

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

**GARY J. KUKLISH,
Complainant**

v.

**TRI-COUNTY JOINT MUNICIPAL
AUTHORITY,
Respondent**

DOCKET NO. E-85442-A

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

ORDER

FINDINGS OF FACT

1. The Respondent is the Tri-County Joint Municipal Authority, (hereinafter, "Tri-County").
2. Tri-County is a water company which supplies water to just over 3,000 customers located in portions of Washington and Fayette Counties. (N.T. 34-35,43).
3. In past years, Tri-County also served a small part of Greene County. (N.T.45).
4. Collectively five townships located in Washington and Fayette Counties participate in Tri-County: Belleville; Centerville; Richeyville; East Beth; and Luzerne. N.T.55).
5. Tri-County is controlled by a five member board which holds monthly public meetings.
6. Tri-County Board members are appointed by a township's supervisors. (N.T.44).
7. In addition to board members, immediately prior to February 11, 1997, Tri-County had employed seven employees: a General Manager, Jeffrey Kovach; two office staff persons; and four laborers. (N.T.42).

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

8. Prior to February 11, 1997, Tri-County also utilized part-time laborers. (N.T.45).
9. In 1995, the Complainant, Gary J. Kuklish, (hereinafter :Kuklish”), was a resident of Luzerne Township. (N.T.44).
10. The then chairperson of the Tri-County Board, Ronald Dellarose, (Hereinafter “Dellarose”), was also from Luzerne Township. (N.T.44).
11. In 1995 Dellarose approached Kuklish and asked him if he wanted to work part-time for Tri-County. (N.T.52).
12. In July 1995 Tri-County hired Kuklish as a part-time laborer. (N.T.24).
13. As a part-time laborer, Kuklish performed all the duties full-time laborers performed with the exception of testing and actually producing water. (N.T.24,25).
14. Part-time laborers performed such duties as shoveling, electrical and plumbing tasks and various odd jobs. (N.T.69).
15. Jeffrey Kovach, (hereinafter “Kovach”), an employee since 1975, was a co-worker of Kuklish’s until Kovach became Tri-County’s General Manager in 1996. (N.T.63).
16. On December 13, 1996 Kuklish submitted an application for full-time employment with Tri-County. (N.T.25).
17. In early 1997, a decision was made to hire two full-time laborers. (N.T.46,77).
18. Tri-County wanted persons who were experienced with either gas or water lines, who would be available 24 hours a day, and who were able to make decisions independently. (N.T.89).

19. Tri-County only considered the applications of individuals who had filed an application with Tri-County. (N.T. 85).
20. Tri-County did not post job openings and did not place any ads for open positions. (N.T. 85).
21. On or about February, 1997, the Tri-County Board loosely put together a committee to review the available applications, to select individuals for and conduct interviews, and to make recommendations to the Board. (N.T. 81-83).
22. Several Board members and Kovach selected five applicants from a pool of perhaps ten or more applicants to interview. (N.T. 78,79,89).
23. Kuklish and four other applicants were interviewed for two available full-time laborer positions. (N.T. 46,79,81).
24. Kovach advised board members that Tri-County employees were very uneasy working with Kuklish. (N.T. 67).
25. Kovach further reported that Kuklish knew how to talk a good days work and that Kuklish was known to say "I'm not doing this or that". (N.T.67-68).
26. As a part-time employee, Kuklish did not get along well with other employees. (N.T. 90,93).
27. The selection committee recommended that Tri-County hire James Barber, (Hereinafter "Barber") and William E. Minerd. (hereinafter "Minerd") (N.T. 14,46-47,83).

28. At the Board's February 11, 1997 meeting, Barber and Minerd were hired. (N.T. 46-47,82).
29. On February 11, 1997, Kuklish was 41 years old. (N.T. 50; CE1).
30. On February 11, 1997, Barber was 48 years old and Minerd was 30 years old. (N.T. 50,71).
31. Barber had prior experience working for a water authority and overall was considered to have great credentials. (N.T. 90).
32. Minerd had worked for a gas company and had knowledge of pipe networks, masonry and both electrical and carpentry experience. (N.T. 90).
33. Minerd had also previously worked part-time for Tri-County and all the employes got along well with him. (N.T. 91).
34. Once Barber and Minerd were hired, Tri-County no longer needed part-time laborers. (N.T. 28,50).
35. Tri-County's policy was that to be considered for hire an applicant had to update an existing application within 180 days. (N.T. 26).
36. On July 21, 1997, Kuklish renewed his December 13, 1996 application. (N.T. 26,CE1).
37. In August, 1997, one of Tri-County's laborers tragically died. (N.T. 93).
38. The day after the tragic death, Kuklish came into the Tri-County office and, in effect, demanded the job created by the tragedy. (N.T. 93,94).
39. Kuklish's actions further alienated Tri-County employees. (N.T. 93-94).

