COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LEONARD E. WILLIAMS, Complainant

v.

DR. CARY A. DAVIDSON, M.D., Respondent
PHRC Case No. 200100977

and

POCONO MOUNTAIN SCHOOL DISTRICT, Respondent
PHRC Case No. 200100979

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STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. The Complainant herein is Leonard E. Williams (hereinafter "Complainant").

2. The Respondents herein are Pocono Mountain School District (hereinafter "Pocono") and Dr. Carr A. Davidson, M.D (hereinafter "Dr. Davidson").

3. The Complainant is a competent adult male.

4. Pocono, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.

5. On October 25, 2001, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Pocono at PHRC No. 200100979. A CJPY of the complaint wii1 be included as a docket entry in this case at time of hearing.

6. On October 25, 2001, the Complainant filed a verified complaint with the Commission against Dr. Davidson at PHRC No. 200100977. A copy of the complaint will be included as a docket entry in this case at time of hearing.

7. On January 24, 2002, Pocono filed an answer to the complaint at PHRC No. 200100979. A copy of the answer will be included as a docket entry in this case at time of hearing.

8. Pocono's submission of January 24, 2002, included two statements signed by Dr. Davidson that Commission staff treated as Davidson's answer to the complaint at PHRC No. 200 1 00977.

9. On February 4, 2002, Pocono filed a Motion to Dismiss.

10. The service packets tor the PHRC complaints served on Pocono and Dr. Davidson included a "Notice of Fact Finding Conference" that scheduled a Fact Finding Conference for February 12, 2002.

11. The fact-finding conference was cancelled by the Commission and no fact-finding conference was ever held.

12. By correspondence dated June 24, 2002, the Commission extended offers to both Pocono and Dr. Davidson .to participate in a mediation process to resolve the cases.

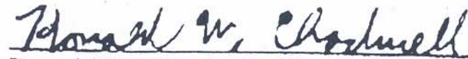
13. On May 19, 2005, PHRC Commission staff filed a response to Pocono's Motion to Dismiss.

14. PHRC Motions Commissioner Raquel Otero de Yiengst issued an Interlocutory Order on May 21, 2005, that denied Pocono's Motion to Dismiss.

15. In correspondence dated October 12, 2005, Commission staff notified the Complainant, Pocono and Dr. Davidson that probable cause existed to credit the allegations found in both complaints.

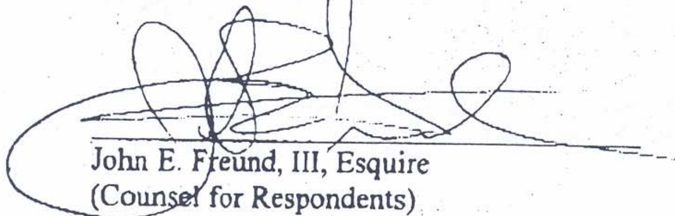
16. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matters in dispute among the parties by conference, conciliation and persuasion but was unable to do so.

17. In correspondence dated February 27, 2006, the Commission notified the Complainant, Pocono and Dr. Davidson that a public hearing had been approved.



Ronald W. Chadwell, Esquire
PHRC Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

Date



John E. Freund, III, Esquire
(Counsel for Respondents)

Date

SECOND SET OF STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required. (This set of stipulations supplements the first set of stipulations previously agreed-upon.)

1. Complainant earned $390.00 from employment in 2001 subsequent to his employment application being rejected by Pocono Mountain School District.

2. Complainant earned $6,316.00 from employment in 2002.

3. Complainant earned $7,642.00 from employment in 2003.

4. Complainant earned $16,647.00 from employment in 2004.

5. Complainant earned $18,603.11 from employment in 2005.

6. Complainant earned $11,029.63 from employment during the period of January 1, 2006, through July 20, 2006.

7. Under the terms of the applicable collective bargaining agreement, Complainant would have earned the following hourly rate at the Pocono Mountain School District for the basic work year of 180 "guaranteed" work days for the indicated school years:

2001-02	$12.10/hour
2002-03	$12.45/hour
2003-04	$12.80/hour
2004-05	$13.15/hour
2005-06	$13.68/hour
2006-07	$14.22/hour.

8. The “substitute” rate for Pocono Mountain School District’s school bus drivers for the 2001-02 school year was $10.00/hour.

Ronald W. Chadwell, Esquire
PHRC Assistant Chief Counsel
(Counsel for the Commission in support of the complaint)

John E. Freund, III, Esquire
(Counsel for Respondents)

FINDINGS OF FACT

1. The Complainant, Leonard E. Williams, (hereinafter "Williams") worked in New York State as a school bus driver between April 1988 and August 1995. (N.T. 28-29)
2. In August 1995, Williams drove for a trucking company. (N.T. 29-30)
3. Through January 2001, Williams had also been driving a school bus in New York State for Hudson Valley Bus. (N.T. 32, 53, 63; CE 4)
4. Williams testified that he never experienced any problems safely driving school buses in New York. (N.T. 30)
5. In order to drive school buses in New York State, Williams had to pass a physical examination. (N.T. 73)
6. In January 2001, Williams applied for a school bus driver position with Respondent Pocono Mountain School District (hereinafter "Pocono"). (N.T. 28; CE 1)
7. In 2001, Pocono was in need of school bus drivers. (N.T. 117)
8. In February 2001, Williams began a 20-hour bus driver study program with Pocono. (N.T. 33, 178, 243)
9. The 20-hour program included 14 hours of classroom study and 6 hours of driver training. (N.T. 185)
10. As a part of Pocono's instructional program, Pocono appointed drivers to take prospective drivers on the road to evaluate their driving skills. (N.T. 33, 34)
11. On April 10, 2001, Williams passed a bus driver skills test given by Pocono. (N.T. 243)
12. Subsequently, Williams took and passed a Pennsylvania Department of Motor Vehicles school bus driving test which allowed an "S" endorsement to be included on Williams' Pennsylvania driver's license. (N.T. 34, 35)
13. An "S" endorsement on a driver's license indicates that an individual may drive a school bus. (N.T. 35)
14. At the time of his application to Pocono, Williams' personal physician was Charles S. Deck, M.D. (hereinafter "Dr. Deck"). (N.T. 37, 64, 67; C.E. 11)
15. Williams had been Dr. Deck's patient from 1997 to February 8, 2001. (N.T. 64)
16. In April/May 1998, Dr. Deck diagnosed Williams with diabetes. (N.T. 37)
17. When Williams was 18 or 19, his right hand and arm were injured in an industrial accident. (N.T. 67)
18. The industrial accident injury to Williams' right arm and hand required approximately four weeks of hospitalization. (N.T. 67, 68; supplemental photos)
19. While a patient of Dr. Deck, Williams asked Dr. Deck to sign a medical certificate that Williams believed would medically qualify him to drive a school bus. (N.T. 65)
20. Dr. Deck declined telling Williams that he was not sufficiently familiar with the state Department of Transportation's qualifications and that Williams should go to a doctor who had such familiarity. (N.T. 65, 66)
21. To become a Pocono school bus driver, an applicant had to undergo a physical examination by Pocono's school transportation physician.
22. School bus driver physicals are required by 67 Pa. Code §71.3 (R.E. 8)
23. 67 Pa. Code §71.3(b)(3) states in pertinent part:

    A person is physically qualified to drive a school bus if the person: [h]as no impairment of...[a] hand or finger likely to impair prehension or power grasping...[a]n arm...likely to impair the ability to perform normal tasks associated

> with driving a school bus...[a]nother significant limb defect or limitation likely to impair the ability to perform normal tasks associated with driving a school bus...(R.E. 8)

24. 67 Pa. Code §71.3(b)(4) states:

    > A person is physically qualified to drive a school bus if the person...[h]as no established medical history or clinical diagnosis of diabetes mellitus currently requiring use of insulin or other hypoglycemic medication. (R.E. 8)

25. For 17 continuous years, Pocono employed Respondent Dr. Cary A. Davidson, (hereinafter "Dr. Davidson") as an independent contractor to be Pocono's school transportation physician. (N.T. 77, 78, 79, 149)
26. Dr. Davidson has been a licensed doctor in the area for 21 years. (N.T. 76-77)
27. Dr. Davidson was paid a lump sum to do all of Pocono's physicals. (N.T. 79)
28. On May 8, 2001, Dr. Davidson gave Williams a bus driver physical. (C.E. 2)
29. Williams discussed with Dr. Davidson the injury to his right arm and how the injury occurred as a teenager. (N.T. 38)
30. As part of Dr. Davidson's examination, he had Williams hold Dr. Davidson's fingers so Dr. Davidson could assess Williams' grip strength. (N.T. 43, 86,118-119)
31. Dr. Davidson did not have any equipment to measure Williams' grip strength. (N.T. 119)
32. Dr. Davidson testified that, although not qualified to measure grip strength, he purported to test Williams' grip strength. (N.T. 119)
33. Dr. Davidson noted that Williams' injury was to his dominant hand and arm. (N.T. 107)
34. During the physical examination, Dr. Davidson informed Williams that there was a very good chance that Williams would not be hired. (N.T. 125)
35. Dr. Davidson further told Williams that he would not be surprised if Williams could find other doctors from other school districts that would qualify Williams. (N.T. 98-99, 125)
36. Williams also informed Dr. Davidson that he had Type II diabetes and that his diabetes was controlled by diet. (N.T. 36)
37. Upon being told this, Dr. Davidson asked Williams to facilitate getting Williams' medical records from Dr. Deck. (N.T. 36)
38. Dr. Davidson wanted Dr. Deck's medical records to review Williams' history of Type II diabetes. (N.T. 89)
39. Approximately three weeks later, Dr. Davidson did receive Williams' medical records from Dr. Deck. (N.T. 90, 109-110)
40. Dr. Davidson noted two main problems with Dr. Deck's records: They were illegible and information he expected to find was not included. (N.T. 91)
41. Dr. Davidson did not contact Dr. Deck in an effort to alleviate the problems he noted with Dr. Deck's records. (N.T. 92)
42. On May 29, 2001, Dr. Davidson issued his report listing his rationale for failing to medically certify Williams for a school bus driver position. (C.E. 2)
43. Dr. Davidson testified that his decision to not certify Williams was based on his perception of the requirements of 67 Pa. Code §71.3. (N.T. 108)

44. Dr. Davidson's report incorrectly indicated that Williams "is missing fingers", even though Williams has all of his fingers. (N.T. 45; C.E. 2)
45. Dr. Davidson's report referenced both Williams arm and hand injury and commented on Williams' diabetes. (C.E. 2)
46. Dr. Davidson's report informed Pocono that Dr. Davidson observed "fexion contractures, scarring and very reduced ability to use the right arm." (C.E. 2)
47. Further, the report generally concluded that Dr. Davison found Williams unqualified to drive a school bus "based upon his severe deformity of his right arm and hand." (C.E. 2)
48. Dr. Davidson's report offered his opinion that "it is necessary that he have good strength of his arm in order to operate the bus door and in order to handle the steering wheel, and in order to help or assist disabled or injured students from the bus." (C.E. 2)
49. Dr. Davidson's report then concludes that Williams "certainly does not have the strength, sensation, or orthopedic ability to handle such tasks," and that Dr. Davidson did "not see any possible way in which this disability with his arm could be overcome." (C.E. 2)
50. With respect to Williams' diabetes, in effect, Dr. Davidson's report informed Pocono that both Williams and his doctor told Dr. Davidson that Williams' diabetes was controlled with a diet alone and that Williams did not require any hypoglycemic medications. (C.E. 2)
51. Dr. Davidson's report further commented that he found this hard to believe and that he had "absolutely no way to verify this..." (C.E. 2)
52. After drafting his report disqualifying Williams, Dr. Davidson called Williams to inform him that he was not qualified to drive a school bus for Pocono. (N.T. 44, 124)
53. Pocono always accepted Dr. Davidson's reports at face value and never questioned the content or rationale found in his reports. (N.T. at 231-232)
54. Pocono accepted Dr. Davidson's report of Williams' physical examination at face value without questioning any of Dr. Davidson's conclusions. (N.T. at 233)
55. The condition of Williams' right hand and arm does not substantially impair his ability to drive a school bus. (N.T. at 45)
56. At the time Dr. Davidson examined him, Williams had already been given an "S" endorsement on his license and could legally drive a school bus in Pennsylvania. (N.T. at 45)
57. Pocono refused to hire Mr. Williams as a school bus driver. (N.T. at 28)
58. Pocono's policy placed responsibility for determining whether a school bus driver is medically qualified solely with Dr. Davidson. (N.T. at 243-244)
59. 67 Pa. Code §71.3 specifically affords individuals with the opportunity to go to the Pennsylvania Department of Transportation to seek a waiver of medical disqualifications. (N.T. 129)
60. In effect, under Pocono's procedures, Dr. Davidson's opinion superseded any medical waiver a school bus driver applicant may have been granted by PennDOT. (N.T. at 261-262)
61. Had Dr. Davidson qualified Williams to drive a school bus at the time of Williams' examination on May 8, 2001, Pocono would have placed Williams on its substitute drivers' list in June, 2001. (N.T. at 245)

