

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

**JAMES C. GILLESPIE,**  
**Complainant**

**v.**

**TOWNSHIP OF HAVERFORD,**  
**Respondent**

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

**PHRC Case No. 200801248**  
**EEOC Charge No. 17F200863217**

**STIPULATIONS OF FACT**  
**FINDINGS OF FACT**  
**CONCLUSIONS OF LAW**  
**OPINION**  
**RECOMMENDATION OF HEARING PANEL**  
**FINAL ORDER**

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

JAMES C. GILLESPIE,	:	
	:	
Complainant	:	PHRC Case No. 200801248
	:	
v.	:	
	:	EEOC Case No. 17F200863217
TOWNSHIP OF HAVERFORD,	:	
	:	
Respondent.	:	

**STIPULATIONS OF FACT**

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

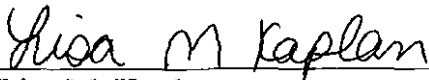
1. The Complainant herein is James C. Gillespie (hereinafter "Complainant").
2. The Respondent herein is Township of Haverford (hereinafter "Respondent").
3. The Respondent, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about September 5, 2008, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against the Respondent at Commission Case Number 200801248. A copy of the complaint will be included as a docket entry in this case at time of hearing.
5. On or about October 21, 2008, Respondent filed a verified answer to the complaint. A copy of the answer will be included as a docket entry in this case at time of

hearing.


6. In correspondence dated August 11, 2009, Commission staff notified the Complainant and the Respondent that probable cause existed to credit the allegations found in the complaint.

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

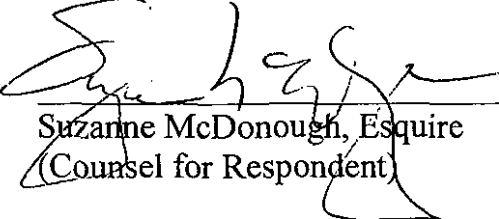
8. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

  
\_\_\_\_\_  
Lisa M. Kaplan  
Assistant Chief Counsel  
(Counsel for the Commission  
in support of the complaint)

12/10/2010  
Date

  
\_\_\_\_\_  
William T. Wilson, Esquire  
(Counsel for Complainant)

12-10-10  
Date

  
\_\_\_\_\_  
Suzanne McDonough, Esquire  
(Counsel for Respondent)

12-10-10  
Date

## FINDINGS OF FACT \*

1. The Respondent herein is the Township of Haverford (hereinafter the "Township").  
(S.F. 2)
2. In 2008, the Township employed approximately 230 to 235 full- and part-time employees in various departments. (N.T. 219)
3. Of the total number of employees, 60 were part-time. (N.T. 219)
4. One of the Township's departments was the public works department. (N.T. 43)
5. The sanitation department was a sub-department within the public works department.  
(N.T. 43, 181)
6. Sanitation department employees were assigned, three to a truck, to the department's eight trash trucks. (N.T. 137)
7. Each trash truck was assigned a driver and two sanitation laborers. (N.T. 276)
8. Trash truck drivers supervised the two sanitation laborers assigned to their truck.  
(N.T. 176-277)
9. Trash pick-up crews left the Township's yard each morning just before 7:00 AM and worked designated routes until an assigned route was completed. (N.T. 78- 80, 291)
10. Sanitation laborers were paid wages for 40 hours no matter how long it took to complete assigned routes. (N.T. 80)

The foregoing "Stipulations of Facts" are hereby incorporated herein as if fully set forth. To the extent that the Opinion, which follows, recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T.	Notes of Testimony
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit
K.Dep.	Koch Deposition

11. In addition to trash routes, the sanitation department employed two full-time recycling employees and a driver to pick-up glass and paper in the Township. (N.T. 62, 114, 182, 286)
12. Although there were no specific light duty jobs in the sanitation department, some felt that picking up glass and paper was less strenuous than general trash pick-up. (N.T. 63)
13. The Complainant herein is James C. Gillespie (hereinafter "Gillespie") (S.F. 1)
14. Gillespie is married with two sons. (N.T. 37-38, 235)
15. On December 3, 2002, Gillespie was hired by the Township as a seasonal temporary employee. (N.T. 39)
16. Gillespie was initially assigned to rake leaves. (N.T. 39)
17. After approximately four weeks of raking leaves, Gillespie remained as a temporary employee and began to be assigned to the sanitation department as a part-time sanitation laborer where he was assigned as a laborer on trash collection crews. (N.T. 40)
18. For approximately the next four years, Gillespie remained a temporary laborer assigned to trash collection crews. (N.T. 40, 43)
19. The job of sanitation laborer was described as an intense, brutal, demanding, and physical job requiring repeated lifting of up to 40 pounds. (N.T. 279, 314)
20. The job of a sanitation laborer entails riding on the back of a trash truck with another laborer, repeatedly getting down from the back of the truck to pull residents' trash cans from the curbside, lifting the cans to empty them into the hopper at the back of the truck, replacing the trash cans back on the curb, walking to the next pick-up location and, repeating the sequence of emptying trash cans into the truck until the truck is full or the route is complete. (N.T. 40, 277, 297)

