COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ANDREW SIVAK Complainant	:	
v.	:	PHRC CASE NO. 200600492
UNION FIRE ASSOCIATION Respondent	:	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant herein is Andrew Sivak, an adult male, (hereinafter "Complainant"), who resides in Drexel Hill, Pennsylvania. (C.E. 1).

2. The Respondent herein is Union Fire Association (hereinafter "Respondent"), which is located in Bala Cynwyd, Pennsylvania (C.E. 1).

3. The Respondent is a volunteer firefighting organization in the Commonwealth of Pennsylvania. (N.T. 8).

4. On or about July 26, 2006, the Complainant filed a complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at PHRC Case No. 200600492. (J.E. 1).

5. Or on about October 23, 2006, the Respondent filed an Answer in response to the Complainant's PHRC complaint. (J.E. 1).

6. In correspondence dated September 5, 2007, Commission staff notified the Complainant and Respondent via a finding of probable cause that Commission staff believed probable cause existed to credit the allegations found in the complaint. (J. E. 1).

* 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
S.F. Stipulations of Fact
C.E. Complainant's Exhibit
J.E. Joint Exhibit
P.D. Pedano Deposition
S.D. Shrager Deposition

7. Subsequent to the determination of probable cause, Commission staff and the parties attempted to resolve the matter in dispute by conference, conciliation and persuasion but were unable to do so. (J.E. 1).

8. In subsequent correspondence, Commission staff notified the parties that a public hearing had been approved. (J.E. 1).

9. On or about April 20, 2006, the Complainant was terminated as a fire fighter/engineer by the Respondent because he had suffered two episodes of syncope. (N. T. 17-18).

10. Syncope is defined as a lapse of consciousness or passing out. (P.D. 11).

11. The two episodes of syncope occurred on March 8, 2006. (N.T. 21).

12. The first episode of syncope occurred in the home of the Complainant and the second episode occurred while the Complainant was at work for the Respondent. (N.T. 17).

13. The two episodes of syncope are characterized as recurring by the Complainant's physician, Dr. Larry Shrager. (S.D. 26).

14. The Complainant went to see Dr. Shrager, his family doctor, on the day he suffered the syncope episodes. (N.T. 18).

15. The Complainant told Dr. Shrager that he had passed out twice on the same day. (N.T. 17).

16. The Complainant's office visit with Dr. Shrager lasted approximately 15-20 minutes. (N.T. 19).

17. Dr. Shrager, incorrectly stated in a response to a Commission request, that the Complainant had only one episode of syncope. (S.D. 20).

18. Dr. Shrager's records clearly indicated that the Complainant had experienced two episodes. (S.D. 20-21).

19. Dr. Shrager did not know the details contained in the job description for Complainant's job as a firefighter. (S.D. 31).

20. The records of Dr. Shrager do not contain any clearance for the Complainant to return to work as a firefighter. (S.D. 24).

21. Dr. Shrager has no record of contacting the Respondent regarding the Complainant's condition. (S.D. 33).

22. The Complainant then went to see Dr. Andrea Pedano, the examining physician for the Respondent. (N.T. 19).

23. The Complainant was required to see Dr. Pedano before he could return to work. (N.T. 19).

24. Upon seeing Dr. Pedano, Complainant was directed by Dr. Pedano to Delaware County Memorial Hospital to see Dr. Slater. (N.T. 20).

25. After a half hour visit with Dr. Slater, a neurologist, Dr. Slater provided the Complainant with a note telling him he could go back to work. (N.T. 20)

26. Even though the Complainant had notes from Dr. Shrager and Dr. Slater, the Complainant still had to be cleared by Dr. Pedano. (N.T. 20)

27. Neither Dr. Shrager's nor Dr. Slater's notes indicates that the Complainant is cleared to return to work as a firefighter. (C.1., C.2.).

28. The note from Dr. Slater is undated and is, essentially a prescription for aggressively treating a cough. (N.T. 24).

29. Dr. Andrea Pedano is not only the examining physician for the Respondent but she is also a qualified firefighter. (P.D. 9-10).