62. In November 2001, Williams obtained a job with Ricky Haldaman Busing driving a school bus for the Wallenpaupack School District and continued to drive a school bus through sometime in 2004. (N.T. at 47-48)
63. Williams did not experience any difficulties driving a school bus during the time he was employed by Ricky Haldaman. (N.T. at 48-49)
64. At the time of the Public Hearing, Williams continued to drive a passenger bus for Monroe County Transit and has been doing so since sometime in 2002. (N.T. at 49-50, 55)
65. Dr. Raymond J. Felins, M.D. (hereinafter "Dr. Felins"), testified via a trial deposition.
66. Dr. Felins is licensed by the Commonwealth of Pennsylvania to practice medicine and maintains an ongoing medical practice in Mt. Pocono, Pennsylvania. (CE 12 at 8-9)
67. Williams became a patient of Dr. Felins on February 27, 2001. (CE 12 at 10)
68. Dr. Felins signed a PennDOT "School Bus Driver's Physical Examination" on February 27, 2001, certifying that Mr. Williams was physically qualified to drive a school bus. (CE 12 at 11-12)
69. Dr. Felins also signed a PennDOT "Physical Examination Certificate" card on March 8, 2001. (CE 12 at 10-11)
70. Prior to signing these two documents, Dr. Felins performed a complete physical examination of Williams. (Felins Depo. at 12)
71. As part of his physical examination, Dr. Felins took a complete medical history and thoroughly examined Williams starting with Williams' vital signs, blood pressure, temperature, pulse, and then examining Williams' head, eyes, ears, nose, throat, neck, heart and lungs, abdomen and extremities. (CE 12 at 12-13)
72. Dr. Felins also performed a neurological examination. (CE 12 at 13)
73. Dr. Felins had Williams move his hands, fingers, wrists, elbows, shoulders, general movements and then tested his grip strength. (CE 12 at 15)
74. After physically examining Williams, Dr. Felins concluded that Williams had adequate strength in his lower and upper extremities including his hand. (CE 12 at 14)
75. Dr. Felins further concluded that Williams had no significant impairment of his lower and upper extremities including his hand. (CE 12 at 14)
76. Dr. Felins concluded within a reasonable degree of medical certainty that Williams had "no loss or impairment of the use of a foot, a leg, a hand or an arm" as required by qualification standard "A" of the PennDOT School Bus Driver's Physical Examination form. (CE 12 at 2, Deposition Exhibit #3)
77. Dr. Felins also concluded that Williams' diabetes did not disqualify him from driving a school bus under the PennDOT form's qualification standard "B1" because at the time Dr. Felins signed the form, Williams was taking neither insulin nor any other hypoglycemic medication but was, rather, controlling his diabetes through diet alone. (CE 12, 15-16; Deposition Exhibit #3)
78. On June 28, 2001, Dr. Felins wrote a letter for Williams in which he refuted the findings of Dr. Davidson's report of May 29, 2001. (CE 12, Deposition Exhibit #4)
79. In Dr. Felins' opinion, the statement Dr. Davidson made in his report of May 29, 2001, that he found it difficult to believe that Williams controlled his diabetes through diet alone was not a reasonable statement for a physician to have made. (CE 12 at 25-26)

80. In Dr. Felins' opinion, the statements Dr. Davidson made in his report of May 29, 2001, that Williams was disqualified from driving a school bus by the condition of his right hand and arm was not a reasonable statement for a physician to have made. (CE 12 at 28-31)
81. Dr. Felins testified that Mr. Williams had a good mobility of his right upper extremity and good strength in his right hand that rendered Mr. Williams able to "handle a steering wheel, open and close the bus door, and...help injured or disabled students off a bus." (CE 12 at 28-29)
82. In Dr. Felins' opinion, the statements Dr. Davidson made in his report of May 29, 2001, that Mr. Williams was "possibly" disqualified to drive a school bus by his history of diabetes was not a reasonable statement for a physician to have made. (CE 12 at 32)
83. Dr. Charles S. Deck, M.D., testified via a trial deposition. (CE 11)
84. During the time Dr. Deck was Williams' physician, he considered Mr. Williams' diabetes to have been well-controlled with diet. (CE 11 at 33)
85. Had Pocono hired Williams in 2001, he would have been a "substitute" driver for the first four weeks of his employment. (N.T. at 238)
86. Williams would then have become a permanent driver. (N.T. at 238)
87. Williams would have worked a seven-and-a-half hour day for 180 days each school year. (N.T. at 238; CE 10)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of these consolidated cases.
2. The parties have fully complied with the procedural prerequisites to a public hearing in these cases.
3. Williams is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Dr. Davidson is a person subject to Section 5(e) of the PHRA.
5. Williams has not proven that Davidson incited, compelled or coerced Pocono to initiate Section 5(a) of the PHRA.
6. Pocono is an employer with the meaning of the PHRA.
7. Williams has met his initial burden of establishing a *prima facie* case by proving that:
    a. he has a disability with the meaning of the PHRA;
    b. he applied for a position for which he was otherwise qualified;
    c. his application was rejected because of his disability; and
    d. Pocono continued to seek applicants of equal qualifications.
8. Williams is a disabled person with the meaning of the PHRA and applicable regulations.
9. Pocono failed to establish that Williams' finger, hand and arm impairment was job-related.
10. Pocono's reliance on Dr. Davidson's recommendation was not reasonable under the circumstances.

OPINION

These consolidated cases arises on complaints filed by Leonard E. Williams (hereinafter "Williams") against Dr. Cary A. Davidson, M.D. (hereinafter "Dr. Davidson"), on or about October 20, 2001 at PHRC Case Number 200100977, and against Pocono Mountain School District, (hereinafter "Pocono"), also on or about October 20, 2001. In his complaint against Dr. Davidson, in effect, Williams contends that because of Williams' diabetes and right arm impairment, Dr. Davidson influenced Pocono's decision not to hire Williams. In his complaint against Pocono, Williams alleged that Pocono refused to hire him as a school bus driver because of his race, national origin and non-job related disability.

In effect, Williams claims that Dr. Davidson's actions violated Section 5(e) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA"), and that Pocono's refusal to hire him violated Section 5(a) of the PHRA.

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted investigations of both claims and found probable cause to credit the allegations of discrimination against Dr. Davidson and Pocono. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful and these cases were approved for public hearing. The case against Pocono proceeded on the disability claim only as Williams' other claims were abandoned.

