

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICTORIA M. CONTI,	:	
Complainant	:	
	:	
v.	:	Docket No. E-15559
	:	
CITY OF PITTSBURGH	:	
Respondent	:	

STIPULATIONS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

3. The Civil Service Commission based its finding that Complainant was not physically qualified for employment on the finding of its physician, Dr. Matyoska, that Complainant's xrays showed a transitional vertebrae.

4. The existence of the transitional vertebrae in Complainant's back was confirmed by Radiologist, Joseph Mazzei.

5. At the time of the denial of Complainant's application, the Civil Service Commission was interpreting its Civil Service Rule III, Section 12(10) to exclude those individuals with a transitional vertebrae from employment in any potentially strenuous non-sedentary jobs. A copy of the Respondent Civil Service Commission Rules are attached and incorporated hereby as Joint Exhibit "B".

5a. By letter dated December 12, 1978, the City Civil Service Commission notified Complainant that she had not passed the physical portion of her application for employment as a paramedic. A true and correct copy of that letter is attached to this document and incorporated as Joint Exhibit A.

5b. Complainant did not request a hearing before the Civil Service Commission and did not file an

appeal before the Allegheny County Court of Common Pleas.

6. On or about January 24, 1979, Victoria Conti was examined by her Orthopedic Surgeon, Edward G. Kelly, of Three Rivers Orthopedic Associates.

7. In a January 24, 1979 letter addressed to Michele Cunko, Assistant Director, Secretary and Chief Examiner for the Civil Service Commission, Dr. Kelly confirmed that Complainant did have "a transitional fifth lumbar vertebrae" but advised Ms. Cunko that he did not consider Complainant a high risk individual for employment. A copy of Dr. Kelly's letter is attached and incorporated as Joint Exhibit "C".

8. At the time of the denial of Complainant's application, Complainant met all written qualifications for the position of paramedic.

9. After denying the position of paramedic to Victoria Conti, City of Pittsburgh, Bureau of Emergency Medical Services continued to seek to fill the position of paramedic.

10. On or about February 1, 1979, Ms. Conti filed a verified complaint with the Pennsylvania Human Relations Commission (Hereinafter called "PHRC") alleging that the denial of her application was

unlawful disability discrimination in violation of the Pennsylvania Human Relations Act (Hereinafter called "PHRA").

11. In August of 1979, Respondent was notified that PHRC staff found cause to credit the allegations of the Complainant. A true and correct copy of that notice is attached to these stipulations and incorporated as Joint Exhibit "C".

12. On or about November 1979, Respondent tendered a offer of employment as a paramedic to Complainant. Two notices of the Respondent intent to change its policy and consider Complainant were given to the PA Human Relations Commission Staff. True and Correct copies of those notices are attached and incorporated as Joint Exhibits "D" and "E".

13. There were no changes in the job of paramedic between the time of Complainant applied for the position and November 1979.

14. The applicable rate of pay for the Respondent's paramedics was \$ 5.735 per hour and said position required at least a forty-hour work week with leave.

15. Four (4) days paid leave were given to

paramedics who worked fulltime for the City of Pittsburgh, Bureau of Emergency Services between January 22, 1979 and November 1979.

16. The difference between the wages Complainant would have earned as a Paramedic for the City of Pittsburgh, Emergency Medical Services beginning on January 22, 1979 until November 1979 and the wages she actually earned is \$ 7,860.00.

Judith Spain

Judith Spain
Assistant City Solicitor
City of Pittsburgh

William R. Fewell, Jr. 12-9-86

William R. Fewell, Jr
Assistant Chief Counsel
Pa. Human Relations Comm.

City of Pittsburgh



Pennsylvania

DEPARTMENT OF PERSONNEL
AND
CIVIL SERVICE COMMISSION

Employment Development Division

December 12, 1978

1st Floor
City-County Building
Pittsburgh, PA. 15219

Dear Applicant:

As you have been orally informed, you do not meet the physical standards for employment in the position of Paramedic. In accordance with Civil Service Rules, you may consult your personal physician regarding your disqualifying condition. If the condition is remedied or if information is received from your personal physician in the form of a written report of an examination or test which states that the disqualifying condition does not exist, the Commission will schedule any additional tests which may be required and you may be eligible for employment.

Please be advised that should you decide to consult your personal physician regarding your disqualifying condition, you do so at your own expense and with the full understanding that, if the condition is found to exist by your personal physician and/or if the condition is not remedied, you will not be eligible for employment.

If you have any questions regarding this procedure, please call me at 255-2705.

