended by both Buckwalter and Whitman.
8. Commission Staff served Buckwalter with a Probable Cause Finding on December 2, 1997.
9. By letter dated December 2, 1997, Commission Staff invited Buckwalter to attend a Conciliation Conference on December 16, 1997, but Buckwalter declined the opportunity to attend.
10. Commission Staff has attempted by other means to conciliate, but these conciliation efforts have failed.
11. By letter dated May 26, 1998, the Pennsylvania Human Relations Commission's Executive Director notified the parties that the case had been approved for public hearing and had been placed on the Commission's Public Hearing Docket.
12. All jurisdictional prerequisites for the public hearing have been satisfied.
13. Buckwalter hired Whitman as a carpenter on September 30, 1985.
14. Whitman underwent heart triple by-pass surgery on July 15, 1992.
15. Whitman's cardiologist released him to return to work effective October 5, 1992, without restrictions.
16. Whitman returned to work for Buckwalter in October 1992 at the same rate of pay.
17. On May 15, 1993, Buckwalter laid off Whitman.
18. Buckwalter recalled Whitman on July 24, 1993.
19. Buckwalter laid off Whitman again on September 11, 1993.
20. By letter dated December 7, 1993, Carl Price, Buckwalter's Office Manager, notified Whitman of the following: "As of December 1, 1993, you are no longer covered under the Buckwalter Construction, Inc.'s Hospitalization Plan. We have been paying your coverage for all these months while you have been laid off, however, we can no longer continue this procedure."
21. Whitman has not worked for Buckwalter since September 11, 1993.

22. Whitman's non-prevailing wage history with Buckwalter was as follows:
  - a. Buckwalter hired Whitman on September 30, 1985 at the starting wage of \$10.00 an hour;
  - b. sometime before November 21, 1986, Buckwalter increased Whitman's wage to \$10.50 an hour;
  - c. sometime before April 18, 1988, Buckwalter increased Whitman's wage to \$11.00 an hour;
  - d. sometime before January 23, 1990, Buckwalter increased Whitman's wage to \$12.00 an hour; and
  - e. sometime before October 9, 1990, Buckwalter increased Whitman's wage to \$12.50 an hour.
23. At the time of his last lay off from Buckwalter on September 11, 1993, Whitman was earning \$12.50 an hour.
24. Whitman found subsequent employment with Pinnacle Contracting, Inc. ("Pinnacle") on April 27, 1994, and has been employed there ever since.
25. Whitman's employment with Pinnacle involves job assignments and duties similar to those he performed while working for Buckwalter.
26. When Whitman began working for Pinnacle in April 1994, his hourly rate was \$12.00, was raised to \$13.00 on November 11, 1994, was raised to \$13.75 on May 2, 1996, and was again raised to \$14.00 on January 1, 1998.
27. Buckwalter laid off the following employees in September 1993:
  - a. Whitman (Carpenter; hired 9/30/85);
  - b. Chris Strangarity (Carpenter; hired 5/26/87);
  - c. Michael D. Baran (Carpenter; hired 6/29/92);
  - d. Scott E. H. Stauffer (Carpenter/Apprentice; hired 3/17/92); and
  - e. Keith G. Lenker (Carpenter's Helper; hired 8/11/92).
28. Buckwalter recalled Chris Strangarity on October 3, 1993.
29. Buckwalter recalled Scott E. H. Stauffer on November 28, 1993.
30. Buckwalter recalled Keith G. Lenker on December 12, 1993.

31. Michael D. Baran found other employment and was not recalled.
32. During 1993, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:
  - a. James D. Whitman - \$12,028.21;
  - b. Chris Strangarity - \$22,087.57;
    - i. earned \$ 12.50 per hour during 1993;
    - ii. worked 503.5 regular hours during October, November and December 1993;
  - c. Michael D. Baran - \$14,195.61;
    - i. earned \$ 13.00 per hour during 1993;
    - ii. laid off week of 9/14/93;
    - iii. not recalled - found other employment.
33. During 1994, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:
  - a. Chris Strangarity - \$27,603.37;
    - i. earned \$ 12.50 per hour during 1994 (except on a prevailing wage job on which he earned \$ 15.37 per hour);
    - ii. worked 1,875 regular hours and 143.5 overtime hours during 1994;
  - b. Joseph A. Martinez - \$10,092.00;
    - i. hired by Buckwalter on 8/13/94;
    - ii. earned \$12.00 per hour from 8/13/94 through the end of 1994;
    - iii. worked 760 regular hours and 54 overtime hours from 8/13/94 through 12/31/94;
  - c. William A. Gahagan - \$7,944.00;
    - i. hired by Buckwalter on 8/15/94;
    - ii. earned \$ 11.50 per hour from 8/15/94 through 9/26/94;
    - iii. earned \$ 12.00 per hour from 9/27/94 through the end of 1994;
    - iv. worked 584 regular hours and 54.5 overtime hours from 8/15/94 through 12/31/94.