The Public Hearing was held on August 1, 2006, in Stroudsburg, Pennsylvania before a three member panel of Commissioners: M. Joel Bolstein, Panel Chairperson; Raquel Otero de Yiengst and Daniel L. Woodall, Jr., Panel Members. The State's interest in the allegations was presented by PHRC Assistant Chief Counsel Ronald W. Chadwell and both Dr. Davidson and Pocono were represented by John E. Freund, III, Esquire. Post-hearing briefs were submitted by the parties. The post-hearing brief on behalf of the complaint was received on October 2, 2006 and the Respondent's post-hearing brief was received on October 4, 2006. On October 19, 2006, Attorney Chadwell filed a reply brief and on October 24, 2006, Attorney Freund's reply brief was received.

Initially, I will address Williams' claim against Dr. Davidson. Section 5(e) of the PHRA states in pertinent part:

> "It shall be an unlawful discriminatory practice...[f]or any person...to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice."

The post-hearing brief on behalf of the complaint argues that Dr. Davidson "incited, compelled and or coerced Pocono to violate Section 5(a)." The post-hearing brief on behalf of the complaint then states: "Dr. Davidson violated the Act when he assumed, without performing an adequate physical examination, that Mr. Williams was unqualified to drive a school bus." In effect, the brief on behalf of the complaint attempts to equate the adequacy of

a physical to an action that incites, compels or coerces an employer that utilizes the services of a doctor to perform pre-employment physicals.

In the case of Action Industries v. PHRC, 518 A. 2d 610, 613 (Pa. Cmwlth. 1986), the court declared that in cases involving disability claims, an employer can not always insulate itself by having a physician "sign off" on hiring decision. Instead, Complainants have the opportunity to attempt to establish that an employer's reliance on a doctor's opinion was unreasonable under the circumstances.

Here, Dr. Davidson conducted a Pa. Code required physical and then submitted a report to Pocono indicating his reasons to deny Williams the medical certification necessary to drive a school bus. Such a report is not dispositive of whether a prospective employee can be hired. In the case of Holiday v. City of Chattanooga, 206 F. 3d 637, 10 A.D. Cases 502 (6th Cir. 2000), applicants for police positions were required by law to pass a physical examination. The Circuit Court in Holiday held that a doctor's opinion does not settle the question of whether an applicant is qualified for a job. Employers are responsible to independently evaluate the objective reasonableness of a doctor without deferring to the doctor's judgment. (Id at 645.)

In other words, Dr. Davidson neither incited, compelled or coerced Pocono's ultimate action in refusing to hire Williams for a bus driver job. Pocono was ultimately responsible to assess Dr. Davidson's medical report and make an independent judgment. In Taylor v. Pathmark Stores, Inc., 177 F. 3d 180, 192 (3rd Cir. 1999), the Third Circuit declared that, "it is an employer's burden to educate itself about the varying nature of impairment and to make individualized determinations about affected employees."

Since Dr. Davidson cannot be held to have incited, compelled or coerced Pocono, the complaint against Dr. Davidson should be dismissed.

This brings me to Williams' claim against Pocono. Of course, the ultimate question arising from the substance of Williams' disability allegation is whether Pocono's rejection of Williams' application to be a school bus driver violated the PHRA.

Section 5(a) of the PHRA provides in relevant part:

> "It shall be an unlawful discriminatory practice...for any employer because of the...non-job-related handicap or disability...of any individual to refuse to hire or employ...such individual, or to otherwise discriminate again such individual...with respect to compensation, hire, tenure, terms, conditions or privileges of employment,...if the individual...is the best able and most competent to perform the services required..."
>
> (43 P.S. 955 (a).)

Sections 4(p) and 4(p)(1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states:

"The term "non-job-related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in..."

Section 4(p)(1) states:

The term "handicap or disability", with respect to a person, means:

(1) a physical or mental impairment which substantially limits on or more of such person's major life activities;
(2) a record of having such an impairment; or
(3) being regarded as having such an impairment...

(43 P.S. 954(p) and (p.1).)

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which provide:

Handicapped or disabled person includes the following:

(i) A person who:

(A) has a physical or mental impairment which substantially limits one or more major life activities; has a record of such an impairment; or
(B) 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 of more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or 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 such an impairment" means has a physical or mental 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 having such an impairment.

(16 Pa. Code §44.4)

Non-job-related handicap or disability includes:

(i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in, or has been engaged in.
(ii) Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a handicap or disability job-related.
(iii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employee or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.
(iv) A handicap or disability may be job-related if placing the handicapped or disabled employee or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

(16 Pa. Code §44.4)

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 621, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The burden of proof applicable to this case was set forth by Pennsylvania's Commonwealth Court in National Railroad Passenger Corporation (AMTRAK) v. PHRC, 70 Pa. Commonwealth Ct. 62, 452 A.2d 301 (1982). Williams must first make out a *prima facie* case by proving:

1. That he has a disability within the meaning of the PHRA and applicable regulations at the time of the action he challenges;
2. That he applied for a position for which he was otherwise qualified;
3. That his application was rejected because of his disability; and,
4. That Pocono continued to seek qualified applicants.

Generally, Pocono's first argument is that Williams is unable to establish a *prima facie* case. Pocono's arguments in this regard focus on two assertions: that Williams has failed to establish he has a non-job-related disability and that Williams cannot establish that he was qualified for the position of school bus driver.

The record in this case generally reveals that, medically speaking, Williams' right arm and hand were severely injured in an industrial accident when he was a teenager. Additionally, Williams has diabetes. With regard to the first prong of the requisite *prima facie* showing, the question here is, was either Williams' arm and hand injury or diabetes a disability within the meaning of the PHRA?

The brief on behalf of the complaint argues that Williams' hand and arm were "regarded as" a disability and that Williams' diabetes, considered in an unmitigated state, would have dire medical consequences. Conversely, Pocono asserts that Williams' hand and arm injury was not regarded as substantially limiting the major life activity of working. Further, Pocono suggests that Williams' diabetes was controlled by diet.

On the "regarded as" question, Pocono asserts that there is no evidence that Williams was regarded as being unable to perform a wide range or class of job. See Williams v. Philadelphia Housing Authority Police Department, 15 A.D. Cases 1607, 1620 (3rd Cir. 2004). On the contrary, not only was Williams considered disqualified from driving a school bus, Dr. Davidson testified that he would have also disqualified Williams from driving trucks for Roadway. (N.T. 132). Considering Williams to have been generally disqualified from driving trucks suffices to establish a "regarded as" claim. Williams was considered as unable to perform a wide range or class of job, thus he was "regarded as" being substantially impaired in the major life activity of working.