Very truly yours,

Michele Cunko
Assistant Director,
Secretary and Chief Examiner

MAC:eff

Joint Exhibit

"A"

SECTION 12. A. Physical Standards - The physical standards in Section 12B and C of this rule are applicable in their entirety to the Police and Fire services. For other positions requiring a physical examination, only those physical standards which are job related shall be applicable to such positions in accordance with Section 11B of this rule.

B. The physical standards are as follows:

(1) HEIGHT: No minimum height is established; however, height and weight, as provided for in Section 12B(2), must be proportionate.

(2) WEIGHT: Weight must conform with Metropolitan Life Insurance Company standards, plus or minus 10% and proportionate to body build. Failure to meet these standards will be disqualifying.

(3) EYES: Vision, each eye, with or without correction must test at least 20/30. Color blindness, loss of depth perception impaired lateral vision, eye disease or chronic conditions which may affect vision will be disqualifying.

(4) EARS: Applicants must be able to hear at least 15 feet and whispered voice at 5 feet. Chronic ear disease will be disqualifying.

(5) SKIN: Applicants must be free of acute or contagious skin diseases not accepted or

whf

THREE RIVERS ORTHOPEDIC ASSOCIATES, INC.

110 FORT COUCH ROAD
PITTSBURGH, PENNSYLVANIA 15241

412/831-6365

EDWARD J. McCLAIN, M.D.
DAVID R. KRAUS, M.D.
EDWARD G. KELLY, M.D.
JOHN S. BEACHLER, M.D.

January 24, 1979

Mrs. Michelle Kunkle
Assistant Director
Department of Personnel and
Civil Service Commission
First Floor
City County Building
Pittsburgh, Pennsylvania 15219.

Joint
Exhibit

"C"

Dear Mrs. Kunkle:

I examined Miss Victoria Conti in my office today to render an opinion concerning the patient's lower spine. This patient has been told that she has an abnormality by x-ray, and consequently has been restricted from pursuing a job application with the city.

This patient denies any symptoms referable to her lumbar spine as an adolescent or as a juvenile. Since she has been an adult, and in her recent employment as a CPR instructor, the patient indicated that some of her duties would include carrying heavy objects such as a 50 pound manikan, with no overt back symptomatology.

When specifically questioning the patient insofar as radicular symptoms, she never has had any. She can go about everyday activities normally and has done in the past, without any incidence of back symptomatology. She keeps herself in good physical shape and her past health history is also within normal limits.

On physical examination, the patient has no overt evidence of a lumbosacral abnormality on physical examination. She demonstrates normal lumbar lordosis and is able to hyperextend without symptomatology. She has no evidence of scoliosis and has no restriction of anterior flexion or rotation. Examination of the hips and lower extremities is within normal limits with no evidence of loss of range of motion, no evidence of hamstring tightness and no evidence of atrophy.

Her neurological examination reveals normal reflexes. No evidence of motor or sensory deficit. I am able to hyperextend her pelvis without eliciting back symptoms and she has no symptomatology with straight leg raising or a femoral stress test.

Similarly, in examining the patient for abnormalities of the sacroiliac joint, no symptoms could be elicited on physical examination.

In essence, her x-rays demonstrate five lumbar vertebra with a rib remnant on the last thoracic vertebra adjacent to the first lumbar segment. The patient demonstrates what should be termed a transitional fifth lumbar vertebra with spina bifida occulta, and these findings from my experience are present in approximately 20% of the normal population. Mechanically, I don't consider this patient a high risk individual,

Page 2
Victoria Conti
Edward G. Kelly, M.D.

insofar as an increased instance of back symptomatology. Should she have a sacralized transverse process or an abnormality of the pars interarticularis, I would then consider her a high risk individual, but as such in my experience, I feel that the patient with her history in examination, in conjunction with her x-rays, is not the type of individual whom I consider a high risk candidate.

I hope that this letter is sufficient for your purposes.

Sincerely yours,

EG Kelly
Edward George Kelly, M.D.