21. Essential functions of a sanitation laborer include: repeated heavy lifting all day, 5 days a week; squatting; bending; walking; repeatedly getting up and down from the back of a trash truck; and coming to work regularly and on time. (N.T. 150, 181, 289)
22. While a temporary employee, Gillespie had missed work due to health issues. (N.T. 48-49)
23. In or around February 2007, Gillespie missed work due to a heart-related issue as Gillespie had severe hypertension. (N.T. 48-49; K.Dep. 9)
24. In October 2007, Gillespie was hospitalized for treatment of an infected finger. (N.T. 49)
25. Gillespie's then supervisor had spoken to Gillespie regarding the issue of Gillespie arriving late to work. (N.T. 52)
26. As a temporary laborer, Gillespie also had to speak with his supervisor's supervisor about his frequent absences. (N.T. 54)
27. In approximately August 2006, Gillespie applied to become a full-time sanitation laborer. (N.T. 43)
28. On this occasion, Gillespie's effort was unsuccessful. (N.T. 44)
29. In October 2007, Gillespie again applied to become a full-time sanitation laborer. (N.T. 44, 187)
30. On October 29, 2007, Gillespie was offered a full-time position and he began a six-month probation period that same day. (N.T. 46, 51, 104)
31. At the time Gillespie was hired full-time, his chain of command included, Greg Robson, (hereinafter "Robson"), his immediate supervisor; and the Director of Public Works, Michael Giordano, (hereinafter "Giordano"), Robson's supervisor. (N.T. 51, 224, 276)

32. At the time of his hire full-time, Gillespie was informed that he would be on a six-month probationary period during which time he could not come in late or miss work. (N.T. 51, 104)
33. During a probationary period, an employee had no health benefits and would only get such benefits if the probationary period was successfully completed. (N.T. 51, 104)
34. The job posting for sanitation laborers indicated that a commercial driver's license was required. (N.T. 124)
35. In an attempt to become full-time, Gillespie obtained a CDL permit as he had been told that he had no chance to become permanent without at least a CDL permit. (N.T. 43)
36. Periodically, throughout the probationary period, Gillespie wanted to practice driving Township trash trucks, however, Giordano told Gillespie that he could not drive the truck unless he was working on a trash crew. (N.T. 160-61)
37. When Gillespie applied for full-time in October 2007, he had been experiencing a lot of physical pain, cuts and bruises he seemed to get easily were not healing, his arm and leg muscles were thinning out, his endurance and stamina were low and his blood pressure was very high. (N.T. 47)
38. On the job, Gillespie was experiencing trouble moving fast, trouble walking, trouble keeping up with the other laborer on a route, trouble climbing up and down off the step on the trash truck, and trouble dragging trash cans to the truck and back. (N.T. 52)
39. On October 12, 2007, Gillespie was in the hospital for treatment of an infected finger. (N.T. 236, 253)
40. After examining Gillespie, Dr. Kim, an infectious disease doctor, informed Gillespie that he suspected Gillespie might have Cushing's Syndrome and that he would send an endocrinologist to see Gillespie. (N.T. 50, 253)

41. Subsequently, Dr. Cheryl Koch, an endocrinologist, examined Gillespie and informed Gillespie that it appeared he had Cushing's Syndrome and that further testing was needed. (N.T. 50; K.Dep. at 7)
42. The rare disorder called Cushing's Syndrome is generally caused by the body producing an excess of cortisol which can cause the following physical problems: muscle weakness; obesity; high blood pressure; high glucose; osteoporosis; low sex steroid production; hypogonadism; easy infections; skin fragility; immune system dysfunction; and anxiety or depression. (K.Dep. 9, 10, 17, 27)
43. After testing, it was determined that Gillespie had a pituitary adenoma, (a tumor), that, if left untreated, Gillespie would die. (K.Dep. at 8)
44. Gillespie's wife, Tracey, testified that on October 15, 2007, she received a call from Mary Ann DelPizzo, the Township's Human Resources Director, (hereinafter "DelPizzo"), indicating that a doctor had called the Township asking to be sure Gillespie followed up with an endocrinologist. (N.T. 188, 237)
45. Gillespie's wife further testified that DelPizzo asked why Gillespie was seeing an endocrinologist and that Tracey's response was that Gillespie may have Cushing's Syndrome. (N.T. 237)
46. Tracey also offered that she informed DelPizzo that with Cushing's Syndrome, one could have muscle weakness, one could develop brittle bones, skin wounds that would not heal, one could have high blood pressure and emotional problems and that if the condition was left untreated, one could die. (N.T. 238, 254, 257)
47. Tracey further indicated that she informed DelPizzo that if the condition was caught early that a full recovery was likely. (N.T. 238)
48. Prior to being hired full-time on October 29, 2007, Gillespie did not mention his health issues to anyone, as he wanted to keep working and did not want anyone at the Township to know of his health condition. (N.T. 109)