On the question of whether diabetes is a disability, the PHRC brief on behalf of the complaint correctly observes that the PHRC has adopted a policy that considers conditions in their unmitigated state when assessing whether the condition substantially limits a major life activity. See i.e. Dahill v. Police Department of Boston, 748 N.E. 2d 956, 963, 11 AD Cases 1377 (Mass. 2001).

Indeed, diabetes is a physiological disorder that has the potential to detrimentally affect numerous body systems. Accordingly, under the PHRA, diabetes must be considered a disability.

Pocono next argues in the alternative that Williams' hand and arm injuries are job-related because Williams' condition poses an appreciable threat of harm to others. Pocono focuses on the fact that the lives and health of young children are implicated when considering who may drive a school bus. Pocono cites 67 Pa. Code §71.3 and submits that this provision exists to protect the health and safety of children riding on school buses. Pocono references those portions of the Pa. Code that relate both to Williams' hand and arm and his diabetes. In doing so, Pocono only references the listed impairments of a hand or arm. Pocono does not reference those portions of the Pa. Code that provide for obtaining waivers of the Code disqualification if an individual can demonstrate their competency through a driving examination.

In other words, having a listed impairment under 67 Pa. Code §71.3 (b)(3) does not automatically make that impairment job related. Individuals who are able to demonstrate competency to drive a school bus despite an impairment would be granted a waiver of the requirements of 67 Pa. Code §71.3(b)(3). Here, this question is left unresolved. Accordingly,

Pocono has not sufficiently established that Williams' impairment of his hand and arm poses an appreciable threat of harm to others.

Next, Pocono submits that Williams cannot establish that he was "qualified" to be a bus driver. In effect, Pocono asserts that 67 Pa. Code §71.3(c) requires medical certification by Pocono's chosen transportation physician, Dr. Davidson, as a requisite qualification to drive a school bus. Because Dr. Davidson did not issue Williams the requisite certificate, Pocono urges a finding that Williams was unqualified.

In a case very similar to the present case, EEOC v. Texas Bus Lines, 5 AD Cases 878 (SD Texas 1996), an employer argued that an applicant for a bus driver job was not "qualified" because the applicant had not been medically certified as required by federal Department of Transportation regulations. Generally, the court found that failing to receive the requisite medical certification did not render the applicant "unqualified" for the purpose of establishing this element of a *prima facie* case. The court observed that the applicant had more than enough qualifications that the applicant would have been hired but for failing to pass the requisite physical examination. Further, in reviewing the applicable Department of Transportation regulations, the applicant's condition was not a per se disqualifying condition. Id at 885, citing Daugherty v. City of El Paso, 56 F.3d 695, 4 AD Cases 993 (5th Cir. 1995), and Chandler v. City of Dallas, 2 f.3d 1385, 2 AD Cases 1326 (5th Cir. 1993). Accordingly, the court found the applicant was a "qualified individual" despite the fact that the applicant was not given the required medical certification.

In the present case, for the limited purpose of assessing whether Williams was "qualified", the fact that Dr. Davidson refused to medically certify Williams does not automatically result in a failure to establish this component of a *prima facie* case. Instead, we note that Williams had successfully completed both class room instruction and a skills assessment. Williams also had taken and passed the Pennsylvania Department of Transportation's driving test and been given an "S" endorsement to his license. Williams had successfully demonstrated his ability to drive a school bus both before and after his rejection by Pocono. This temporal bracketing is fairly strong circumstantial evidence that Williams was qualified to drive a school bus. Further, as impairments of the hand and arm are not per se disqualifying conditions under 67 Pa. Code §71.3, but are subject to waiver when an individual can demonstrate their driving competency despite an impairment, Williams' hand and arm injury cannot be considered automatically disqualifying. Accordingly, for the limited purpose of meeting the requisite *prima facie* showing Williams' has sufficiently established that he was "qualified."

There is no apparent dispute that Williams can establish the remaining elements of the requisite *prima facie* showing. Accordingly, I turn to the heart of Williams' case against Pocono. Pocono correctly observes that Pocono has articulated a legitimate non-discriminatory reason for failing to hire Williams. The burden in this regard is simply a production burden. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 62 FEP 96 (1993). To prevail, Williams must show that Pocono's reasons are pretextual and that a discriminatory reason was the real reason Williams was not hired.

In its post-hearing brief, Pocono references the 1993 PHRC opinion of Welker v. City of Pittsburgh, Department of Personnel and Civil Service Commission, PHRC Docket No.

E35007D, April 7, 1993, and argues that Pocono reasonably relied on Dr. Davidson's medical report recommending Williams' disqualification from driving a school bus. As we found in Welker, reliance on a doctor's opinion and recommendation as the basis for a refusal to hire sufficiently articulates a legitimate non-discriminatory reason for an adverse action. Clearly, Pocono relied on Dr. Davidson's report and having done so, Pocono articulated a legitimate non-discriminatory reason for not hiring Williams.

In effect, the PHRC post-hearing brief on behalf of the complaint poses two principal arguments: that it was not reasonable for Pocono to accept Dr. Davidson's report; and that Pocono should have engaged Williams in an interactive process.

On the issue of whether Pocono can be found to have failed to engage Williams in an interactive process, I have reviewed the case of Canteen Corporation v. PHRC, 814 A.2d 805 (Pa. Cmwlth. Ct. 2003). In Canteen, the court considered the general question of when an employer needs to participate in an informal, interactive process to ascertain whether a reasonable accommodation can be found for a given disability. Importantly, the court stated, "once an employee asks for a reasonable accommodation due to a disability, the employer has an obligation to initiate an interactive process with him or her aimed at determining the disabled employee's limitations and any possible way of accommodating them." Id at 812.

Here, Williams never asked Pocono to consider a reasonable accommodation. Had he, the record establishes that Pocono would have either attempted to seek an accommodation or suggested alternative positions. (N.T. 218, 233, 249, 250, 251, 260, 261). Because Williams failed to take the initiative and seek an accommodation, Pocono had no independent duty to engage Williams in an interactive process.

The remaining argument found in the post-hearing brief on behalf of the complaint submits that it was not reasonable for Pocono to have acted on Dr. Davidson's report. In effect, the brief on behalf of the complaint suggests that Pocono violated the PHRA when it "slavishly" accepted Dr. Davidson's report without considering its "objective reasonableness." Numerous cases are cited that deal with instances where an employer's reliance on a doctor's report was found to be unreasonable. After reviewing these cases, I conclude that, under the circumstances present here, Pocono's reliance upon Dr. Davidson's report was not reasonable.

