

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIE C. SCHROEDER,
Complainant

v.

CITY OF PITTSBURGH,
Respondent

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Docket No. E-15934

STIPULATIONS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIE C. SHROEDER,
Complainant

v.

CITY OF PITTSBURGH,
Respondent

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Docket No. E-16945

JOINT STIPULATIONS OF FACT

The parties hereby jointly stipulate as to the truth and relevance of the following statements of fact as well as to the authenticity and relevance of the incorporated exhibits referred to in said stipulations concerning the above captioned case by the signatures of their attorneys below:

1. Complainant herein is Marie C. Shroeder who is an individual within the meaning of Section 5(a) of the Pennsylvania Human Relations Act (PHRA).

2. Respondent is the City of Pittsburgh, an employer within the meaning of Section 5(a) and Section 4(b) of the PHRA.

3. On or about April 18, 1979, Marie C. Shroeder applied for a position as an Outreach Worker in the Respondent's CETA Program. A true and correct copy of Marie C. Shroeder's application

for this employment is attached hereto, incorporated herein and marked as Joint Exhibit 1.

4. The duties and requirements for the position as communicated by the Respondent's Department of Housing to the Civil Service Commission for Outreach Worker are set forth in the job description for Outreach Worker, a true and correct copy of which is attached hereto and incorporated herein and marked as Joint Exhibit 2. The description for Outreach Worker does not state that the position was included within the purvue of the Civil Service Commission, nor does it state that the positions was considered to be an "arduous and non-sedentary position."

5. Complainant met the requirements for the position of Outreach Worker as set forth in Joint Exhibit 2.

6. Thereafter, Marie C. Shroeder received a physical examination by Respondent's personnel, from which results Respondent determined that complainant failed on account of being fifty-four pounds over the 147 lb. weight allowable for height of 61 inches, as determined by the height and weight standards of the Metropolitan Life Insurance tables adopted by the Civil Service Commission for the City of Pittsburgh. A true and correct copy of Respondent's certificate of medial exam for Marie C. Shroeder is attached hereto, incorporated herein and marked as Joint Exhibit 3.

7. Respondent's "allowable weights" were determined by reference to the height and weight standards adopted by the Civil Service Commission of the City of Pittsburgh for its employees.

A true and correct copy of the height and weight standards applicable to women at the time of Complainant's examination is attached hereto, incorporated herein and marked as Joint Exhibit 4.

8. Sections 11 and 12 inclusive of Respondent's Civil Service Commission Rule 3 addressed the physical examinations of applicants or candidates for employment with Respondent, both in sedentary and arduous or non-sedentary jobs. A copy of Sections 11 and 12 inclusive of the Civil Service Commission Rule applicable to examination is attached hereto, made a part hereof and marked as Joint Exhibit 5.

9. At the time of Complainant's application, Respondent applied the minimum/maximum weight standard to "arduous and non-sedentary" positions in only three instances: (1) at the original hiring; (2) promotion; and (3) transfer.

10. Once a person was employed in an "arduous and non-sedentary" Civil Service Commission position, and if that person never applied for a promotion or transfer, what the person weighed during their entire tenure in that job did not jeopardize their job security.

11. At the time of the denial of the Complainant's application, Respondent interpreted the Civil Service Commission Regulations to require application of the height-weight standards to applicants for the position of Outreach Worker.

12. At the time of the denial of the Complainant's application, Respondent considered the position of Outreach Worker as non-sedentary, based on the job description as stated in Joint Exhibit 2.

13. Respondent applied the height-weight standards to all applicants for the position of Outreach Worker.

14. Respondent refused to hire Complainant for position as Outreach Worker because she exceeded the maximum weight established by Civil Service Commission height-weight tables.

15. At the time of the denial of Complainant's application, Respondent continued to seek persons to fill the position of Outreach Worker.