34. During 1995, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:
- a. Chris Strangarity - \$25,590.70;
    - i. earned \$12.50 per hour during 1995;
    - ii. worked 2,027 regular hours and 13.5 overtime hours during 1995;
  - b. Joseph A. Martinez - \$22,659.00;
    - i. earned \$12.00 per hour during 1995;
    - ii. worked 1,878.5 hours and 6.5 overtime hours during 1995;
  - c. William A. Gahagan - \$11,127.00;
    - i. earned \$12.00 per hour during 1995;
    - ii. employment terminated 6/16/95;
    - iii. worked 927.2 regular hours from 1/1/95 through 6/16/95.
35. During 1996, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:
- a. Chris Strangarity - \$20,039.07;
    - i. employment with Buckwalter terminated on 9/10/96;
    - ii. earned \$12.50 per hour from 1/1/96 through 4/23/96;
    - iii. earned \$13.50 per hour from 4/24/96 through 9/10/96;
    - iv. worked 1416.2 regular hours and 79.7 overtime hours from 1/1/96 through 9/10/96;
  - b. Joseph A. Martinez - \$9,971.51;
    - i. employment with Buckwalter terminated on 5/31/96;
    - ii. earned \$12.00 per hour from 1/1/96 through 4/23/96;
    - iii. earned \$12.50 per hour from 4/24/96 through 5/31/96;
    - iv. worked 822 regular hours from 1/1/96 through 5/31/96;
  - c. Barry J. Kissinger - \$9,387.54;
    - i. hired by Buckwalter on 4/29/96;
    - ii. employment with Buckwalter terminated on 9/17/96;
    - iii. earned \$12.50 per hour from 4/29/96 through 9/17/96;
    - iv. worked 697 regular hours and 36 overtime hours from 4/29/96 through 9/17/96;
  - d. Sean M. King - \$6,356.12;
    - i. hired by Buckwalter on 9/24/96;
    - ii. earned \$12.00 per hour from 9/24/96, through the end of 1996;
    - iii. worked 519.5 regular hours and 5 overtime hours from 9/24/96 through 12/31/96.



36. During 1997, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:

- a. Sean M. King (Carpenter/Foreman) - \$24,681.22;
  - i. earned \$12.00 per hour from 1/1/97 through 1/21/97;
  - ii. earned \$12.50 per hour from 1/22/97 through the end of 1997;
  - iii. worked 1944.7 regular hours and 23 overtime hours during 1997;
  
- b. Donald L. Collins - \$19,707.94;
  - i. hired by Buckwalter on 1/21/97;
  - ii. earned various wage rates from 1/21/97 through 3/18/97;
  - iii. earned \$12.00 per hour from 3/19/97 through the end of 1997;
  - iv. worked 1572.7 regular hours and 12 overtime hours from 1/21/97 through 12/31/97;
  
- c. Robert B. Wildey - \$4,616.15;
  - i. hired by Buckwalter on 1/14/97;
  - ii. employment with Buckwalter terminated on 4/2/97;
  - iii. earned various wage rates during his time with Buckwalter;
  - iv. worked 357 regular hours from 1/14/97 through 4/2/97.

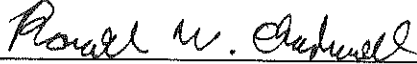
37. During 1998, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:

- a. Sean M. King - \$22,771.92;
  - i. earned \$12.50 per hour during 1998;
  - ii. worked 1806.7 regular hours and 10 overtime hours during 1998;
  
- b. Donald L. Collins - \$19,708.50;
  - i. employment with Buckwalter terminated on 12/8/98;
  - ii. earned \$12.00 per hour during 1998;
  - iii. worked 1591 regular hours and 34.2 overtime hours during 1998;
  
- c. Scott E. H. Stauffer - \$24,665.05;
  - i. promoted from "Apprentice Carpenter" to "Carpenter" in the Spring of 1998;
  - ii. earned \$12.50 per hour during 1998;
  - iii. worked 1840.2 regular hours and 89 overtime hours during 1998.