EGK/gla
cc: Victoria Conti

City of Pittsburgh



Pennsylvania

October 18, 1979

DEPARTMENT OF LAW

Mead J. Mulvihill, Jr.
City Solicitor

313 City-County Building
Pittsburgh, PA. 15219

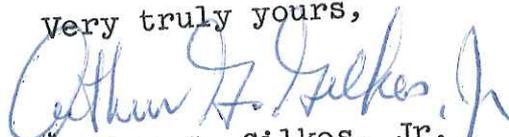
Ms. Wanda Burwell
Pennsylvania Human Relations Commission
Suite 1210 - 355 Fifth Avenue
Pittsburgh, PA 15222

Re: Conti v. City of Pittsburgh
No. E-15559

Dear Ms. Burwell:

As per our conversation of October 12, 1979, this is to confirm a recent change in policy by the Civil Service Commission concerning Transitional Vertebrae. The new policy is that when the condition is identified by back X-ray, the applicant will be sent to an appropriate specialist to determine if the presence of a Transitional Vertebrae constitutes a gross abnormality. Accordingly all applicants who have been disqualified from employment will receive letters to this effect and appointments will be set up. Victoria Conti is among those to be contacted.

Very truly yours,


Arthur G. Gilkes, Jr.
Assistant City Solicitor

AGG/eac

Joint Exhibit No.

D

City of Pittsburgh



Pennsylvania

DEPARTMENT OF LAW

Mead J. Mulvihill, Jr.
City Solicitor

313 City-County Building
Pittsburgh, PA. 15219

December 24, 1979

DIRECT DIAL: 255-2026

Ms. Wanda Burwell
Human Relations Representative
Commonwealth of Pennsylvania
Human Relations Commission
Suite 1210 - 355 Fifth Avenue
Pittsburgh, PA 15222

Dear Ms. Burwell:

Because the medical profession cannot agree on whether a transitional vertebrae causes lower back disabilities, the City is no longer interpreting its Civil Service Rule III, Section 12(10) to exclude those with a transitional vertebrae from employment in strenuous non-sedentary jobs.

Very truly yours,

Arthur G. Gilkes, Jr.
Assistant City Solicitor

AGG/eac

Joint Exhibit No.

E

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.

2. The parties and the Pennsylvania Human Relations Commission have fully complied with the procedural prerequisites to a public hearing in this case.

3. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. Respondent is an employer within the meaning of the PHRA.

5. Complainant has met her initial burden of establishing a prima facie case by proving that:

- a. She is a handicapped or disabled individual;
- b. She applied for a position for which she was qualified;
- c. Her application was rejected; and
- d. The Respondent continued to seek applicants of equal qualifications.

6. Respondent failed to meet its burden of introducing evidence tending to establish a legitimate, non-discriminatory reason for its conduct, namely the job relatedness of the Complainant's handicap or disability.

7. Complainant has met her ultimate burden of persuasion that her condition is a non-job related handicap or disability.

OPINION

This case arises on a complaint filed by Victoria M. Conti. (hereinafter "Complainant") against the City of Pittsburgh, (hereinafter "Respondent") on or about February 1, 1979, at Docket No. E-15559. The Complainant alleged that the Respondent discriminated against her by refusing to hire her for the position of a paramedic in the Emergency Medical Services after the Complainant did not pass a pre-employment physical examination. The Complainant claims the Respondent's action violated Section 5(a), (b)(1) and (b)(5) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegations of discrimination. The PHRC and the parties then attempted to eliminate the allegedly unlawful practice through conference, conciliation and persuasion. These efforts were unsuccessful, and the case was approved for public hearing. By agreement of the parties and with leave of the Hearing Examiner, this matter was submitted for resolution on briefs of the parties. All substantial facts were undisputed and reduced to Stipulations of Fact from which the legal analysis of this matter is taken. The brief on behalf of the Complaint was filed by PHRC regional staff attorney Fewell on May 4, 1987, and the Respondent's brief was filed on August 21, 1987 and received on August 24, 1987.

The Complainant bears the initial burden of establishing a prima facie case of discrimination under the PHRA. General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976). If she meets this burden, the Respondent may prevail by showing a legitimate, non-discriminatory reason

for its conduct; in this case the Respondent could do this by proof that the Complainant had a job-related disability at the time of her application. National Railroad Passenger Corp. v. PHRC, 70 Pa. Commonwealth Ct. 62, 452 A.2d 301 (1982).

The Complainant's initial burden under the PHRA is well settled; she can make out her prima facie case by proof that:

1. She is a handicapped or disabled individual within the meaning of the PHRA and the applicable regulations thereunder;
2. She applied for a position for which she was qualified;
3. Her application was rejected; and
4. The Respondent continued to seek applications of equal qualifications.

National Railroad Passenger Corporation Id., and Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983).

The Respondent does not contest that the Complainant has met this burden. Admittedly, the Complainant's application was rejected by the Respondent because an X-ray, taken as part of a required pre-employment physical, revealed that the Complainant had the condition of a Transitional Vertebrae.