40. In August 1997, Tri-County began a selection process which was similar to the February 1997, selection process. (N.T. 83).
41. On August 27, 1997, of over ten applicants considered, Tri-County hired Michael J. Williams, (hereinafter "Williams"). (N.T. 14,84).
42. Williams was selected because he had held a highly responsible management position, he was considered a self-motivated decision-maker, he had a knowledge of electricity, he was certified in CPR, and he had inventory experience. (N.T. 92).
43. On June 19, 2000 Tri-County hired another laborer, Michael A. Sabo, (hereinafter "Sabo"). (N.T. 14).
44. At the time of his hire Sabo was 42 years old (N.T. 70-71).
45. Tri-County's job application form asks applicants to provide their "Date of Birth". (CE 1-5).
46. During the hiring process, the age of applicants was not discussed. (N.T. 68).

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. Kuklish is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. Tri-County is an employer within the meaning of the PHRA.
5. Kuklish has the initial burden of establishing a *prima facie* case of age discrimination by proving that:
 - a. he is a member of a protected class;
 - b. he applied for an open position for which he was qualified.
 - c. he was rejected; and
 - d. the position was awarded to an applicant with either equal or less qualifications than Kuklish and who was younger than Kuklish.
6. Kuklish failed to prove by a preponderance of evidence that Tri-County awarded a position to an applicant with equal or less qualifications than his and who was younger than him.
7. Assuming arguendo Kuklish established a *prima facie* case, Tri County articulated legitimate non-discriminatory reasons for not hiring Kuklish on February 11, 1997, and on August 27, 1999.

8. Kuklish has not shown Tri-County's reasons to be pretextual.
9. By asking for an applicant's date of birth, Tri-County's violated the PHRA.
10. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on a complaint filed by Gary J. Kuklish (hereinafter "Kuklish") against the Tri-County Joint Municipal Authority (hereinafter "Tri-County"), which alleged age-based discriminatory refusals to hire Kuklish as a laborer. Kuklish alleged the first refusal was in June or July 1997, and the second alleged refusal to hire occurred on or about August 27, 1997. Kuklish also alleged that Tri-County made illegal pre-employment inquiries on its application form.

Kuklish's age-based allegations are claims under Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1995, PL 744, as amended, 43 PS §§951, *et seq.* (hereinafter "PHRA"). The alleged illegal pre-employment inquiries presents a claim under Section 5(b)(1) of the PHRA.

PHRC staff initially conducted an investigation and found probable cause to credit the allegations of age-based disparate treatment and illegal pre-employment inquiries. Subsequently the PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. These efforts were unsuccessful and eventually all of the allegations were approved for a public hearing.

The public hearing was held on October 16, 2001, in Washington, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. The post-hearing brief on behalf of the complaint was received on December 10, 2001. Tri-County did not file a post-hearing brief.

Turning to the general issues arising from the substance of Kuklish's age-based allegations, we initially note that the ultimate question for resolution here is whether Tri-County's rejection of Kuklish to be a laborer 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 . . . age, . . .
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.

On the issue of Kuklish's allegation that Tri-County made illegal pre-employment inquiries, Section 5(b)(1) states in pertinent part:

It shall be an unlawful discriminatory
practice . . . [f]or any employer . . . to [e]licit any
information . . . or use any form of
application . . . containing questions or entries
concerning the . . . age . . . of any applicant for
employment . . .

On his age-based claim, Kuklish alleges that Tri-County treated him less favorably than others because of his age. To prevail, Kuklish is required to prove that Tri-County had a discriminatory intent or motive in failing to hire him. 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). Kuklish 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 the *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:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) 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 1018 (6th Cir. 1987).

Here, we must adapt the McDonnell Douglas test because this case involves an alleged age-based refusal to hire from an applicant pool. To establish a *prima facie* case of an age-based refusal to hire from an applicant pool, Kuklish must show:

1. that he is a member of a protected class;
2. that he applied for and was qualified for a position for which Tri-County was seeking applicants;
3. that, despite his qualifications, Kuklish was denied the position;
and
4. that the position was awarded to an applicant with either equal or less qualifications than Kuklish's, and who is younger than Kuklish.