16. On or about May 23, 1979, Marie C. Shroeder filed a verified complaint with the Pennsylvania Human Relations Commission (PHRC) alleging that the denial of her application was unlawful disability or handicap discrimination in violation of the PHRA.

17. As a result of the Opinion and Order dated October 17, 1980 of Judge Silvestri of the Court of Common Pleas of Allegheny County in the class action matter of Luna et al. v. City of Pittsburgh et al., G. D. 80 235181, which Order enjoined the defendants from applying the height-weight standards to the named class representatives and deferred damage assessment and the application to the height-weight standard to all potential class members until final hearing, the City of Pittsburgh Civil Service Commission, at its meeting held October 23, 1980, decided to suspend the application of the height-weight standards until the outcome of the Court proceeding in Luna or the completion of a validation study, and that in

cases where persons were denied employment, if the position had been filled, the person would be put on a list of eligibles for the next position. A true and correct copy of the relevant portions of the Civil Service Commission's minutes of the meeting of October 23, 1980 are attached hereto, made a part hereof and marked as Joint Exhibit 6.

18. As a result of the Civil Service Commission's decision at its meeting on October 23, 1980, Marie C. Shroeder was employed by Respondent as an Outreach Worker, with her employment commencing December 1, 1980.

19. Marie C. Shroeder worked as an Outreach Worker in Respondent's employ until May 18, 1981, when her position was eliminated due to federal funding cutbacks in the CETA Program and Community Development Funds.

20. There were no changes in the job of Outreach Worker between the time Complainant applied for the position and December, 1980.

21. Complainant performed adequately in the position of Outreach Worker.

22. The rates of pay for the position of Outreach Worker in 1979 and 1980 were as follows:

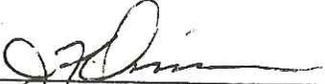
1979 - \$9,491.00 per annum or \$790.92 per month
1/80 - 6/80 - \$10,191.00 per annum or \$849.25 per month
7/80 - 11/80 - \$10,891.00 per annum or \$907.58 per month

All dollar amounts stated are gross wages.

23. The amount of pay earnable by Marie C. Shroeder, had she been employed by Respondent as an Outreach Worker between May 10, 1979 and December 1, 1980, is \$15,725.00.

24. All procedural requirements for the holding of a public hearing under the PHRA have been met in the instant case.

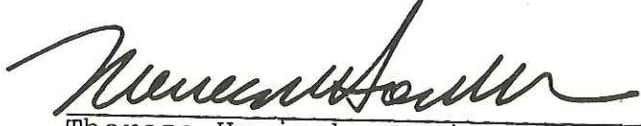
In behalf of the City of Pittsburgh



Joseph F. Quinn, Assistant City Solicitor
313 City-County Bldg.
Pittsburgh, PA 15219
(412) 255-2026

Date: 8/31/87

In behalf of the Pennsylvania
Human Relations Commission



Theresa Homisak, Assistant Chief Counsel
State Office Bldg.-11th flr.
300 Liberty Ave.
Pittsburgh, PA 15222-1210

Date: 8/27/87

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the PHRA.

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

3. The Commission has jurisdiction over the parties and the subject matter of this case.

4. All procedural prerequisites to a public hearing in this case have been met.

5. The Complainant has shown that: (1) she had a handicap or disability within the meaning of the PHRA and applicable regulations; (2) that she applied for a position for which the Respondent was seeking applicants; (3) that despite the Complainant's qualifications, she was rejected; and (4) that after her rejection, the position remained open and the Respondent continued to seek applications from persons of Complainant's qualifications.

6. The Respondent regarded the Complainant as having a physical impairment which substantially limited her in the conduct of a major life activity, working.

7. The Respondent's suggestion that the Complainant had a job-related handicap or disability sufficiently met the Respondent's burden to articulate a legitimate non-discriminatory reason for its actions.

8. The Complainant successfully rebutted the reason articulated by the Respondent by showing that being overweight as an Outreach Worker was not job-related.