I begin my analysis with the seminal case in Pennsylvania on this issue. In Action Industries, Inc. v. PHRC, 518 A.2d 610 (Pa. Cmwlth Ct. 1986), the court reviewed a situation where an employer had relied on the opinion of a medical expert in deciding not to hire an applicant. As a general principle, the court stated, "an employer can have a good-faith defense which negates its intent to discriminate where it *reasonably* relies upon the opinion of a medical expert in refusing to hire an applicant." Id al 613. The Court went on to note that a Complainant could still show that reliance upon the doctor's opinion was unreasonable under the circumstances. For instance, there would be a question or reasonableness where an employer paid a doctor only if a prospective employee was found unsuitable, or where an employer advised the doctor to declare an otherwise protected group unfit. The court further recognized that it is virtually certain that, except in the most extreme cases, contradictory medical opinions will exist, and that just because a Complainant can find a doctor to contradict the employer's doctor, this factor should not give

rise to liability. The issue is what facts are available to an employer at the time of the decision not to hire.

Indeed, the critical question in this case is whether Pocono's refusal to hire Williams resulted from an objectively reasonable informed and considered decision that was based on appropriate criteria or from unreasonable assumptions made without a good-faith assessment of Williams' actual capabilities? Beyond the principles found in Action Industries, I have chosen to draw from legal principles found in four additional cases as I contemplate this question. These cases are: EEOC v. Texas Bus Lines, 5 AD. 878 (S.D. TX. 1996); Holiday v. City of Chattanooga, 206 F-3d 637, 10 AD. 502 (6th Cir. 2000); Gillen v. Fallon Ambulance Service, Inc., 12 AD. 1633 (1st Circ. 2002); and Rodriguez v. Conagra Grocery Products Co., 436 F 3d 468, 17 AD. 790 (5th Cir. 2006).

In EEOC v. Texas Bus Lines, an individual applied for a position of passenger van driver that required transporting passengers between local hotels and an airport. After being interviewed and references checked, the applicant was given a road test in a vehicle identical to the one that would be driven if hired. After the applicant passed the road test, the bus line asked the applicant to undergo a federally required physical examination. The examining doctor, who had been doing such exams for over 40 years, refused to issue the required medical certification concluding the applicant was morbidly obese and would not be able to move swiftly enough in an accident situation.

Finding that both the examining doctor and the company perceived and mistakenly believed the applicant's obesity disqualified the applicant, the court held the employer liable for refusing to hire the applicant. Under the applicable federal regulations, obesity, in and of itself, did not per se disqualify an individual from being medically certified. The court found that the employer's knowledge of the regulations rendered its reliance on the doctor's failure to qualify the applicant unreasonable.

The doctor's opinion was described by the court as erroneous, faulty and unsupported by objective medical findings. Reliance on such an opinion was found to be both improper and in violation of the ADA. Knowing the regulatory provisions, the company was on notice that the doctor's findings were inconsistent with the applicable Federal regulations. The company's decision not to hire was also found to have been made without the benefit of objective medical testing or findings. Instead the company's blind reliance on a very limited medical examination and an erroneous medical opinion was deemed wholly unreasonable. The court also noted that it is significant that the company was aware the applicant had successfully passed the road test administered by the company.

In the case of Holiday v. City of Chattanooga, 206 F.3d 637, 10 AD 502 (6th Cir. 2000), an individual who had experience as a police offer with several other jurisdictions was refused a position as a police officer because he was infected with HIV. After passing both a written exam and a strenuous physical agility test, the applicant was interviewed and given a conditional offer of employment subject to passing a statutorily required physical examination.

At the physical examination, the applicant voluntarily informed the examining doctor that he was infected with HIV. In effect, the doctor's medical report suggested the applicant suffered from AIDS related health problems and was physically unable to perform the duties of a police officer because he was not strong enough to withstand the rigors of police work.

The court noted that the record contained no evidence that the examining physician attempted to determine whether the applicant actually experienced fatigue, sluggishness, shortness of breath or any other symptom of physical weakness or lack of endurance. Under the ADA, an individualized inquiry is mandated. People with disabilities ought to be judged on relevant medical evidence and the abilities they have, not on unfounded fear, prejudice, ignorance or mythologies. Citing Smith v. Chrysler Corp., 155 F. 3d 799, 805 (6th Cir. 1998). Further, the court referenced Taylor v. Pathmark Stores, Inc., 177 F.3d 180, 193 (3rd Cir. 1999), where it was noted that, "it is the employer's burden to educate itself about the varying nature of impairment and to make individualized determinations about affected employees."

In Holiday, the court observed that the applicant presented significant evidence that he was qualified to be a police officer. He had successfully performed the job of police officer in several other jurisdictions. He passed the employer's strenuous physical agility test and had served as a police officer without limitations on his ability to perform the job requirements. Also, after being denied the job, he passed a physical examination for a police officer position given by another doctor and was hired as a police officer.

The court in Holiday termed the medical report used to reject the applicant as "unsubstantiated and cursory". If a doctor's opinion is neither based on the requisite individualized inquiry nor supported by objective scientific and medical evidence, a court need not defer to it. Instead, a court should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments. Citing Bragdon v. Abbott, 524 U.S. 624 (1998). The court also opined that, "employers do not escape their legal obligations...by contracting out certain hiring and personnel functions to third parties." Nothing prevented the employer from seeking a second opinion or sending the applicant back for further testing.

The next case from which useful principles can be borrowed is the case of Gillen v. Fallon Ambulance Service, Inc., 12 AD 1633 (1st Cir. 2002). Gillen is a genetic amputee with only one functioning arm who was denied an EMT position by Fallon Ambulance Service. After college, as an aspiring doctor, Gillen took the interim step of seeking employment as an EMT. Gillen enrolled in a prepatory course and after 110 hours of course work, she took and passed an exam composed of both written and practical applications. Being certified, Gillen applied to become an EMT with Fallon. Gillen was interviewed and offered employment as an EMT, conditioned upon Gillen passing a physical examination.

Initially, Gillen was examined by a doctor who decided that further review of Gillen's strength and ability to lift was needed before he could make a judgment on her qualifications. However, before any tests were run, the doctor's supervisor stepped in and offered the opinion that Gillen could not perform the essential functions of an EMT and thus could not pass the pre-employment examination. The supervising doctor considered further testing unnecessary and filed a report

that basically declared that Gillen could perform all essential job functions of EMT except two handed lifting.

Subsequently, Gillen applied for an EMT position with another employer. That employer agreed to hire Gillen on the condition she pass a strength test. After a few weeks of weightlifting training, Gillen passed the required test and was hired as an EMT where she performed the job successfully without any special accommodations.