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

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

If Tri-County carries this burden of production, Kuklish must then satisfy a burden of persuasion and show that the legitimate reasons offered by Tri-County were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 US at 804. This burden now merges with the burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 US at 256. The ultimate burden of persuading the trier of fact that Tri-County intentionally discriminated against Kuklish remains at all times with Kuklish. *Id.* at 253.

During the public hearing Kuklish was clear that he perceived that he had been discriminated against on three occasions:

First on February 11, 1997 when Tri-County hired two laborers; then on August 27, 1999; and finally on June 19, 2000. Since at the time of each hiring,

Kuklish was over 40 years old, he easily establishes that he was a member of a protected class. Kuklish also has no difficulty establishing that he applied for openings and that he had the requisite qualifications to be a laborer. Next, Kuklish has easily shown that he was not selected for the separate laborers openings.

The ease with which Kuklish was able to establish the first three elements of the requisite *prima facie* showing suddenly becomes much more difficult on the requisite fourth element. First of all, one of the hires was in fact older than Kuklish when he was hired and another was in the protected class and only four years younger than Kuklish: Barber, who was hired on February 11, 1997 was 48 years old at the time and Kuklish was 41; Sabo, who was hired on June 19, 2000 was 40 years old, and Kuklish was then 44. Regarding Michael J. Williams, the individual hired on August 27, 1997, no evidence was presented at the Public Hearing regarding his age. Instead, the post-hearing brief on behalf of the complaint attempts to rely on Tri-County's answer to the complaint, which provides that Williams was approximately 35 years old.

As for as any qualification comparisons, only the applications of three of those hired were submitted as evidence and no additional witnesses were offered with respect to providing an explanation of who had what qualifications. Case law in Pennsylvania requires that an unsuccessful candidate establish that he was as well qualified as the candidates selected. PHRC v. Johnston Redevelopment Authority 527 Pa. 71, 588 A. 2d 197, 501 (1991).

The post-hearing brief on behalf of the complaint suggests that Williams application was not submitted as evidence because it was not produced pursuant to a subpoena. Once again, reliance is placed on a docket entry rather than evidence introduced at the Public Hearing in an apparent attempt to raise an adverse inference regarding Williams' hire. When one reviews the chronology of events which appear to surround the question of evidence about Williams age and his application, it is hard to comprehend how no evidence was submitted at the Public Hearing on either issue. The complaint in this case was filed in November, 1997. The PHRC approved this case for Public Hearing at its monthly meeting held on May 22, 2001. On August 17, 2001, a pre-hearing conference was held where it was established that continued discovery was to end on September 28, 2001. On September 28, 2001, at 2:11p.m. the office of the Hearing Examiner received a faxed request for a subpoena for documents which, in part, requested Williams' application. The signed requested subpoena was faxed at 2:48p.m. on September 28, 2001. The subpoena asked that the requested documents be produced at the Public Hearing. At the beginning of the Public Hearing, most of the documents requested were produced by Tri-County. Documents including the applications of Sabo, Miner, Novotney and Barber were introduced as CE 2-5.

The fact that Williams' application was not produced at the Public Hearing is an evidentiary issue which rests in the hands of the prosecution of this matter. If the Williams application had not been obtained during the three

and a half years this case was under investigation, there was ample time to seek its production during the discovery period which began on May 22, 2001 and ended on September 28, 2001. Why one would wait until the afternoon of the last day of discovery to attempt to subpoena this document is puzzling. Furthermore, at the Public Hearing, when asked about the Williams application, and whether he had it, Kovach testified that he "Would have to look. I thought it was in that file. I may have it. It's probably at work. I'll definitely pick it up for you". (N.T. 95).

Instead of asking that a short continuance be granted to attempt to secure the document, if it presently existed, the matter was simply dropped. No effort was made to provide any explanation for the failure to produce this document. At the Public Hearing, the subpoena in question was not even made an exhibit. Rather, it was simply added as a docket entry, and docket entries are not evidence.

In summary, no adverse inferences against Tri-County can be drawn from the fact that the Williams application was not made a part of the record. As indicated, Kuklish had the burden to produce it if he felt it could support an argument that his qualifications were either equal to or better than Williams'. The failure to produce the Williams application leaves Kuklish with no comparison what-so-ever between himself and Williams.