9. The PHRC has wide discretion in fashioning remedies where unlawful discrimination has been shown.

OPINION

This case arises on a complaint filed by Marie C. Schroeder (hereinafter "Complainant"), against the City of Pittsburgh, (hereinafter "Respondent"), on or about May 21, 1979, at Docket Number E-15934. The Complainant alleged that the Respondent discriminated against her by disqualifying her from being hired as a CETA Funded Outreach Worker because of the Complainant's weight. The Complainant claimed that the Respondent's action violated Section 59 (a), of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter the "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. By agreement of the parties and with leave of the Hearing Panel Chairperson, this matter was submitted to the Hearing Panel Chairperson 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. Briefs were submitted by the parties. The Respondent's brief was received on April 12, 1988, and the brief for the Complainant was received on April 11, 1988.

As we have so often done, this case will be viewed using a variation of the analytical model developed by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973),

and later adopted for use in Pennsylvania in General Electric Corp. v. PHRC §469 Pa. 202, 265 A.2d 649 (1976). See also, Allegheny Housing v. PHRC, ___ Pa. ___, 532 A.2d 315 (1987).

That model sets out the nature of the evidence needed for a Complainant to establish a prima facie case, for the Respondent to respond, and for the Complainant to counter the Respondent's response. If a Complainant can show a prima facie case, the burden shifts to the Respondent to articulate some legitimate, non-discriminatory reason for its actions. McDonnell Douglas at 802. If the Respondent is successful, the Complainant must have a full and fair opportunity to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. This third stage burden merges with the Complainant's ultimate burden of persuading the fact finder that the Complainant has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

Factually, this case differs only slightly from the circumstances in McDonnell Douglas. The McDonnell Douglas case was factually based on a race-based refusal to hire allegation. The Court noted that the Complainant must carry the initial burden of establishing a prima facie case of racial discrimination. Id at 802. This may be done by showing:

- (1) That the Complainant belongs to a racial minority;
- (2) That the Complainant applied for a job for which the Respondent was seeking applicants;
- (3) That, despite the Complainant's qualifications, he was rejected; and

- (4) That after the rejection, the position remained open and the Respondent continued to seek applications from persons of Complainant's qualifications.

The McDonnell Douglas Court wisely anticipated that facts of different cases will necessarily vary and that the four prong prima facie requirement articulated will not be applicable to differing factual situations. McDonnell Douglas at 802 n. 13. The U.S. Supreme Court made it clear that the general process it was creating would appropriately need adaptations to adjust the process to the facts presented. Accordingly, some adaptation of the required prima facie showing must be done in this instance.

At the outset, several things should be noted. First, in Burdine, Supra at 250, the U. S. Supreme Court declared, "The burden of establishing a prima facie case of disparate treatment is not onerous." Second, it is apparent that the U.S. Supreme Court intended that the four parts of the prima facie showing are non-subjective and susceptible to objective proof.

Since this case concerns an alleged handicap/disability-based disqualification from hiring because of the Complainant's weight, the prima facie case may be established by showing:

- (1) That the Complainant is a handicapped/disabled individual;
- (2) That the Complainant applied for a position for which the Respondent was seeking applicants;
- (3) That despite the Complainant's qualifications, she was rejected; and

(4) That after the rejection, the position remained open and the Respondent continued to seek applications from persons of Complainant's qualifications.

In effect, the Respondent has stipulated to facts which established the second, third, and fourth elements of the Complainant's prima facie case. Stipulation of Fact number 3 states that the Complainant applied for a position as an Outreach Worker. Stipulation of Fact number 5 indicates she met the requirements for the position and a combination of Stipulations of Fact numbers, 11, 12, 14 and 15 reveal the Complainant was rejected. Equally clear is the stipulated fact in Stipulation of Fact number 15 that after the denial, the Respondent continued to seek persons to fill the position of Outreach Worker.