The court observed that there is a fine line between permissible and impermissible decision making. While employment decisions based on stereotypes about a disability are prohibited, decision making based on actual attributes of a disability are allowed. Citing Pesterfield v. Tenn. Valley Auth., 941 F.2d 437 (6th Cir. 1991). Employers cannot insulate themselves from liability merely by asserting an honestly held belief that a prospective employee's disability will limit the ability to do a job. Citing Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40 (1st Cir. 2002). To avoid liability, evidence must show that the employer understood the nature, extent, and implications of a particular impairment, and that an employment decision reflected that understanding. If an employer's assumptions about an applicant's disability are unreasonable, or are not based upon a good-faith assessment of an applicant's capabilities and ultimately prove to be groundless, a refusal to hire will engender liability. Citing Smith v. Chrysler Corp., 155 F.3d 799 (6th Cir. 1998).

In Gillen, the applicant's lifting capability was never fully tested. The court observed that such an examination was vital to an understanding of Gillen's ability to perform requisite duties. The court further stated that a fact finder could conclude that, absent such testing, the rejection of Gillen was based on a stereotype about one-handed persons.

Gillen's successful completion of the practice portion of the EMT certification exam and Gillen's ultimate success in holding EMT positions with two employers could support a finding that Fallon's negative assumptions were both based on an unfounded stereotype and inaccurate.

When Fallon attempted to rest upon its good-faith reliance on the doctor's report, the court noted that a physician's endorsement does not automatically provide complete insulation. Instead, the objective reasonableness of the views of health care professionals should be assessed. "An employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions."

In the case of Rodriguez v. Conagra Grocery Products Company, 436 F.3d 468 (5th Cir. 2006), an employer "regarded" Rodriguez's Type II diabetes as uncontrolled and according to ConAgra's policy, ConAgra's did not hire anyone with uncontrolled diabetes. Interestingly, Rodriguez had been working at ConAgra's for several months as a temporary employee when ConAgra's offered Rodriguez a job contingent on Rodriguez doing several things including passing a physical exam.

As part of the exam, a urinalysis showed an elevated concentration of glucose in Rodriguez's urine. Based on this and the fact that Rodriguez could not remember the name of his doctor or the name of the medication he was taking to control his diabetes, the examining doctor

concluded Rodriguez's diabetes was uncontrolled. Accordingly, the doctor's report indicated that Rodriguez was not medically qualified for the job.

The court found that the examining physician had not based his assessment of Rodriguez on the requisite individualized review of Rodriguez's capabilities. On the one hand, the doctor with whom ConAgra's had a contractual relationship had declared Rodriguez was not medically qualified, while on the other hand all of the partialized evidence available to ConAgra's about Rodriguez's ability to do the job established the opposite. Indeed, Rodriguez had been given a job offer precisely because he had already been performing up to ConAgra's expectations.

With the general principles found in these cases in mind, I turn to the facts of this case. I begin with what Pocono knew at the time Williams was sent for a physical exam. On his application, Williams had indicated that he had previously driven school buses for several New York companies. Second, Williams had taken Pocono's preparatory course and successfully passed the written and practical driving portions of the program.

It also appears that prior to being examined by Dr. Davidson, Williams' then personal physician, Dr. Felins, had certified Williams to be physically qualified to take a PA Department of Transportation School Bus Driver's driving test. Further, prior to Dr. Davidson's physical exam, Williams passed the school bus driving test and had an "S" endorsement placed on his Pennsylvania driver's license.

The information Pocono had when it received Dr. Davidson's report should have caused Pocono to pause and assess the report more carefully. Instead, the record reveals that Pocono automatically accepted Dr. Davidson's report medically disqualifying Williams. Had Pocono even superficially assessed Dr. Davidson's report, like the case of EEOC v. Texas Bus Lines, Pocono would have easily noted that the injury to Williams' arm and hand referenced in the report is not a per se disqualifying injury. Under the applicable Pa. regulations, the Department of Transportation may grant a waiver of the requirement that to be physically qualified to drive a school bus one should not have an impairment of a hand or finger likely to impair prehension or power grasping. One can obtain such a waiver by demonstrating competency through a driving examination. Indeed, Williams had already demonstrated his ability by passing the state's school bus driving test.

Clearly, Pocono never gave consideration to a possible waiver. Instead, Pocono mistakenly believed that Williams' injury to his hand and arm disqualified Williams. I also find that Pocono was generally aware of the waiver process as they told applicants about it at job fairs. Knowing a waiver process existed, Pocono was on notice that the portion of Dr. Davidson' reported findings regarding Williams' hand and arm injury were inconsistent with Pa. regulations.

I also find that, like in Gillian, Dr. Davidson's report merely concluded that he saw no possible way Williams' arm and hand injury could be overcome. The report does not provide Pocono with sufficient information about the nature, extent, and implications of Williams' injury to adequately advise Pocono that an individualized inquiry had been made. As was noted in Holiday, an employer has the burden of educating itself about the varying nature of impairments and to make individualized determinations about prospective employees.

Here, the record shows that all Dr. Davidson did was to have Williams grasp Dr. Davidson's hands and from this technique, Dr. Davidson purportedly concluded that there was no possible way that Williams could overcome the injury to his arm.

As in Gillen, Dr. Davidson should have assessed Williams' capabilities and the actual attributes of Williams' hand and arm. Instead, I find that Dr. Davidson's decision and report are neither based upon a good-faith assessment of Williams' capabilities nor supported by objective scientific and medical evidence. Accordingly, I find that Pocono's rejection of Williams was based on a stereotype about individuals with hand and arm injuries similar to Williams' injuries.

Pocono's knowledge that Williams had driven school buses and passed the driving component of its own program directly contradicts Dr. Davidson's conclusory statement that he did not see any possible way Williams' injuries could be overcome. Under the circumstances presented here, I find that Pocono's reliance on that portion of Dr. Davidson's report that speaks to Williams' injury as a disqualifying condition was wholly unreasonable.

With regard to those portions of Dr. Davidson's report that reference Williams' diabetes, once again I find any reliance by Pocono on Williams' diabetes to also be unreasonable. As with the possibility of a waiver for a hand or arm injury, the Pa. regulations specifically provide for waivers for individuals who use medication for diabetes. Once again, because Pocono was aware of the availability of a waiver, any reliance by Pocono of this portion of Dr. Davidson's report in its decision not to hire Williams was also unreasonable.

Further, like in the Rodriguez case, Dr. Davidson's report is not based on an individualized review of Williams' capabilities. Instead, Dr. Davidson merely conveyed to Pocono that Williams and his doctor both confirmed that Williams' diabetes was controlled by diet, but that Dr. Davidson would not accept either Williams' or his doctor's word.