In this case, little effort was made to, first, establish precisely what the qualifications for the positions in question were and even less effort was made to offer evidence of any other comparison. While each application presented in

evidence lists an applicant's prior job experiences, no meaningful comparison was offered regarding whether Kuklish was either better qualified or at least as qualified as a selected applicant.

Assuming arguendo that Kuklish was at least as qualified as either William Miner, hired on February 11, 1997 at age 30, or Michael J. Williams, hired on August 27, 1997, Tri-County met its production burden of articulating legitimate non-discriminatory reasons for not selecting Kuklish.

Kovach testified that the reason Kuklish was not hired on February 11, 1997, was that he had personal knowledge of Kuklish from having worked with him while Kuklish was a part-time employee. Kovach testified that the work force did not get along with Kuklish. Kovach testified that he told Tri-County's board that other Tri-County employees were very uneasy working with Kuklish. Other employees reported that Kuklish "Talked a good days work". (N.T. 67). Additionally, Kuklish had been known to make such remarks as "I'm not going to do this job or that job, I'm only making \$8.00 an hour, you're making more than me". (N.T. 67-68). Kovach further generally added that Tri-County was looking for experienced workers who were available 24 hours a day and who were able to make decisions independently. (N.T. 89).

Here, Kovach conveyed sufficient negative information to the Board's selection committee that Kuklish, although interviewed, was not recommended for hire on February 11, 1997. Similarly, Kovach conveyed to the August, 1997 selection committee sufficient negative information that once again Kuklich was

not recommended for hire. In addition to the earlier information, Kovach's testimony depicted Kuklish as further alienating Tri-County employees the day after one of the workers tragically died. Kuklish was described as coming to the Tri-County offices the day after the tragic death and demanding to be hired into the vacancy created by the death.

This testimony, considered as a whole, sufficiently meets Tri-County's production burden to articulate legitimate non-discriminatory reasons for Tri-County's failure to hire Kuklish. At this point, Kuklish had the burden to prove by a preponderance of the evidence that the reasons offered by Tri-County were pretextual.

Here, Kuklish made no effort to show pretext. In the post-hearing brief on behalf of the complaint, an argument is made that Dellarose testified "that he heard no reports about Kuklish's employment at the time Kuklish's application was pending before the Board for consideration for full-time hire". At the Public Hearing, Dellarose was asked, . . . "had you received any reports from your supervisor and managers and foreman and employees regarding Mr. Kuklish and his work efforts as a part-time employee?". Mr. Dellarose's answer was "No, not anything that I can recall". (N.T.49).

Under the circumstance, Dellarose's testimony is not in conflict with Kovach's. Furthermore, it was never made clear who participated with Kovach on the Board's selection committee. If Dellarose was not on that committee he may well not have heard Kovach's negative report about Kuklish. The full five

member Board simply voted on the selection committee's recommendations.

The root of Kuklish's problem was in not being recommended by the selection committee.

Upon a review of the sparse record in this matter, Tri-County has articulated legitimate, non-discriminatory reasons for its actions, and Kuklish has not shown those reasons to be pretextual.

We thus turn to the remaining allegation. In this record there is direct evidence of a violation of Section 5(b)(c) of the PHRA.

Quite clearly, Tri-County illegally asked for an applicant's date of birth on employment applications.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

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v.

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DOCKET No. E-85442-A

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Kuklish failed to prove age-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It was proven that Tri-County violated Section 5(b)(1). It is, therefore, the Permanent Hearing Examiner's recommendation that the attached 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 recommends issuance of the attached Final Order.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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FINAL ORDER

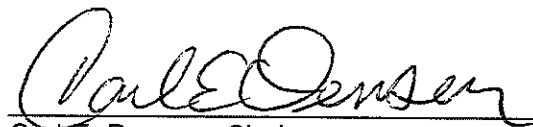
AND NOW, this 25th day of February, 2002, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the Findings of Fact, Conclusions of law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That Kuklish's age-based allegations under Section 5(a) are dismissed.
2. That Tri-County cease and desist from using any form of application containing questions concerning the age of any applicant for employment.
3. That within thirty (30) days of the effective date of this order, Tri-County shall report to the Commission on the manner of its compliance with the terms of this order by letter addressed to Katherine Fein, Esquire in the Commissioner's Pittsburgh regional office.

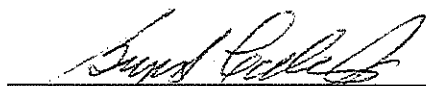
PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



Carl E. Denson, Chairperson

ATTEST:



Gregory J. Celia Jr., Secretary