The preliminary area of major contention in this matter deals with whether the Complainant's condition, obesity, renders her a handicapped/disabled individual within the meaning of the PHRA and applicable regulations. Section 4(p) of the Act defines "non-job related handicap or disability" as:

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 employe insurance plan does not render a handicap or disability job related.

Regulations adopted by the Commission prior to the filing of this complaint define "handicapped or disabled person" as one who:

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

- (B) has as record of such an impairment; or
- (C) is regarded as having such an impairment.

16 Pa. Code §44.4(i)

Phrases used in these basic definitions are further defined:

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

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

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

(D) "is regarded as having an impairment" means 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(ii)

These regulatory definitions have been upheld as a valid exercise of the Commission's legislative rule-making authority.

Pennsylvania State Police v. PHRC, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 483 A.2d 1039 (1984), reversed on other grounds 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

The Respondent argues that the Complainant offered no evidence that her condition, obesity, was a condition which substantially limited any of her major life activities. However, the Respondent does recognize that the Complainant's case relies on 16 Pa. Code §44.4(i)(c), which defines a handicapped or disabled person as one who "is regarded as having [an impairment which substantially limits one or more major life activities.]"

It would appear the Respondent contends that it does not regard the Complainant as having a condition which substantially limits a major life activity but only regards the Complainant as not meeting a height and weight requirement. In support of this argument, the Respondent cites a line of federal cases which hold that failure to qualify for a single job because of some impairment does not constitute being limited in the major life activity of working. See Tudyman v. United Airlines, 38 FEP 732, 608 F. Supp. 739 (C.D. Cal. 1984), citing E.E. Black, Ltd. v. Marshall, 23 FEP 1253, 497 F. Supp. 1088 (D.Haw. 1980), vacated and remanded, 26 FEP 1183 (D.Haw. 1981).

Even if we were to accept this restrictive reading of 16 Pa. Code §44.4(i)(c), the Complainant in this case would have been prevented from seeking any job with the Respondent which was considered by the Respondent to be "arduous and non-sedentary." The federal cases cited by the Respondent in support of the restrictive view it proposes, deal with individuals who were prevented from having a single job.

In Tudyman, supra, a bodybuilder was seeking a job as an airline flight attendant. The Respondent airline was found to merely regard the Complainant in that case as merely not being under a certain weight. The Complainant in Tudyman thus failed to qualify for a single job and such refusal to hire was held not to constitute perceiving the applicant as a handicapped individual.

In E.E. Black, supra, cited by the Respondent, the U.S. District Court in Hawaii cited some examples of individuals refused particular jobs who it would not consider handicapped. These examples include:

- a. a worker who was offered a particular job by a company at all of its plants but one, but was denied employment at that plant because of the presence of plant matter to which the employee was allergic.
- b. an individual with acrophobia who was offered 10 deputy assistant accountant jobs with a particular company, but was disqualified from one job because it was on the 37th floor.
- c. an individual with some type of hearing sensitivity who was denied employment at a location with very loud noise, but was offered positions at other locations.

These are significantly different situations from the situation encountered by the Complainant when she sought the Outreach Worker position with the Respondent. Also, it appears the Respondent

should have taken a closer look at the court's opinion in E.E. Black. The court in that case noted, "[a] person who is disqualified from employment in his chosen field has a substantial handicap to employment, and is substantially limited in one of his major life activities. Id at 17,650.

Accordingly, even under a restrictive interpretation of the "regarded as" provision of our regulations, the Complainant was restricted from employment in any "arduous, non-sedentary" position. However, PHRC regulations are not this restrictive. In fact, Section 12 (a) of the PHRA specifically mandates that "[t]he provisions of [the PHRA] shall be construed liberally for the accomplishment of the purposes thereof. . . ." Furthermore, the Pa. Commonwealth Court has provided guidance on what the phrase "regarded as" shall include.