49. At the time, Gillespie thought he could work until he was tested and had surgery, if needed. (N.T. 109)
50. In early November 2007, Gillespie was working as a sanitation laborer when he thought he pulled something in his back. (N.T. 56, 142)
51. Gillespie testified that he may have first injured his ribs in early October 2007.
52. Finding it difficult to breathe, Gillespie informed his driver that he was in too much pain to lift trash cans and he could not do the job. (N.T. 55, 56, 116)
53. Gillespie asked the driver to call his supervisor to come pick him up. (N.T. 56)
54. Both Robson and Giordano came to the route and Gillespie informed them that he had hurt his back and could not lift the trash cans. (N.T. 110, 144)
55. Gillespie informed Giordano that he possibly has Cushing's Syndrome and that he needed testing to confirm this. (N.T. 55)
56. Gillespie told Giordano what he understood of the symptoms of Cushing's Syndrome and that if he did not have surgery he could die. (N.T. 57)
57. Gillespie also relayed to Giordano that he did not want to lose his job to which Giordano told Gillespie he would put him on the grass crew raking leaves until things are sorted out. (N.T. 57, 110)
58. For a time, Gillespie raked leaves and operated a leaf blower until these tasks became too strenuous. (N.T. 110, 11)
59. At that time, Gillespie was assigned to sweep up and pick up around the yard and to ride with his supervisor to assist in picking up trash that residents had put out too late. (N.T. 59, 75, 112, 284)
60. In January 2008, David Dabney, (hereinafter "Dabney"), replaced Robson as on December 13, 2007, Robson had died. (N.T. 261, 313)

61. When Dabney became Gillespie's supervisor, Giordano and DelPizzo told Dabney about Gillespie's medical condition and that Gillespie needed an operation.  
(N.T. 313)
62. On or about December 2007/January 2008, Gillespie had various medical tests, which confirmed he had a tumor on his pituitary gland. (N.T. 59, 60; K.Dep. at 11)
63. On February 2008, Gillespie underwent surgery to remove the tumor from his pituitary gland. (N.T. 60, 189)
64. While going through the admission process for the surgery, multiple rib fractures were discovered. (K.Dep. at 10)
65. Gillespie had suffered with six broken ribs since November 2007. (N.T. 60, 153)
66. Following his surgery, Gillespie was placed in ICU for two weeks, then an additional two weeks recovery at home. (N.T. 61)
67. For several weeks following his surgery, Gillespie experienced tremendous fatigue, achiness, and nausea. (K.Dep. at 13-14)
68. Dr. Koch treated Gillespie with cortisol and he progressively improved. (K.Dep. at 13-14)
69. A few weeks following his surgery, Gillespie met with Giordano, Dabney, DelPizzo and the Township Manager, Larry Gentile, (hereinafter "Gentile"). (N.T. 64)
70. During this meeting, Gentile reviewed the time Gillespie had missed and told him that the Township would not contest unemployment compensation if Gillespie quit.  
(N.T. 64, 152)
71. Gillespie declined. (N.T. 64)
72. *Gentile then asked Gillespie what he could do physically upon returning to work.*  
(N.T. 65-66)
73. Gillespie responded that he could cut grass until he was strong enough to do paper and glass recycling. (N.T. 65-66)

74. Gillespie was of the opinion that glass and paper recycling was less strenuous.  
(N.T. 63, 116)
75. After the meeting, Dabney and Giordano told Gillespie that upon his return they would do what Gillespie wanted and assign him to glass and paper for a few weeks.  
(N.T. 74, 81-82, 115, 116)
76. Indeed, when Gillespie returned following his surgery, Giordano first assigned Gillespie to the grass crew for approximately two weeks. (N.T. 61, 156, 163)
77. On February 21, 2008, Gillespie had given Dabney a note from Dr. Koch, which stated, "To Whom It May Concern: Mr. Gillespie has developed multiple rib fractures as a result of Cushing's Syndrome. These will likely take 4-6 weeks to heal. In the interim, he is not permitted to lift weights over 10 pounds." (N.T. 67; C.E. 1)
78. Subsequently, Gillespie went to see his surgeon, Dr. James Kenning, asking Dr. Kenning to write him a note saying it would be ok for Gillespie to pick up paper and glass. (N.T. 68, 69)
79. The March 25, 2008 note that Dr. Kenning gave to Gillespie stated: "patient may return to full-duty as a sanitation laborer effective March 27, 2008." (N.T. 70, 123; C.E. 2)
80. When Dr. Kenning gave Gillespie the note, Gillespie thought the note did not say what he wanted Dr. Kenning to say. (N.T. 123)
81. When Gillespie handed Dabney the March 25, 2008, doctor's note, Dabney assigned Gillespie to pick up paper.
82. The next day, Dabney was off, and a driver simply informed Gillespie to grab some gloves, he was on trash. (N.T. 76)
83. That day, the driver became aggravated and angry with Gillespie because he could not keep up with the other laborer. (N.T. 76)