30. Dr. Pedano is paid by the Lower Merion Firemen's Relief Association. (P.D. 8).

31. Dr. Pedano is paid whether she finds a firefighter fit for duty or not fit for duty. (P.D. 8).

32. Dr. Pedano determined that the Complainant was not qualified to safely operate firefighting apparatus, including the driving of a fire truck, in accordance with the National Fire Protective Association Code (hereinafter "NFPA"). (P.D. 12).

33. The NFPA Code contains the medical requirements for both paid and volunteer firefighters. (P.D. 12-13).

34. In the NFPA Code, a candidate shall not be certified as meeting medical requirements if the fire department physician determines that the candidate has any Category A medical condition as specified in chapter three of the standard. (P.D. 13).

35. NFPA standards provide that Category A conditions are deemed clinically significant risks to the safety and health of the individual firefighters or others and the standards further state that "recurrent syncope" is a Category A condition. (S.D. 26).

36. Dr. Pedano reviewed the records of Dr. Shrager and did not find any reasons to change her opinion. (P.D. 15).

37. Dr. Pedano also reviewed the records of Dr. June Frye, another physician the Complainant saw, and did not change her opinion because Dr. Frye focused on a separate medical issue, obstructive sleep apnea. (P.D. 14).

38. Dr. Pedano felt that if the Complaint continued as a firefighter, there would potentially be demonstrable and serious harm not only to the Complainant and other firefighters, but also to the health and safety of others. (P.D. 15).

39. Dr. Pedano, with reasonable medical certainty, did not believe it was safe for the Complainant to continue as a firefighter. (P.D. 15).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "Commission") has jurisdiction over the parties and the subject matter of the complaint under the Pennsylvania Human Relations Act (hereinafter "Act").
2. The parties and the Commission have fully complied with the procedural prerequisites to convene a public hearing under the Act.
3. The Complainant is an individual within the meaning of Section 5(a) of the Act.
4. The Respondent is an employer within the meaning of the Act.
5. In order to establish a *prima facie* case of disability discrimination under the Act, the Complainant must show that:

   (1) he is a disabled person within the meaning of the Act;

   (2) he is otherwise qualified to perform the essential functions of the job; and

   (3) he has suffered an adverse employment decision.
6. The Complainant cannot satisfy the second element of the prima facie showing.
7. A Respondent has a good faith defense where it reasonably relied upon the opinion of a medical expert.

OPINION

On or about July 26, 2006 Andrew Sivak (hereinafter "Complainant") filed a complaint against the Union Fire Association(hereinafter "Respondent") with the Pennsylvania Human Relations Commission (hereinafter "Commission") at case No. 200600492. The Complainant alleged in his complaint that the Respondent discharged him from employment as a firefighter because he was regarded as having a disability. The Complainant further asserts that Respondent's alleged actions violate Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "Act")

PHRC staff conducted an investigation and found probable cause to credit the allegations of the complaint. When efforts to resolve this matter through conference, conciliation and persuasion were unsuccessful, the case was approved for public hearing.

This matter was heard on June 8, 2009 in Philadelphia, Pennsylvania before Permanent Hearing Examiner Phillip A. Ayers. Norman G. Matlock, PHRC Assistant Chief Counsel represented the state's interest in the complaint. Ronald Ervais, Esquire and Jeffrey M. Lindy, Esquire appeared on behalf of the Respondent.

In the Respondent's post-hearing brief, the Respondent contends that the PHRC lacks jurisdiction because the Respondent employed only three full-time employees. The Respondent notes that they also employed temporary casual employees and that all other members of the Fire Association were volunteers. The Respondent's argument is summarily rejected. Voluntary firefighters have been found to be employees for the purposes of the PHRA. See Harmony Volunteer Fire Co. and Relief Association v. PHRC, 459 A.2d 439, 442 (Pa. Cmwlth. 1983).