38. During January 1999, Buckwalter employed the following individuals as carpenters, who each earned the indicated amount for the year:
- a. Sean M. King - \$1,181.25;
    - i. earned \$12.50 per hour during January 1999;
    - ii. worked 94.5 regular hours during January 1999;
  - b. Scott E. H. Stauffer - \$1,218.75;
    - i. earned \$12.50 per hour during January 1999;
    - ii. worked 97.5 regular hours during January 1999.
39. Whitman earned the following amounts from Buckwalter during the indicated years:
- a. 1985 - \$ 5,028.50 (hired 9/30/85);
  - b. 1986 - \$ 20,519.73;
  - c. 1987 - \$ 23,816.59;
  - d. 1988 - \$ 19,622.79;
  - e. 1989 - \$ 24,839.09;
  - f. 1990 - \$ 23,308.11;
  - g. 1991 - \$ 26,358.46;
  - h. 1992 - \$ 11,548.48; and
  - i. 1993 - \$ 12,028.21.
40. Whitman's W-2 forms from Pinnacle indicate the following amounts as "wages, tips, other comp." for the indicated years:
- a. 1994 - \$ 15,600.36;
  - b. 1995 - \$ 15,226.30;
  - c. 1996 - \$ 16,595.29;
  - d. 1997 - \$ 20,797.10;
  - e. 1998 - \$ 20,064.55.
41. In 1995, Whitman also earned \$ 1,335.00 from Sycamore Homes, Inc., and \$ 225.00 from R. G. Botz Construction Co., Inc.
42. Whitman was on layoff and earned no wages from Pinnacle during the entire month of January 1999.
43. Buckwalter's employees are not unionized.
44. Buckwalter has no written policies concerning lay-offs and /or recalls.



45. Buckwalter does not prepare or maintain records of job performance evaluations for its employees.

  
\_\_\_\_\_  
Ronald W. Chadwell, Esquire  
PHRC Asst. Chief Counsel  
Harrisburg Regional Office  
1101-1125 S. Front St., 5th Floor  
Harrisburg, PA 17104-2515

Date: 2/23/99

  
\_\_\_\_\_  
Christina L. Hauser, Esquire  
Counsel for Buckwalter Construction, Inc.  
Hempfield Center, Suite 300  
930 Red Rose Court  
Lancaster, PA 17601

Date: 2/23/99



COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES D. WHITMAN	:	
Complainant	:	
	:	
vs.	:	Docket No. E-67927-H
	:	
BUCKWALTER CONSTRUCTION, INC.,	:	
Respondent	:	

**STIPULATIONS OF FACT, SET NO. 2**

1. Whitman received the following amounts of unemployment compensation during the indicated years:

a.	9/11/93 - 12/31/93	\$4,002.00
b.	1994	\$4,046.00
c.	1995	\$1,981.00
d.	1996	\$5,437.00
e.	1997	\$3,096.00
f.	1998 (through 11/9/98)	\$3,907.00

2. Whitman received the following amounts of workers' compensation benefits during the indicated years:

a.	1996	\$1,559.82
b.	1997	\$ 288.65

The undersigned counsel hereby stipulate to the factual accuracy of the above

statements, but do not stipulate as to the relevance of those facts to the matter before the Commission.

COMMONWEALTH OF PENNSYLVANIA  
HUMAN RELATIONS COMMISSION

By: Ronald W. Chadwell  
Ronald W. Chadwell, Esquire  
PHRC Asst. Chief Counsel  
1101-1125 S. Front Street, 5th Floor  
Harrisburg, PA 17104-2515

RUSSELL, KRAFFT & GRUBER, LLP

By: Christina L. Hausner  
Christina L. Hausner, Esquire  
Counsel for Buckwalter  
Construction, Inc.  
Hempfield Center, Suite 300  
930 Red Rose Court  
Lancaster, PA 17601

FINDINGS OF FACT \*

1. James D. Whitman ("Complainant") at all times relevant to the instant complaint resided at 1211 East Lehman Street, Lebanon, Pennsylvania. (SF 1.)
2. Buckwalter Construction, Inc. ("Respondent") is a building contracting firm with its principal offices in Lancaster, Pennsylvania. (SF 2.)
3. Respondent is a family-owned and -operated construction company. (NT 239.)
4. Respondent hired Mr. Whitman as a carpenter on September 30, 1985. (SF 13.)
5. While employed by Respondent, Complainant was laid off periodically due to lack of work. (NT 53.)
6. In the construction industry, it is normal for workers to be laid off at various times during the year. (NT 166.)
7. Mr. Whitman last worked for the Respondent on September 11, 1993, when he was laid off and not recalled. (SF 19, 21.)