84. The next day, March 31, 2008, Gillespie was again assigned to pick up trash.  
(N.T. 81)
85. On this day, it was raining, trash containers were heavy and Gillespie was once again having trouble keeping up. (N.T. 81)
86. Both the driver and the other laborer were getting annoyed with Gillespie and Dabney was called to the route. (N.T. 81)
87. When Gillespie reminded Dabney that he said he would assign him to glass and paper for several weeks, Dabney told Gillespie to speak with Giordano. (N.T. 82)
88. The second laborer asked Dabney to replace Gillespie but Dabney did not and told the other laborer to give Gillespie a chance. (N.T. 82)
89. A short while later, Gillespie was struck in the leg by a metal garbage can inflicting a laceration. (N.T. 83)
90. An ambulance was called and Gillespie was taken to the hospital where he was given stitches for the cut and sent home. (N.T. 84, 85)
91. The next day, Gillespie's leg was swollen; he had a fever and was vomiting. (N.T. 86)
92. Gillespie went back to the hospital, the wound had become infected and Gillespie underwent emergency surgery for a blood clot that traveled from his leg to his lung.  
(N.T. 86; K.Dep. at 15)
93. On this occasion, Gillespie spent a week in ICU and another week in the hospital.  
(N.T. 86)
94. Both the blood clot that lodged in Gillespie's lung and septic shock posed life-threatening conditions. (K.Dep. 15)
95. Gillespie remained off work from March 31, 2008 until July 7, 2008. (N.T. 132)
96. Gillespie's leg surgeon, Dr. Jennifer Denne, had provided Gillespie with an April 12, 2008 doctor's note saying that Gillespie would be out of work until further notice.  
(N.T. 88; C.E. 4)

97. The six-month probationary period that began October 29, 2007, ended on April 1, 2008. (N.T. 112)
98. As of April 1, 2008, Township Manager, Gentile had the option to either terminate Gillespie or extend his probation. (N.T. 203)
99. Because Gillespie had been out due to medical reasons, Gentile extended Gillespie's probation to April 30, 2008. (N.T. 202)
100. Before deciding to extend Gillespie's probation, Gentile spoke with Giordano and Dabney and learned that Gillespie had been late numerous times and when taking off he failed to call his supervisor. (N.T. 204)
101. In extending his probation, Gentile told Gillespie that he understood his medical condition but that Gillespie needs to let his supervisor know if he is going to be late or not coming in. (N.T. 204-05)
102. At that time, Gillespie did not request an accommodation and simply accepted Gentile's assessment of attendance issues. (N.T. 216)
103. After Gillespie's leg injury, Gentile again extended Gillespie's probation to July 30, 2008. (N.T. 212)
104. Before returning from his leg injury Gillespie met with DePizzo, Giordano and Dabney and was told not to worry because when he returned he would be put on the grass crew or recycling. (N.T. 239-40)
105. While out with the leg injury, the Township sent Gillespie to see Dr. Marilyn Horvath, the doctor to whom Township employees that sustain work-related injuries would be sent. (N.T. 90; C.E. 5)
106. In a June 12, 2008 report to DePizzo, Dr. Horvath referenced Gillespie's leg wound and the resultant life threatening blood infection and pulmonary embolis and indicated that it was her expectation that Gillespie would fully recover and return to full duty within 4 to 6 weeks, if not sooner. (N.T. 91; C.E. 5)

107. On July 1, 2008, Gillespie's leg surgeon, Dr. Jennifer Denne, wrote Gillespie a doctor's note indicating that Gillespie was able to return to work on July 7, 2008 with no restrictions. (N.T. 92; C.E. 6)
108. Gillespie testified that he told Dr. Denne that he was ready to return to work. (N.T. 93)
109. Upon returning to work on July 7, 2008, Gillespie was assigned to trash pick up where, within approximately four hours, Gillespie became nauseous and dizzy. (N.T. 93, 94, 134, 135)
110. Gillespie asked the driver to tell Dabney he could not finish the day. (N.T. 94)
111. Subsequently, both Dabney and Giordano showed up at the truck, drove Gillespie back to the yard, and told him to go home. (N.T. 94-95)
112. Prior to returning on July 7, 2008, Gillespie did not consult with Dr. Koch. (K.Dep. at 35)
113. Had Dr. Koch written a doctor's note at that time, Dr. Koch would have given Gillespie a lifting restriction. (K.Dep. 35)
114. For the remainder of July 2008, Gillespie was assigned mainly the job of weed whacking. (N.T. 96)
115. Once or twice a week, Gillespie was assigned to pick up paper. (N.T. 96)
116. In July 2008, Gillespie's health was steadily improving. (N.T. 96)
117. On the last day of July, 2008, Gillespie was again assigned trash pick up. (N.T. 96)
118. Records of the time and attendance of Township employees are computerized. (N.T. 136)
119. Prior to August 1, 2008, Gentile met with DelPizzo and Giordano to discuss Gillespie. (N.T. 191-192)
120. Gentile had requested a printout of Gillespie's time and attendance records because Giordano had said that Gillespie had unexcused absences and was late numerous times in July. (N.T. 356-57)

121. Gillespie's computerized attendance records confirmed Giordano's report.  
(N.T. 208, 358)
122. On August 1, 2008, Gillespie met with Gentile, Dabney and Giordano at which time Gentile informed Gillespie that he had not successfully completed his six-month probation and the decision was to terminate him. (N.T. 98, 208)
123. At this meeting, Gillespie neither contested his attendance records nor mentioned his medical condition. (N.T. 216-17, 358)
124. At this point, when Gentile informed Gillespie that he was being terminated, Gentile told Gillespie that when he feels better to come back and fill out an application for part-time. (N.T. 98-130)
125. On August 1, 2008, the Township posted the full-time opening created by Gillespie's termination. (N.T. 348-49)
126. During the entire probationary period until his termination on August 1, 2008, Gillespie was paid a full salary. (N.T. 112)
127. The Township had never paid a probationary employee in the way Gillespie was paid.  
(N.T. 228)

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to the public hearing in this case.
3. Gillespie is an individual within the meaning of the PHRA.
4. The Township is an employer within the meaning of the PHRA
5. Gillespie failed to establish that the Township failed to reasonably accommodate him.
6. To establish a *prima facie* case of a disability-based termination, a Complainant must show:
  - a. That he is a disabled person within the meaning of the PHRA;
  - b. That he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and
  - c. That he suffered an adverse employment action as a result of discrimination
7. Gillespie failed to establish that he was qualified to perform the essential functions of the job.