When an employer rejects an applicant for medical reasons, that action is per se an impairment of a major life activity, i.e. employment. PA State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 at 589 n. 12 (1983). Accordingly, the Complainant was a handicapped or disabled person simply because the Respondent regarded the Complainant as having an impairment. See 16 Pa. Code §§44.4 (i)(C), and 44.4 (ii)(D).

The remaining elements of the prima facie showing are also easily established. There is no dispute that the Complainant was, in all other ways, qualified for the position of paramedic. Clearly, the Complainant was rejected and the Respondent continued to seek equally qualified applicants to fill vacant paramedic positions.

The Complainant, by establishing a prima facie case, has created a presumption that the conduct complained of was discriminatory. The Respondent may (and, in order to prevail, must) rebut the presumption thus created by introducing admissible evidence of a legitimate, non-discriminatory reason for its action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1980); Pennsylvania Department of Transportation v. PHRC, 480 A.2d 342 (1984). Job relatedness of a handicap is, of course, such a reason; the PHRA's protection extends only to non-job related handicaps.

At least one Pennsylvania case deciding a claim that a handicap was job related suggests that the burden placed on an employer making that assertion is one of persuasion as well as the burden of production apparently contemplated by Burdine. In National Railroad Passenger Corp. (AMTRAK) v. PHRC, 452 A.2d 301 (1982), the Pennsylvania Commonwealth Court held that the burden of establishing job relatedness is on the employer. Any apparent discrepancy in the decided cases regarding the precise nature of the Respondent's burden may, however, be resolved by an analysis of the Complainant's overall burden, which is the ultimate burden of persuading the finder of fact that an unlawful discriminatory practice has occurred.

In the context of a case alleging handicap-based discrimination where the defense of job relatedness is submitted, a Respondent may rebut the prima facie presumption by introducing evidence establishing job relatedness. Consistent with both Burdine and Amtrak, Complainant may still attempt to meet the ultimate burden of persuasion by introducing evidence relevant to the issue of job relatedness which contradicts the employer's evidence. Burdine discusses a Complainant's opportunity to meet the ultimate burden in terms of demonstrating that a Respondent's proffered reasons for a challenged action are pretextual. Where, as here, the reason for the rejection is not in dispute and the relevant inquiry is whether a handicap is job related, the Complainant can meet his ultimate burden by demonstrating that his handicap is in fact not job related.

The Respondent vigorously argues that the Civil Service Commission of the City of Pittsburgh is bound by its enabling statute to insure that, "appointments. . . shall be made only according to qualifications and fitness. . ." 53 P.S. §23431. The General Civil Service Act, Section 23436, also provides the City of Pittsburgh with the mandate to, "prescribe, amend, and enforce rules and regulations for carrying into effect the provisions of [the General Civil Services Act]. . ." The Respondent contends that its action in denying employment to the Complainant was consistent with its obligation to appoint according to fitness.

Upon discovery of the Complainant's conditions of transitional vertebrae, an administrative determination was made that such conditions precluded the Complainant from efficiently fulfilling the duties

of a paramedic. In support of this position, the Respondent cites portions of Rule III of the Rules of the Civil Service Commission, City of Pittsburgh. Rule III, Section 12 A states:

Physical Standards - The physical standards in Section 12B and C of this rule are applicable in their entirety to the Police and Fire services. For other positions requiring a physical examination, only those physical standards which are job related shall be applicable to such positions in accordance with Section 11B of this rule.

The Respondent appears to have fully relied on its administrative interpretation of Rule III, Section 12A of the Rules of the Civil Service Commission for its decision that the Complainant's condition was job related. It is important to note, that the evidence clearly shows that it was the Respondent's administrative decision that the Complainant's condition precluded her from being hired. The Respondent cites the case of Action Industries v. PHRC, ___ Commonwealth Ct. ___, 518 A.2d 610 (1986), for the proposition that when a Respondent reasonably relies upon the opinion of a medical expert in refusing to hire an applicant, that Respondent has a good faith defense which negates a perceived intent to discriminate. Close scrutiny of Joint Exhibits D and E clearly reveals that the pre-employment physical merely identified a condition, but that there was medical disagreement regarding whether the condition of transitional vertebrae was actually job related. The exhibits in no way suggest that the Respondent was given a medical opinion that the Complainant's condition would prevent her from performing the job.

This case is clearly distinguishable from the facts in Action Industries. Here, there is no clear evidence that the Respondent received anything more than a medical report indicating the Complainant had the condition of transitional vertebrae.

The record is clear that the Respondent administratively made the assessment that these conditions were job related, by an administrative interpretation of Rule III, Section 12A.