---

\* 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:

NT	Notes of Testimony
RE	Respondent's Exhibit
SF	Stipulations of Fact

8. While laid off in July of 1992, Mr. Whitman suffered a heart attack and had triple by-pass surgery on July 15, 1992. (SF 14.)

9. Mr. Whitman was released by his physicians to return to work without restrictions, effective October 5, 1992. (SF 15.)

10. Mr. Whitman returned to work in October 1992 at the same rate of pay as before his surgery. (SF 16.)

11. Mr. Whitman was not under any restrictions or limitations from his doctor. (NT 173.)

12. When Mr. Whitman returned to work, he was capable of performing his job functions without the assistance of others. (NT 69-71.)

13. Following his heart attack in 1992, Mr. Whitman was employed by Respondent from October 1992 through September 1993. (SF 17, 18, 19.)

14. During this time period, Mr. Whitman and other employees experienced two layoffs based on lack of work and inclement weather. (NT 187-188.)

15. Respondent recalled Mr. Whitman on two occasions. (NT 187-188.)

16. Mr. Whitman was recalled to work in October of 1992 after his heart attack. (SF 16.)

17. Mr. Whitman was laid off on May 15, 1993, and was recalled on July 24, 1993. (SF 17, 18.)

18. In September 1993, the individual responsible for making layoff and recall decisions was Dennis Buckwalter. (NT 491.)



19. Dale Buckwalter, Carl Price and Jennifer Buckwalter were not involved in hirings, layoffs, or recalls. (NT 286, 458.)

20. Layoffs and recalls were made dependent on the needs of the job, the task to be performed, and by the ability of the employee. (NT 496-497.)

21. Respondent's records indicate instances where employees with less seniority were recalled before employees with greater seniority. (NT 439.)

22. Dennis Buckwalter made the decision not to recall Mr. Whitman in September 1993. (NT 515.)

23. Mr. Whitman was not recalled because of reduced available work and his skill level, compared to those recalled. (NT 501.)

24. Chris Strangarity was recalled because he was a more versatile carpenter than Mr. Whitman. (NT 504.)

25. Mr. Whitman's skills as a trim or finish carpenter were limited. (NT 242-243.)

26. Mr. Whitman's performance with respect to metal buildings was merely adequate. (NT 137.)

27. Respondent has no written policies regarding layoffs and/or recalls. (SF 44.)

28. Because of the declining amount of work, Respondent tried to keep the skilled employees who could perform many different jobs. (NT 503.)

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("Commission") has jurisdiction over the parties and the subject matter of the case.
2. The parties and the Commission have complied with procedural prerequisites to a public hearing.
3. James D. Whitman is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. At all times relevant to this case, Buckwalter Construction, Inc. was an "employer" within the meaning of the PHRA.
5. Mr. Whitman has met his initial burden of establishing a *prima facie* case by showing that:
  - a. he is a member of a protected class;
  - b. he was qualified for an open position;
  - c. Respondent did not recall Mr. Whitman; and
  - d. Respondent recalled similarly-situated employees outside Mr. Whitman's protected class.
6. Respondent's articulated reason for not recalling Mr. Whitman was that because of declining work Respondent opted to recall a more versatile carpenter.
7. The Complainant has not shown that the reasons Respondent did not recall him were pretextual.

## OPINION

This matter arises out of a complaint filed by James D. Whitman (hereinafter "Complainant") against Buckwalter Construction, Inc. (hereinafter "Respondent"), Docket No. E-67927-H, with the Pennsylvania Human Relations Commission (hereinafter "Commission" or "PHRC").

On or about February 17, 1994, the Complainant filed a complaint with the PHRC alleging that the Respondent refused to recall him because of his non-job-related handicap/disability, heart surgery, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 951, *et seq.* (hereinafter "PHRA").

PHRC staff conducted an investigation into the allegations raised by the complaint. After an investigation, PHRC staff found probable cause, on December 2, 1997, to credit the allegations in the complaint and then attempted to conciliate the matter, without success. PHRC notified the parties on May 26, 1998, that the instant case was approved for public hearing and placed on the public hearing docket.