## OPINION

This case arises on a complaint filed by James C. Gillespie, (hereinafter "Gillespie"), against the Township of Haverford, (hereinafter the "Township"), verified on September 5, 2008, at PHRC Case No. 200801248. There are two counts in Gillespie's initial complaint: Count 1 – alleged failure to reasonably accommodate a disability by denying Gillespie's request for light duty; and Count 2 – alleged disability based termination in that the Township allegedly terminated Gillespie in order to deny him insurance benefits.

On March 31, 2011, the Township filed a Motion to Rescind the Finding of Probable Cause. As an attachment to the Township's Motion, the Township included a copy of Gillespie's deposition, which in effect, disavowed certain portions of his initial complaint. Gillespie had indicated that portions of his complaint, as drafted, were inaccurate. Although the Township's Motion was denied, by Interlocutory Order dated May 3, 2011, Gillespie was "directed to state his case in his own words more fully and in more detail."

The May 3, 2011 Interlocutory Order specifically instructed Gillespie to articulate purported facts that underlie his allegations. Indeed, the Interlocutory Order clearly outlined the scope of what an amended complaint should include with respect to stating the background to his allegations. Further, the Interlocutory Order instructed Gillespie to clarify the specific nature of his alleged denial of an accommodation.

On May 11, 2011, Gillespie verified an amended complaint in which he generally alleged that upon his return to work on March 31, 2008 and early July 2008, the Township failed to accommodate Gillespie's disability, Cushing's disease. Gillespie also alleged that on August 1, 2008, the Township terminated him due to his "ongoing disability, his history thereof, or due to its perception of his disability..." Gillespie's allegations claim that the Township violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 *et seq.* (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation of Gillespie's initial complaint and found probable cause to credit the allegations of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on June 1 and June 2, 2011, in Media Pennsylvania before a Hearing Panel consisting of Sylvia A. Waters, Panel Chairperson; Dr. Raquel O. Yiengst and Gerald S. Robinson, Esquire, Panel Members. Briefs were submitted by the parties. The Township's brief was received on July 14, 2011, and Gillespie's brief was received on July 21, 2011.

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 discharge from employment...such individual...or to otherwise discriminate against 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 one or more of such persons 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 has or is one of the following:
  - (A) A physical or mental impairment, which substantially limits one or more major life activities.
  - (B) A record of such impairment.
  - (C) Regarded as having such an impairment.
- (ii) As used in subparagraph (i) of this paragraph, the phrase:
  - (A) “physical or mental impairment” means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; 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 impairment” means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more life activities.
  - (D) “is regarding 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 towards 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.

*Non-job-related handicap or disability* – The term includes the following:

- (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. Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a handicap or disability job-related.
  - (ii) 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
  - (iii) 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. See Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d

584 (1983) and Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 624, 483, A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to *propriety of remedy*).

In the present case, we first address Gillespie's claim that the Township failed to accommodate his disability, Cushing's Syndrome. In the Township's post-hearing brief, in effect, the Township concedes that Gillespie's condition constituted a disability. In making this concession, the Township acknowledges there is a fundamental contradiction between *the substance and effect of doctor notes that Gillespie produced while employed and Dr. Koch's, after-the-fact, deposition testimony*. Twice, Gillespie presented the Township with doctors' notes indicating that he was able to return to work without restriction. Following Gillespie's February 2008 surgery, on March 25, 2008, Gillespie's brain surgeon, Dr. Kenning, wrote a doctor's note, which stated, "patient may return to full-duty as a sanitation laborer effective March 27, 2008." (C.E. 2) *The second note, written on July 1, 2008 by Gillespie's leg surgeon, Dr. Denne, indicated that Gillespie was able to return to work on July 7, 2008.* (C. E. 6)

The Township submits that the doctors' notes evidence that Gillespie's condition was of a limited duration and, as such, would not qualify as a disability. However, the Township also acknowledges, *despite the doctors' notes provided by Gillespie, Dr. Koch testified that from as early as October 2007 until well past July 2008, she would have placed lifting restrictions on Gillespie due to residual long-term effects of Cushing's Syndrome.* (K.Dep. at 24) Indeed, Dr. Koch testified that full recovery would have taken one to two years and that until Gillespie was fully recovered, repetitive heavy lifting was contraindicated. (K.Dep. at 38)

Considered as a whole, the evidence presented reveals that the fullness of Gillespie's medical problems can be seen as an extension of the lasting effects of Cushing's Syndrome. From the rib fractures that likely resulted from Cushing's Syndrome contributing to brittle bones to the life threatening complications associated with the infection that set in after

Gillespie suffered a leg wound on March 31, 2008, Dr. Koch's deposition testimony allows us to see that Gillespie's body was not yet fully recovered from the residual long-term effects of Cushing's Syndrome. As such, the evidence supports a finding that Gillespie did, in fact, have a disability throughout his employment and for a period after.

