

**COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

CHARLES UNDERWOOD, Complainant

v.

ZOOLOGICAL SOCIETY OF PHILADELPHIA, Respondent

Docket No. E-35380

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

JOINT 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 Charles Underwood, an adult male.
2. The Respondent herein is Zoological Society of Philadelphia.
3. The Respondent, at all times relevant to the instant case, has employed four or more individuals in the Commonwealth.
4. On December 23, 1985 the Complainant filed a notarized complaint with the Pennsylvania Human Relations Commission ("Commission") at docket number E-35380.
5. On December 31, 1985 the Commission staff served a copy of the complaint on Respondent in a manner which satisfies the requisites of 1 Pa. Code §33.32.
6. By correspondence, dated July 23, 1986, the Respondent was notified of the probable cause finding.
7. In correspondence, dated July 23, 1986, the Commission notified the Respondent that a public hearing had been approved in this matter.

8. The Complainant, Charles Underwood, does not have a B.S. degree.
9. The Complainant, Charles Underwood, did not have two years of avicultural experience as an apprentice keeper in September, 1985.

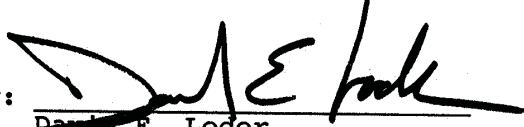
Counsel for the Commission

DUANE, MORRIS & HECKSCHER

By:


Cynthia Williams
Attorney for Complainant

By:


David E. Loder
1500 One Franklin Plaza
Philadelphia, PA 19102
Attorneys for Respondent

Date:

12/8/88

Date:

12/2/88

FINDINGS OF FACT

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 Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibits
S.F. Stipulations of Fact
D.E. Defendant's Exhibit

1. The Complainant was first employed by the Respondent on November 9, 1980 as an Apprentice Keeper. (C.E. I)
2. The Complainant was terminated by the Respondent on November 13, 1984. (C.E. 3)
3. The reasons for Complainant's termination were absenteeism, lateness, missing on the job, and poor performance. (N.T. 44)
4. After his termination, the Complainant entered the Fairmount Institute for rehabilitation for drug and alcohol addiction. (N.T. 22)
5. The Complainant was at the Fairmount Institute during the period of January to February of 1985. (N.T. 23)
6. The Complainant was re-employed by the Respondent as a laborer on or about March 15, 1985 (N.T. 47)
7. When Complainant returned to work on or about March 15, 1985, he had to complete a six-month probationary period. (N.T.48)
8. The Complainant understood that he would have to perform satisfactorily as a laborer for six months before being considered for other positions at the zoo. (N.T. 47, 48)
9. Six months from March 15, 1985 is approximately September 16, 1985 (N.T. 48)

10. The Respondent posted a vacancy announcement for an Apprentice Commissary Worker on September 4, 1985. (N.T. 30)
11. The Complainant applied for the Apprentice Commissary Worker position on September 5, 1985. (N.T. 30, C.E. 10)
12. The job posting for the Apprentice Commissary position closed on September 6, 1985. (N.T. 48)
13. The Complainant did not complete his probationary period until on or about September 15, 1985. (N.T.48)
14. The Complainant acknowledged that he understood that he had not completed his probationary period when the job vacancy was posted. (N.T. 48, 49)
15. The Respondent posted a vacancy announcement for a Watchman position on September 23, 1985. (N.T. 33)
16. Following the posting of the above Watchman position, the Respondent reviewed its needs and decided against hiring a Watchman. (N.T. 79)
17. The Respondent has not hired a person for the position of Watchman since 1981. (N.T. 79)
18. An Apprentice/Animal Keeper position was posted on September 18, 1985. (N.T. 81)
19. The Complainant applied for the position of Apprentice/Animal Keeper by correspondence on September 19, 1985. (C.E. 8)
20. The person responsible for filling this vacancy was Dr. Wilbur Amand, head of Animal Services. (N.T. 98)
21. The four internal applicants for the position were Daniel Callahan, Donna Marie Price, Daniel Faggans, and the Complainant. (N.T. 98-102)
22. None of the four internal applicants for the position were interviewed for the position because they did not have experience in the avicultural area. (N.T. 98-102)
23. The job description that was posted with the September 18, 1985 announcement was dated August 1, 1970. (C.E. 7)
24. The job qualifications for the Apprentice/Animal Keeper position included avicultural experience. (N.T. 82)
25. The job description posted on September 18, 1985 did not accurately reflect the requirements being sought. (N.T. 75-76)
26. The job description did not immediately change because of on-going negotiations with the union. (N.T. 68-73)
27. In addition to the negotiations with the union, there was a backlog of internal procedures for reviewing, approving and typing the proposed updated job descriptions. (N.T. 76)
28. When the Respondent posted the outdated job description for Apprentice/Animal Keeper on September 18, 1985, the Respondent's credible testimony indicates that the Respondent was searching for someone with a B.S. degree and two years of avicultural experience. (N.T. 74-75)
29. When the Respondent found there were no internal applicants who were qualified, a decision was made to advertise nationally in the American Association of Zoological Parks and Aquariums Newsletter and the Animal Keepers Forum to seek qualified applicants. (N.T. 102-104)
30. The advertisements in the above publications were not printed until November, 1985. (N.T. 103)