The public hearing in this matter was held on the following dates: February 23, 1999; March 22, 1999; March 23, 1999; and May 26, 1999, with Phillip A. Ayers, Permanent Hearing Examiner, presiding. The Commission's interest on behalf of the complaint was represented by PHRC Assistant Chief Counsels Ronald W. Chadwell and Joseph T. Bednarik. The Respondent was represented by

Christina L. Hausner, Esquire. Both Respondent Counsel and Commission Counsel filed post-hearing briefs in the matter.

In reviewing the Complainant's allegations, we recognize the issue of disparate treatment. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a Pennsylvania Supreme Court case. 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 Corp. v. Green, 411 US 792 (1973). The Court's guidance indicates that the Complainant must first establish a *prima facie* case of discrimination. If 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 US 248, 256 (1981).

Following its instruction on the effect of a *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 that:

*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, of course, first establish a *prima facie* case. However, the *prima facie* showing should not be an onerous burden. In the instant case, a *prima facie* case of disability discrimination can be established by showing that:

1. Complainant is a member of a protected class;
2. Complainant was qualified for an open position;
3. Respondent did not recall Mr. Whitman; and
4. Respondent recalled a similarly-situated employee not in Complainant's protected class.



In the matter before the Commission, the Complainant easily meets the second, third and fourth elements of the *prima facie* showing. The Complainant had worked for Respondent for a number of years and, consequently, is qualified to be a carpenter for the Respondent. Next, the Respondent laid off the Complainant in September of 1993 and did not recall him. The third element of the *prima facie* showing, therefore, is met. Lastly, the Respondent recalled a similarly-situated employee (*i.e.*, Mr. Strangarity), but not the Complainant. Mr. Strangarity does not have a disability.

The real issue is the first element of the *prima facie* showing: whether the Complainant is a disabled person within the meaning of the PHRA. The definition of a "disabled person" is contained within 16 Pa. Code §44.4.

(i) *A person who:*

(A) *has a physical or mental impairment which substantially limits one or more major life activities;*

(B) *has a record of such an impairment; or*

(C) *is regarded as having such an impairment.*

(ii) *As used in subparagraph (i) of this paragraph, the phrase:*

(A) *"physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin and endocrine; or a mental or psychological disorder such as mental illness, and specific learning disabilities.*

*(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.*

*(C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.*

*(D) "is regarded as having an impairment" means having a mental or physical impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator or provider of a public accommodation as constituting such a limitation.*

In the instant case, the Complainant asserts that he is a "person with a disability" under all three theories set forth in the above regulations. The Complainant asserts that:

1. he has a disability;
2. he was regarded as having a disability; and
3. he had a "record" of a disability when the Respondent did not recall him to work.

In the case before the Commission, the Complainant is disabled because, at the time of his lay-off, he had a "record" of a substantially limiting impairment. An individual has a record of such an impairment if he has "a history of" or had been misclassified as having a mental or physical impairment that substantially limits one or more major life activities. 16 Pa. Code §44.4. In the instant case the Complainant alleged that

Respondent refused to recall him to work because of his disability, heart surgery. Mr. Whitman was hospitalized for his heart surgery. He was unable to work, and was limited in any type of physical activity for approximately two and a half months. Because of the life threatening nature of his condition and the substantial limitation of major life activities, Mr. Whitman has a record of a disability under the PHRA, and consequently has met his *prima facie* showing.

As aforementioned, once the Complainant meets his *prima facie* showing, the burden of production then shifts to the Respondent to produce evidence of a legitimate, non-discriminatory reason for its actions. McCloskey v. Nu-Car Carriers, Inc., 387 Pa. Super. 466, 564 A.2d 485 (1989). The Respondent's testimony indicates that the reason for not recalling Mr. Whitman was that the Respondent's amount of work and number of employees had declined over a number of years. Consequently the Respondent had to evaluate each employee's value to the company. (NT 504, 505.) In doing so, Respondent articulates that the Complainant was not as good or versatile as those carpenters who were recalled. The Respondent has therefore met its burden of production.

Next, we move to the question of whether the Complainant has demonstrated, either by direct evidence or by circumstantial evidence, that a discriminatory reason more likely motivated the Respondent or, indirectly, by showing that the proffered explanation is unworthy of credence. Burdine, supra. As always the Complainant retains the burden of persuasion on the ultimate issue of whether the employer had

a discriminatory motive. Harrisburg School District v. Pa. Human Relations Commission, 77 Pa. Cmwlth. 594, 466 A.2d 760.