The Respondent asserts that Pennsylvania courts have not addressed this issue. However, in Pa. State Police v. PHRC, 85 Pa. Cmwlth Ct. 621, 483 A.2d 1039 (1984), citing Pa. State Police v. PHRC, 72 Pa. Cmwlth Ct. 520, 457 A.2d 584 (1983), the court clearly stated that "[if] an employer rejects an applicant for medical reasons, that act under the Commission's regulations is an impairment, per se, of a major life activity, employment." Further, the court found irrelevant the fact that a Complainant believes he can perform all the duties which would be required of her and the fact that the examining physician does not consider an applicant to be disabled. These issues were deemed irrelevant with respect to a determination of whether a Complainant was "regarded" as having such an impairment.

Under the circumstances presented here, the physical taken by the Complainant with the resulting refusal to hire amounts to the Respondent having regarded the Complainant as having an impairment of a major life activity. Accordingly, within the meaning of the PHRA and applicable regulations, the Complainant was a handicapped/disabled individual.

Another argument raised by the Respondent is that the Complainant's condition is a voluntary one thus the Complainant can not be said to have a physiological disorder or abnormality. The Respondent cites two state cases, Plizka v. A.O. Smith Corp., (Wisc. D.I.L.H.A.R., August 19, 1975) and Solizs v. Continental Oil Co., (Mont. H.R.C., February 10, 1987) which rejected voluntary obesity as a handicap.

Contrary authority is found in S.D.H.R. v. Xerox Corp., 37 FEP 1389 (N.Y. Ct of Appeals 1985). The court in S.D.H.R. v. Xerox Corp., cited State Office of Drug Abuse Services v. State Human Rights Appeal Board, 49 N.Y. 2d 276, 28 FEP 1452 (1979), which found that it is reasonable to conclude obesity itself can constitute an impairment. The New York courts rejected the voluntariness argument, now submitted by the Respondent. We join New York in rejecting a claim that voluntariness of a condition renders obesity not an impairment. The key assessment is the "regarded as" portion of our regulations, not the issue of voluntariness.

Thus, a prima facie case has been established. At this point, a Respondent is obliged to articulate a legitimate non-discriminatory reason for its actions. Here, an inference drawn from the stipulations of the parties accomplishes this task. An inference can be drawn that it is the Respondent's position that

weight proportionate to height for this position is job-related in that the Complainant would be in a position that would require arduous labor, non-sedentary activity. Clearly, job relatedness of a handicap is a valid defense because the PHRA only protects individuals who have non-job related handicaps. The final question for resolution on the question of liability is therefore, was the Complainant's condition job-related?

A review of the Stipulations of Fact reveals sufficient substantial information to determine that it was not. First, as noted, the Respondent's weight restrictions applied only to positions classified as "arduous and non-sedentary." No evidence of record factually relates the weight requirements to ability to do any job. Instead, it appears that the Respondent simply presumed one was incapable of performing certain jobs when an individual did not conform to the arbitrary weight standards. Clearly, the Complainant performed all functions and duties of this position after she was subsequently hired in December 1980. Also, she performed her position adequately between December 1980 and May 18, 1981 when the position was eliminated.

Second, it is noteworthy that the weight restrictions applied only to original hires, transfers and promotions. Obviously, once hired, transferred or promoted, an employee could exceed the standards without endangering their job. In reality, the weight restrictions bore no genuine factual relation to an individual's capability to do the job.

Accordingly, the Complainant has met her burden of showing the legitimate reason articulated by the Respondent to be pretextual, and her ultimate burden of proving that she was the victim of

discrimination. Having determined that the Respondent's action discriminated against the Complainant, we next consider appropriate relief.

By stipulation of the parties, the wages lost as a result of the Respondent's actions amount to \$15,725.00. An appropriate order follows.

2. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Theresa Homisak, Esquire, in the PHRC Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

John P. Wisniewski
John P. Wisniewski
Secretary