The Civil Service Rules do not in any way specifically address the condition of transitional vertebrae. Rule III, Section 12B (10) states:

The physical standards are as follows: SPINE:
Evidence of serious back injury, disc, or back pathology, abnormal curvature, Pott's disease, ankylosis, osteomyelitis, or other gross abnormalities will be disqualifying.

First of all, without further clarification, the physical standards outlined in Section 12 B(10) cannot be said to even apply to the position of paramedic. Section 12A says that Section 12B standards apply in their entirety only to police and firefighters positions and that Section 12B standards apply to other positions only when they are job related. Like the PHRA, the Respondent's own guidelines require a showing of job relatedness.

Second, even if we were to assume that Section 12B (10) standards apply to the paramedic position, the section does not specifically include transitional vertebrae. The Respondent submitted no medical evidence to substantiate that transitional vertebrae constitutes a

serious back injury, back pathology, or other gross abnormality. To the contrary, the Respondent's policy changed in 1979 to provide for a job relatedness determination.

It is significant that numerous cases decided under the PHRA have considered the issue of job relatedness by weighing evidence introduced by both the Respondent and the Complainant. See e.g. Pennsylvania Department of Transportation v. PHRC, 457 A.2d 584 (1983); National Railroad Passenger Corp. v. PHRC, 452 A.2d 301 (1982). As in any other case, questions regarding the weight to be accorded to the evidence presented are for the finder of fact to resolve. Harmony Volunteer Fire Co. v. PHRC, 459 A.2d 439 (1983).

The Complainant's evidence of non-job relatedness is contained in Joint Exhibit C. The Complainant's doctor, Edward G. Kelly, M.D., had examined the Complainant in order to render an opinion concerning the condition of her lower spine. While transitional vertebrae was noted, Dr. Kelly indicates that approximately 20% of the normal population have a similar condition, and that the Complainant's condition did not make her a high risk individual. The Complainant's work history was reviewed and assessed with the finding that the Complainant has not had adverse lower back symptoms despite working at jobs which included carrying heavy objects as heavy as 50 pounds. The Complainant was assessed as in good physical shape, with a past health history within normal limits. This bears out the Complainant's contention that she did not have a job related back condition. This evidence is quite persuasive when stacked up against the minimal record submitted by the Respondent. Frankly, the record is devoid of persuasive evidence that a fair determination was ever made that the

Complainant's back condition constituted a job related circumstance. Instead, the Respondent simply made an administrative conclusion that any sign of any back condition prohibited an applicant from being hired as a paramedic without due regard for whether the condition noted was in fact job related.

Accordingly, the Complainant has met her ultimate burden of establishing that her condition is not job related, and that the Respondent's refusal to hire her violated Section 5 of the Act. Appropriate relief must therefore be considered. Following a finding of discrimination, the PHRC is empowered by Section 9 of the Act to award relief which includes hiring and lost wages. Complainant here seeks only lost wages.

By stipulation between the parties, a back pay award is limited to \$7,860.00. This amount represents the difference between the wages the Complainant would have earned as a paramedic and the wages she actually earned during the period covering January 22, 1979 until November, 1979. Interestingly, the Complainant's brief does not seek interest on the back pay remedy. Additionally, other equitable considerations in this matter operate against awarding interest.

The Complainant does ask for a cease and desist order, however, the Respondent's actions in cases of this nature has been previously evaluated by the Respondent and the policy in effect at the time of the Complainant's rejection has been changed. The Respondent now requires a more specific medical finding. The Complainant's brief simply asks for a cease and desist order preventing a return to the old policy. Obviously, the Respondent has already seen the weaknesses of its prior

policy and does not intend to return to a policy which presents significant exposure to liability.

Accordingly, under the circumstances of this case a cease and desist order is not appropriate. Relief is, therefore, ordered as described with specificity in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

VICTORIA M. CONTI,
Complainant

v.

CITY OF PITTSBURGH
Respondent

Docket No. E-15559

RECOMMENDATION OF THE HEARING EXAMINER

Upon consideration of the entire record in the above captioned matter, it is the view of the Hearing Examiner that the Respondent refused to hire the Complainant because the Respondent regarded the Complainant's back condition as a handicap or disability in violation of §5 of the Pennsylvania Human Relations Act. Accordingly, it is the Hearing Examiner's recommendation that the attached Stipulations of Fact, Conclusions of Law, Opinion, and Final Order be adopted by the full Pennsylvania Human Relations Commission.

BY: 
Carl H. Summerson
Hearing Examiner

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

John P. Wisniewski
John P. Wisniewski
Secretary