This factor should have alerted Pocono that Dr. Davidson's report failed to make an individualized assessment of Williams. Accordingly, I find that it was unreasonable for Pocono to base any part of its decision not to hire Williams on those portions of Dr. Davidson's report that make reference to Williams' diabetes.

In summary, I find that Pocono failed to act in an objectively reasonable way when it blindly accepted Dr. Davidson's faulty report that was not supported by objective medical findings. Instead, I find that Pocono acted on an illegal stereotype when it refused to hire Williams. Accordingly, I turn to the question of an appropriate remedy.

Section 9(f) of the PHRA provides in pertinent part:

> "If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not

> limited to, reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement...with or without backpay...and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice...as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance".

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 10FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. Supreme Ct. 1973).

The first aspect we must consider regarding making Williams whole is the issue of the extent of financial losses suffered. When complainants prove an economic loss, backpay should be awarded absent special circumstances. See Walker v. Ford Motor Co. Inc., 684 F2d 1355, 29 FEP 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise, but must simply be a "reasonable means to determine the amount [the Complainant] would probably have earned..." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975), aff'd. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., 46 FEP 720 (3rd Cir. 1988).

In this case, Williams submits that he should be completely reimbursed for lost wages based upon established wage rates through the 2004-2005 school year adjusted by subtracting his interim earnings.

Williams asserts that he made reasonable attempts at mitigation. Courts consistently hold that it is a respondent's burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. See Jackson v. Wakulla Spring & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Maine Human Rights Comm. v. City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EDP 36,968 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort. It is a respondent, not a complainant, who has the burden of establishing that the complainant failed to make an honest, good faith effort to secure employment. Id. At 46,704.

Regarding whether Williams mitigated his damages, the evidence shows that shortly after Pocono refused to hire Williams, he was hired as a school bus driver for Ricky Haldaman where he was assigned school bus driving duties with Wallenpaupack School District.

Given the extent of Williams' mitigation efforts, I recommend a finding that he is entitled to a full backpay award less his intern earning. The calculations offered in the post-hearing brief on behalf of the complaint have been reviewed and are found acceptable. Accordingly, the earnings Williams would have made encompass the following:

2001-02 School Year:	($10.00/hour)	(7.5 hours/day)	(20 days)	=	$ 1,500.00
	($12.10/hour)	(7.5 hours/day)	(160 days)	=	14,520.00
2002-03 School Year:	($12.45/hour)	(7.5 hours/day)	(180 days)	=	16,807.50
2003-04 School Year:	($12.80/hour)	(7.5 hours/day)	(180 days)	=	17,280.00
2004-05 School Year:	($13.50/hour)	(7.5 hours/day)	(180 days)	=	18,225.00
TOTAL LOST PAY:					**$ 68,332.50**

Williams' Mitigation Income

Calendar Year 2001:	$ 390.00
Calendar Year 2002:	6,316.00
Calendar Year 2003:	7,642.00
Calendar Year 2004:	16,647.00
Calendar Year 2005 (through end of 04-05 School Year)	8,526.38
TOTAL MITIGATION EARNINGS:	**$ 39,521.38**

Recommended Total Backpay Award

$ 68,332.50 - $ 39,521.38 = **$ 28,811.12**

As noted in the post-hearing brief on behalf of the complaint, Williams' earnings after the end of the 2004-2005 school year were at least equal to the wages he lost as a result of Pocono's failure to hire him. Accordingly, the period of the back-pay award ends at the conclusion of the 2004-2005 school year.

Finally, the post-hearing brief on behalf of the complaint has offered an interest calculation that I find acceptable. Accordingly, I also recommend an award of interest on the backpay lost in the amount of $ 6,168.72. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LEONARD E. WILLIAMS, Complainant

v.

DR. CARY A. DAVIDSON, M.D., Respondent
PHRC Case No. 200100977

and

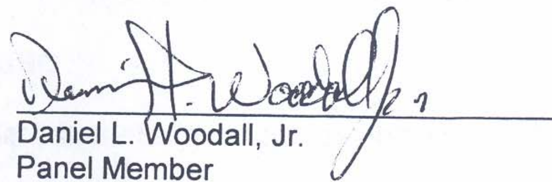
POCONO MOUNTAIN SCHOOL DISTRICT, Respondent
PHRC Case No. 200100979

RECOMMENDATION OF HEARING PANEL MEMBER WOODALL

Upon consideration of the entire record in the above-captioned consolidated cases, Panel Member Woodall finds that the Complainant has failed to prove discrimination against Dr. Davidson in violation of Section 5 (e) but has proven discrimination against Pocono in violation of Section 5 (a) of the Pennsylvania Human Relations Act. It is, therefore, Panel Member Woodall's recommendation that the attached Stipulation of Fact, Second Set of Stipulations of Fact, Findings of Facts, Conclusions of Law and Opinion be approved and adopted. If so approved and adopted, Panel Member Woodall recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

1/10/07
Date



Daniel L. Woodall, Jr.
Panel Member

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
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LEONARD E. WILLIAMS, Complainant
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DR. CARY A. DAVIDSON, M.D., Respondent
PHRC Case No. 200100977

and

POCONO MOUNTAIN SCHOOL DISTRICT, Respondent
PHRC Case No. 200100979

FINAL ORDER

AND NOW, this 27th day of March 2007, after a review of the entire record in this consolidated matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the Stipulations of Fact, Second Set of Stipulations of Fact, Conclusions of Law and Opinion of Hearing Panel Member Woodall. Further, the full Commission adopts said Stipulations of Fact, Second Set of Stipulations of Fact, Findings of Facts, Conclusions of Law and Opinion as its own finding in these consolidated matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaints and hereby:

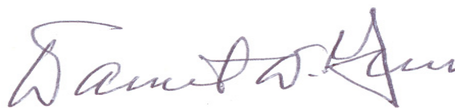
ORDERS

1. That Pocono shall cease and desist from failing to make informed individualized assessments of disabled job applicants.
2. That Pocono shall pay to Williams within 30 days of the effective date of this Order the lump sum of $28,811.12, which amount represents pack pay lost for the period between May 1, 2001 through the end of the 2004-2005 school year.
3. That Pocono shall pay additional interest of 6% per annum on the backpay award, calculated as $ 6,168.72.
4. That Pocono shall report the means by which it will comply with this Order, in writing, to Ronald W. Chadwell, PHRC Assistant Chief Counsel, within thirty days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:
Stephen A. Glassman, Chairperson

ATTEST:


Daniel D. Yun, Secretary