Turning to the substantive issue in this case, Section 5 (a) of the Pennsylvania Human Relations Act (hereinafter "PHRA"), inter alia declares it to be an unlawful discriminatory practice:

(A) For any employer because of the . . . non-job related handicap or disability . . . to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required. .. 43 P.S. § 955(a).

In cases involving allegations of disparate treatment, we turn to the proof format first set forth in McDonnell-Douglas, Corp. v. Green 411 U.S. 792 (1973). The McDonnell-Douglas case involved an allegation of race discrimination in employment pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S. C.A. § 20000 c-2 (a) *et seq*. Under the McDonnell-Douglas model, the Complainant bears the initial burden of establishing a *prima facie* case of discrimination. Once a Complainant has met the *prima facie* burden, the Respondent must articulate a legitimate non-discriminatory reason for its action. The Complainant still retains the ultimate burden of proving he is a victim of unlawful discrimination.

In order to establish a *prima facie* case of disability discrimination under the Act, the Complainant must show that:

(1) he is a disabled person within the meaning of the Act,
(2) he is otherwise qualified to perform the essential functions of the job; and
(3) he has suffered an adverse employment decision.

Williams v. Philadelphia Housing Authority Police Department 380 F. 3d 751, 10 AD Cases 1607 (3rd Cir. 2004), and Taylor v. Phoenixville School District, 184 F.3d 296 AD Case, 1187 (3rd Cir. 1999), citing Gaul v. Lucent Technologies, 134 F. 3d 576, 580, 7 AD Cases, 1223 (3rd Cir 1998).

In regard to the first element of the *prima facie* showing, the Complainant is a member of a protected class since he was regarded as disabled by the Respondent. Section 4 (p) of the Act defines disability as follows:

> (p. 1) 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 person's major life activities;
> (2) a record of having such an impairment, or
> (3) being regarded as having such an impairment, but such terms does not include current illegal use of or addiction to a controlled substance, as defined in Section 102 of the Controller Substance Act (Public Law 91-513, 21 U.S.C. § 802).

Specifically the Commission has promulgated regulations which offer clear guidance on the meaning of disability under the PHRA. The Commission regulations provides:

> (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 or 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 major life activities.
> (D) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment, or has none of the impairments defined in subparagraph (i) (A) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.

In the instant case, the first element of the *prima facie* showing is met since it is clear that the Respondent certainly regarded the Complainant as having a disability within the

meaning of the PHRA. The Respondent's doctor regarded the Complainant as having recurrent syncope which resulted in the Complainant passing out.

The next element of the prima facie showing is whether the Complainant is qualified to perform the essentials functions of the position. In the matter before the Commission, the Complainant cannot satisfy the second element of the prima facie showing. The record shows that to be qualified to perform the essential functions of fire fighter, he must meet medical standards established by NFPA. Here, the Complainant is unable to establish that he does not have a disqualifying condition. Instead, the record clearly reveals that the Respondent discharged the Complainant because of the recurrent medical condition of syncope, or passing out.

Here, Dr. Andrea Pedano, a physician the Respondent relied on to evaluate whether employees meet NFPA medical standards, issued a disqualification to work determination based on the doctor's application of NFPA medical examination guidelines. When a Respondent relies on a doctor's assessment to make an employment decision, the issue becomes whether the Complainant can establish that such reliance was unreasonable under the circumstances of a given set of circumstances.

Here, our analysis should begin with the question of whether, under the circumstances of this case, the Respondent's reliance on Dr. Pedano's opinion was reasonable. The major case in Pennsylvania on this issue is Action industries, Inc. v. PHRC, 518 A.2d 610 (Pa. Cmwlth. Ct. 1986). In that case, the court reviewed a situation where an employer had relied on the opinion of a medical expert in deciding not to hire an applicant. Generally, the court stated, "an employer can have a good-faith defense which negates its intent to discriminate where it reasonably relies upon the opinion of a medical expert in refusing to hire an applicant." Id at 613. The court in Action Industries recognized that a Complainant could still show that reliance upon the doctor's opinion was, under certain circumstances,

unreasonable. The court further recognized that it is virtually certain that, except in the most extreme cases, contradictory medical opinions will exist, and that just because a Complainant may find a doctor to contradict an employer's doctor, this factor should not give rise to liability.