On Gillespie's alleged denial of an accommodation claim, the next question is whether the Township failed to accommodate Gillespie's condition. In general, we answer this fundamental question by observing that the efforts extended by the Township to Gillespie were laudable.

Initially, there is evidence that Gillespie was hired full-time on October 29, 2007 despite the Township's HR director knowing as early as October 15, 2007, that Gillespie might have a condition that could involve muscle weakness, brittle bones, skin wounds that would not heal, high blood pressure, and emotional problems. (N.T. 238, 254, 257)

Once hired full-time, only a short while later, Gillespie became unable to continue to work collecting trash. In early November 2007, Gillespie's supervisors generally became aware that Gillespie might have Cushing's Syndrome and if left untreated, Gillespie could die. (N.T. 57) Immediately, Giordano took Gillespie off trash collection and reassigned him to lighter duty on the grass crew. (N.T. 57, 110) Subsequently, when the duties associated with the grass crew became too strenuous for Gillespie, he was reassigned to even lighter duties. (N.T. 59, 75, 112, 284) Gillespie remained assigned to light duty until he went out to have surgery to remove the tumor from his pituitary gland.

Following his surgery, Gillespie met with his supervisors, DePizzo and Gentile, at which time, Gillespie was asked what he believed he could do physically when he returned to work. (N.T. 65-66) Gillespie indicated he would be able to cut grass until he became strong enough to do recycling. (N.T. 65-66)

When Gillespie did return to work after his surgery, initially, Giordano did assign Gillespie to the less strenuous job of working on the grass crew. (N.T. 61, 156, 163)

Subsequently, Gillespie asked his surgeon to write a note saying Gillespie could pick up paper and grass. (N.T. 68-69) However, the note Gillespie's doctor wrote, in effect, gave Gillespie a full release to return to full-duty as a sanitation laborer. (C.E. 2)

Even with this full release note, Gillespie's immediate supervisor, Dabney, still initially assigned Gillespie to what Gillespie believed was a less strenuous task, picking up recycled paper. The following day, March 28, 2008, Dabney was off and a trash truck driver assigned Gillespie to pick-up trash. (N.T. 76) On this route, Gillespie had trouble keeping up. The next workday, March 31, 2008, Gillespie was again assigned to trash collection and again, the driver and the other laborer became annoyed with Gillespie being unable to keep up. When Dabney was called to the scene, Dabney instructed the annoyed laborer to give Gillespie a chance.

Gillespie's refusal to accommodate claim partially encompasses the March 28-31, 2008 assignments because Gillespie contends that as an accommodation he should have been assigned to recycling until he regained his strength sufficiently to enable him to work on the trash truck. It is here where we observe that Gillespie was his worst enemy. Instead of revealing the nature of his true condition following surgery, Gillespie took measures to hide the full scope of the effects his bout with Cushing's Syndrome was having. Rather than ask for further accommodation, Gillespie secured a full release to return to work.

We do not know how long Gillespie would have lasted as a laborer assigned to the trash truck because on March 31, 2008, Gillespie's leg was lacerated. The laceration initially required stitches and ultimately became infected causing Gillespie to be out three additional months. At around the same time as Gillespie's leg was wounded, his initial probationary period was due to expire. As a further accommodation, Gillespie's probation was extended to April 30, 2008.

Of course, at the time of the extension, no one knew Gillespie would be out for 3 months. Accordingly, once the Township knew Gillespie would be out past April 30, 2008, his probation was extended to the end of July 2008.

At no time after Gillespie's leg was cut did the Township have information with which to conclude that Cushing's Syndrome might be the underlying cause of the leg infection that posed several life threatening conditions to Gillespie. All the Township knew was that Gillespie had lacerated his leg and there was a subsequent infection. A leg wound is normally a short-term condition and not an impairment that amounts to a disability. In other words, as far as the Township knew, Gillespie's Cushing's Syndrome had been cured by surgery and Gillespie had been given a full release to return to work back in late March 2008. The leg wound would have understandably been viewed as an entirely separate condition. Courts have noted that an employee's inability to work while recovering from surgery is simply not evidence of a substantial limitation of the major life activity of working. See Heintzelman v Runyon, 120 F.3d 143 (8<sup>th</sup> cir. 1997). The prior doctor's evaluation indicating Gillespie's Cushing's Syndrome impairment was gone is persuasive evidence the leg wound impairment was only a temporary condition and thus not a covered disability. See Pollard v Highs of Baltimore, 281 F.3d 463 (4<sup>th</sup> Cir. 2002).

We further observe that the entire time Gillespie was out for pituitary surgery and the period of recovery after an infection to a leg wound, the Township paid Gillespie his full salary. (N.T. 112) We also note that in at least one case, a court had indicated that employers do not have a duty to reassign non-probationary employees when they become unable to perform the essential functions of their assigned duties. See Mengine v Runyon, post Master General, U.S. Postal Service, 114 F.3d 415, 418 (3<sup>rd</sup> Cir. 1997). Here, Gillespie was a probationary employee from October 29, 2007 until August 1, 2008, the date he was terminated. Being a probationary employee, Mengine supports that the Township was not

obligated to reassign Gillespie when he became unable to perform the essential functions of a laborer working on a trash truck.