In the instant case, Complainant argues that there is direct evidence of pretext in that there were statements made in regard to problems that Complainant was causing regarding insurance costs. Commission Counsel asserts that where there is direct evidence, the Respondent must affirmatively defend its decision not to recall Mr. Whitman. Montour School District v. Pa. Human Relations Commission, 530 A.2d 957 (1987). The Respondent presented credible testimony showing that Mr. Whitman was recalled twice after suffering his heart attack and subsequent surgery. The first time was immediately after the surgery, and the second time was after Mr. Whitman had been laid off. Next, Respondent reinstated the Complainant to its group insurance plan on September 1, 1992. This date was a month and a half after the surgery and before the Complainant was released to return to work. When the Respondent changed insurance plans in the fall of 1993, the Respondent sent the Complainant an enrollment form. (SF 24.) When the Respondent made the decision to obtain new insurance, the condition of two other employees impacted Respondent from taking it. Regardless of Complainant's condition, there would be difficulties in obtaining new insurance. Also, the record reflects that the premiums paid for Mr. Whitman's insurance were the same or less than those paid for employees who continued with Respondent.

Also, the Respondent presented testimony indicating the number of employees and amount of work had declined. In fact, both Mr. Whitman and Mr. Buckwalter

testified as to a conversation regarding the availability of work. The Respondent was bidding on a job in Virginia and wanted to see if Mr. Whitman would be interested in the job. (NT 511.) The record shows that the Respondent's work load was decreasing, and fewer employees were needed. Consequently the Respondent had to make a decision. The only individual who was comparable in title to Mr. Whitman was Chris Strangarity. The Respondent concluded that Mr. Strangarity was a better and, more importantly, a more versatile carpenter. (NT 504-505.) Even Mr. Strangarity, who testified on behalf of Mr. Whitman, could only assert that their skill levels were "pretty even." (NT 397.) There is nothing in the record that sets Mr. Whitman's overall skill level above that of Mr. Strangarity. As a matter of fact, credible testimony was presented establishing that Mr. Whitman's skills as a trim or finish carpenter were somewhat limited. (NT 242-243.) In addition, his work on metal buildings was merely adequate. Mr. Whitman further asserts that he would have been recalled because he had more seniority than Strangarity. However, records presented at the public hearing show several instances where employees with less seniority were recalled before employees with greater seniority. (RE 42.)

The Complainant's case is based chiefly on comments made by Carl Price, Respondent Business Manager, that Mr. Whitman was causing Respondent problems in containing medical insurance costs. Firstly, the records reflect that the concern was expressed by someone who did not have the authority to make decisions regarding layoffs and/or recalls. (NT 286.) Secondly, the record, as aforementioned,



further reflects that Mr. Whitman's situation was not the only one having an impact on the Respondent's attempt to provide health insurance in 1992.

In reviewing Respondent's actions in this matter, it is difficult to reconcile Respondent's actions as discriminatory. The Respondent brought Mr. Whitman back twice after his heart attack. Mr. Whitman was employed for over a year after his heart attack. When Mr. Whitman was laid off in May of 1993, he was recalled in July 1993. Finally, the Respondent not only reinstated his health insurance in September 1992, the Respondent enrolled him in the new insurance plan in the fall of 1993.

Based on the record in this case, the Complainant has not shown that Respondent's articulated reasons for its action were pretextual. Accordingly, an appropriate order follows.

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

**JAMES D. WHITMAN,**  
Complainant

v.

**BUCKWALTER CONSTRUCTION, INC.,**  
Respondent

DOCKET NO. E-67927-H

**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, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner also recommends issuance of the attached Final Order.

By:



Phillip A. Ayers  
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES D. WHITMAN,  
Complainant

v.

BUCKWALTER CONSTRUCTION, INC.,  
Respondent

DOCKET NO. E-67927-H

FINAL ORDER

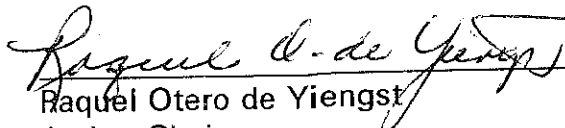
AND NOW, this 23rd day of May 2000,

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, Conclusions of Law, Opinion, and Recommendation of the Permanent Hearing Examiner, and hereby

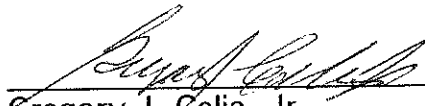
**ORDERS**

that the instant complaint, docketed at E-67927-H, be dismissed.

By:

  
Raquel Otero de Yiengst  
Acting Chairperson

Attest:

  
Gregory J. Celia, Jr.  
Secretary