Dr. Pedano's opinion was, with reasonable medical certainty that it would not be safe for the Complaint to continue as a firefighter. Specifically Dr. Pedano stated:

> "That the fact that he suffered two episodes of syncope would put him and the firefighters in the community at risk should he suffer those episodes behind the wheel of a fire truck or in the situation of a burning building." (P.D. 14).

The record before the Commission clearly reflects that the Complainant suffered two episodes of syncope which is defined as a lapse of consciousness. In addition, both Dr. Pedano and Dr. Shrager, Complainant's family doctor, further defined the episodes as recurrent. Dr. Pedano's opinion is in accordance with the National Fire Protective Association Code (NFPA) which defines recurrent syncope as a Category A condition and further provides:

"Category A conditions are deemed clinically significant risks to the safety and health of the individual firefighter or others." In Dr. Pedano's correspondence with the Respondent, she indicates that the recurrent syncope experienced by Complainant is a job related disability in that it interferes with his ability to perform the essential functions of the job and would pose a demonstrable threat of harm to both the claimant and to others. The Respondent has not asserted any other reason, other than the medical disqualification, for the termination of the Complainant. The Complainant has not produced any evidence that the Respondent's action in terminating the Complainant was pretextual.

The Complainant also presented the testimony, by deposition, of Dr. Larry Shrager, his family physician. The Complainant went to Dr. Shrager's office the day the two episodes of syncope occurred. Dr. Shrager's testimony in this matter is somewhat confusing. During the

Commission's investigation of this matter, Dr. Shrager first indicated that the Complainant "...never had any diagnosis in Category A in any of the NFPA standards." (S.D. 19). Dr. Shrager then stated that "syncope occurred only once and was not recurrent and was not due to sleep apnea." However, a further review of Dr. Shrager's own records indicated two episodes of syncope and that the syncope was recurrent. Dr. Shrager later admitted that his reply to Commission staff was incorrect. (S.D. 21). The letter addressed to Respondent dated July 22, 2008 from Commission Counsel stating that Dr. Shrager advised the Commission that the Complainant "never had any of the diagnosis in Category A of the NFPA standards" was clearly wrong and was based upon the misinformation submitted by Dr. Shrager. (S.D. 27). Dr. Shrager's overall testimony was not with any reasonable medical certainty in regard to the Complainant's disability.

In addition, the Complainant presented two "notes" as exhibits in support of his case. The first document was a printed certificate from Dr. Shrager, stating that "...will be able to return to work/school on 3/27/06. " The other document, an undated note written on a prescription form which states "Dx Cough syncope may return to work treat any cough aggressively." As stated before, Dr. Shrager's own records do not contain any reference to the Complainant returning to work as a firefighter. (S.D. 24). In fact, Dr. Shrager stated that his "medical decision may be outside of the guidelines of firefighting." (S. D. 30).

The record clearly supports the position that the Respondent reasonably relied on the opinion of Dr. Pedano that Complainant could not continue as a firefighter after he suffered two episodes of syncope. The Complainant has not shown that the Respondent's reliance on that opinion is unreasonable or pretextual.

An appropriate Order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ANDREW SIVAK **Complainant**	:	
v.	:	**PHRC CASE NO. 200600492**
UNION FIRE ASSOCIATION **Respondent**	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above captioned matter, the Permanent Hearing Examiner finds that the Complainant has failed to prove discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's Recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. Furthermore, the Permanent Hearing Examiner recommends the issuance of the attached Final Order.

October 14, 2009
Date

Phillip A. Ayers
Phillip A. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

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ANDREW SIVAK **Complainant**	:	
v.	:	**PHRC CASE NO. 200600492**
UNION FIRE ASSOCIATION **Respondent**	:	

FINAL ORDER

AND NOW, this 27th day of October, 2009, 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 Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own finding 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

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Stephen A. Glassman
Chairperson

Dr. Daniel D. Yun
Secretary