Gillespie's second alleged incident of failure to accommodate him revolves around the point at which he returned to work after recovering from complications following the leg wound infection. Gillespie submits that once again he should have been assigned recycling duties instead of being assigned trash collection upon his return to work on July 7, 2008.

Once again, Gillespie had presented a doctor's note that fully released him to return to work. With such a release, Gillespie's supervisor would have no reason not to believe Gillespie was ready to resume his duties collecting trash. Remember, after his surgery to correct the Cushing's Syndrome, Gillespie had already been released to full duty in March 2008 three months earlier. Again, Gillespie actively sought to hide any idea that he continued to experience long-term residual effects of Cushing's Syndrome. Instead, Gillespie sought out a full medical release in an effort to salvage his probationary period.

Then, when Gillespie experienced physical difficulty on his first day back to work on July 7, 2008, once again, Gillespie was accommodated by being assigned less strenuous duties. In summary, each and every time Gillespie manifested an inability to perform the essential functions of a laborer on a trash truck, he was reassigned lighter duties. Once again, we find the Township's actions in this regard laudable.

Next, we turn to Gillespie's allegation that he was terminated because of "his ongoing disability, his history thereof, or due to [the Township's] perception of his disability..." To establish a *prima facie* case of disability discrimination under the PHRA, a Complainant must prove that: (1) he is a disabled person within the meaning of the PHRA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) he has suffered an adverse employment decision as a result of discrimination. Williams v Philadelphia Housing Authority Police Department, 380 F.3d 751, 10 AD Cases 1607 (3<sup>rd</sup> Cir. 2004); and Taylor v Phoenixville School District, 184 F.3d 296, 9



AD Cases 1187 (3<sup>rd</sup> Cir. 1999), citing Gaul v Lucent Technologies, 134 F.3d 576, 580, 7 AD Cases 1223 (3<sup>rd</sup> Cir. 1998).

As previously noted, Gillespie is able to establish that during his entire probationary period the long-term residual effects of Cushing's Syndrome substantially impaired a number of his major life activities. Further, although the Township could not have known that residual effects of Cushing's Syndrome contributed to all of Gillespie's medical problems, Gillespie has shown that at the time of his termination he had a disability within the meaning of the PHRA. As previously indicated, the Township, in effect, concedes this important point.

Gillespie is also able to show that at the time of his termination he had a record of a disability. Although having been hospitalized does not necessarily mean a Complainant has a record of a disability, see Gutridge v Clure, 153 F.3d 898 (8<sup>th</sup> Cir. 1998), and Prince v Claussen, 1999 U.S. App Lexis 5021 (10<sup>th</sup> Cir. 1999), and having had surgeries may not be sufficient, see Rooney v Koch Air LLC, 410 F.3d 376 (7<sup>th</sup> Cir. 2005), we find that the number of doctors' notes combined with the prolonged absences that can be attributed to Cushing's Syndrome and its residual effects amount to a record of a disability.

What Gillespie is unable to show is that, at the time of termination, the Township "regarded" Gillespie as having a disability. Quite clearly, Gillespie hid the full scope of his condition from the Township. Throughout his bout with Cushing's Syndrome and its lingering residual effects, Gillespie downplayed the extent of his weakened condition. Twice, Gillespie gave the Township doctor's notes that declared he was medically fit to return to full duty. Dr. Koch's assessment of Gillespie that came out in her deposition was information that the Township did not have at the time of Gillespie's termination. Further, Gillespie never verbalized a request for an accommodation. When the Township saw Gillespie could not perform his job, they simply reassigned him to jobs he could perform. Additionally, by letter dated June 12, 2008, the Township's doctor had advised the Township that she expected Gillespie to fully recover from his leg wound within four to six weeks, if not sooner. (C.E. 5)

On August 1, 2008, the Township simply did not regard Gillespie as being disabled. Indeed, the day before Gillespie was terminated, he was assigned to trash collection.

The Township asserts that Gillespie is unable to establish the second element of the requisite *prima facie* showing. The Township initially contends that Gillespie was not qualified to perform the essential functions of the job of sanitation laborer because he failed to secure a CDL license during his probation. Indeed, while Gillespie did get a CDL permit, he did not secure a CDL license during his probation. The Township submits that the job posting for the position of full-time sanitation laborer indicates that a CDL is required.

We note that the Township has eight trash trucks, on which a crew of three is assigned. Each truck has a driver and two sanitation laborers. One must ask whether each full-time sanitation laborer has obtained a CDL. We do know that a driver supervises the two laborers and receives a higher rate of pay. What is not clear is why the Township would need every sanitation laborer to have a CDL.

Although the Township asserts that having a CDL is an essential function of the position of sanitation laborer, we find no evidence that all sanitation laborers are required to have a CDL. Clearly, not all sanitation laborers would be required to perform the driver function. Since all laborers did not perform the driving function, obtaining a CDL should not be considered an essential requirement.

The Township's post-hearing brief points to the question of why an employee who worked for four years in a part-time status would have to be on a six-month probation. On this question, we find that the Township's post-hearing brief accurately outlines applicable precedent on this issue. We find no fault in the fact that Gillespie was put on a six-month probation upon his hire as a full-time sanitation laborer.

For nearly all of Gillespie's initial probationary period and the two extensions of his probation, Gillespie was unable to perform the essential function of heavy lifting which was a fundamental requirement of the job of sanitation laborer. In this case, however, the

Township continually assigned Gillespie to duties which effectively eliminated the lifting requirement. Because the Township continually reassigned Gillespie, the lifting function would not bar him from having been a qualified individual with a disability because he met the lifting requirements of the positions to which he was assigned.

A separate essential function operates in such a way as to lead to the conclusion that Gillespie was not qualified to perform the essential functions of either the sanitation laborer position or the other jobs to which he was assigned. That essential function was that employees on probation must neither be late nor be absent. Courts consistently hold that regular, predictable attendance and the ability to keep a regular schedule are essential functions of nearly any job. See Antonio v Runyon, 1994 U.s. Dist. Lexis 15965 (ED. Pa. 1994); and Walders v Garrett, 765 F. Supp. 303 (ED. Va. 1991), *aff'd*, 956 F.2d 1163 (4<sup>th</sup> Cir. 1992). Indeed, an employee who cannot meet the attendance requirements of the job at issue cannot be a "qualified" individual. See Tyndall v National Education Centers, 31 F.3d 209 (4<sup>th</sup> Cir. 1994).

Here, in order for crews not to be held up, the nature of the position of sanitation laborer requires being on time and if not coming in, to call so other arrangements can be made. In the case of Halperin v Abacus Technology Corp., 7AD Cases 406 (4<sup>th</sup> Cir. 1997), a medical condition caused an employee to miss 46 days of work in a 6-month period before he was terminated. Halperin had also stated that he would have been unable to work for an additional 5 months as of the date of his termination. The court found Halperin was not otherwise qualified for a job that required regular attendance and that being unable to come to work on a regular basis rendered Halperin unable to satisfy an essential function of the job.

Here, before being hired full-time, Gillespie had to be spoken to, by both his supervisor and Giordano, about coming to work late and absences. (N.T. 52, 54) Once he became full-time, Gillespie not only missed a month's work following his surgery, he also was

out three more months recovering from an infection of a leg wound. Beyond these absences, when hired full time, Gillespie was specifically told that he could not come in late or miss work during his probationary period. (N.T. 51, 104) Subsequently before extending Gillespie's probation on April 1, 2008, Gentile specifically spoke with Gillespie about his having been late numerous times and failing to call when he was not coming to work. (N.T. 204-05) Gillespie was told that he needed to let his supervisor know when he is running late or not coming in. (N.T. 204-05) The record then shows that when Gillespie returned on July 7, 2008, he continued to be absent between July 7, 2008 and his termination on August 1, 2008.

Given the circumstance of Gillespie's sporadic and unpredictable attendance, he did not fulfill the essential function of regular predictable attendance and timeliness. Accordingly, we find that Gillespie fails to meet the second element of the requisite *prima facie* showing in that he was not a "qualified individual" with a disability.

Assuming *arguendo* that Gillespie did manage to make a *prima facie* showing, the Township articulated a legitimate non-discriminatory reason why Gillespie was terminated. The Township presented evidence that in July 2008, Gillespie was absent a fair amount of time and late a good bit of time. (N.T. 289)

On this point, Gillespie contends that he was never late or absent in July 2008. (N.T. 139, 266) On this issue, we credit Gentile's version as uncontradicted evidence reveals his assessment of Gillespie's time and attendance was based on reports from both Dabney and Giordano and their reports were then cross-referenced with computerized printouts of employees' time and attendance. Further, when being terminated, Gentile reviewed with Gillespie his concerns about his time and attendance and Gillespie neither disputed nor contested Gentile's information. In addition, Gillespie did not mention his medical condition. (N.T. 208, 216-17; 358)

In summary, Gillespie failed to establish that the articulated reason for his termination was a pretext for disability-based discrimination. Accordingly, we find Gillespie's allegation that his termination was discriminatory without merit.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES C. GILLESPIE,  
Complainant

v.

TOWNSHIP OF HAVERFORD,  
Respondent

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

PHRC Case No. 200801248  
EEOC Charge No. 17F200863217

RECOMMENDATION OF HEARING PANEL

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

August 8, 2011  
Date

August 8, 2011  
Date

August 8, 2011  
Date

Sylvia A. Waters  
Commissioner Sylvia A. Waters

Gerald S. Robinson  
Commissioner, Gerald S. Robinson, Esquire

Ms. Raquel O. Yiengst  
Commissioner Raquel O. Yiengst

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES C. GILLESPIE,  
Complainant

v.

TOWNSHIP OF HAVERFORD,  
Respondent

:  
:  
:  
:  
:  
:  
:  
:  
:  
:  
:

PHRC Case No. 200801248  
EEOC Charge No. 17F200863217

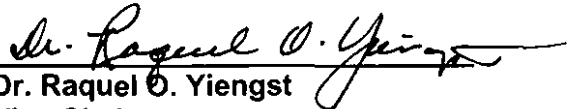
FINAL ORDER

AND NOW, this 22<sup>nd</sup> day of August 2011, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing panel. Furthermore, the full Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That the complaint in this case be, and the same hereby is dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:   
Dr. Raquel O. Yiengst  
Vice Chairperson

Attest

  
Dr. Daniel D. Yun, Secretary