31. The advertisements placed in the national publications used the term "Bird Keeper" for the above position. (D.E. 6-7)
32. The advertisements in the publications indicated that the Apprentice/Bird Keeper position required two years avicultural experience with a zoo or other major collection and a B.S. was preferred. (D.E. 6-7)
33. One of the external applicants for the Apprentice/Bird Keeper position was Anne Kot. (N.T. 105)
34. Anne Kot was interviewed for the position since she met the "job requirements as stated in the advertisements. (N.T. 106, D.E. 8-9)
35. Subsequently, Anne Kot was hired for the above position with the Respondent, and commenced employment on January 5, 1986.
36. The Complainant does not have a B.S. degree. (S.F. 8)
37. The Complainant did not have two years of avicultural experience as an Apprentice Keeper in September, 1985. (S.F.9)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and PHRC have complied with all procedural prerequisites to a public hearing.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. The Respondent is an employer within the meaning of the PHRA.
5. The Complainant bears the burden of establishing a prima facie case of discrimination.
6. The Complainant has met its burden of establishing a prima facie case by proving that:
 - 1) He is a member of a protected class; i.e.. handicapped;
 - 2) He applied for the positions in questions;
 - 3) He was rejected; and
 - 4) The Respondent continued to seek other applicants.
7. The Respondent has met its burden of producing evidence of legitimate. non-discriminatory reasons for its failure to hire the Complainant for any of the three positions.
8. The Complainant has not met his ultimate burden of showing pretext or that the proffered explanation of the Respondent is unworthy of credence.

OPINION

This case arises on a complaint filed by Charles Underwood, ("Complainant") against Zoological Society of Philadelphia, ("Respondent"), with the Pennsylvania Human Relations Commission. On December 23, 1985, the Complainant filed a complaint with PHRC alleging that the Respondent failed to hire the Complainant for the positions of Commissary Worker, Apprentice Keeper, or Watchman due to his handicap/disability, drug and alcohol addiction.

PHRC staff conducted an investigation of the allegation and found probable cause to credit the allegation of discrimination based on the Complainant's handicap. Thereafter, the Commission endeavored to conciliate this matter, and efforts were unsuccessful. Therefore, a Public Hearing in this matter was approved on July 23, 1986.

The Public Hearing was held on March 10, 1989 before a panel of Commissioners consisting of: Elizabeth Umstadd, Hearing Panel Chairperson; Aubra S. Gaston, Commissioner; and Alvin E. Echols, Jr., Commissioner. The Hearing Panel Advisor was Phillip A. Ayers, Esquire. Cynthia Williams, Assistant Chief Counsel appeared on behalf of the Complainant, and David Loder, Esquire appeared on behalf of the Respondent. Both parties submitted post-hearing briefs.

At the Public Hearing, the focus was appropriately placed on a disparate treatment analysis of the allegations made and the evidence received. The order and allocation of proof in a disparate treatment case was first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and recently clarified by the PA Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 PA 124, 532 A.2d 315 (1987) No. 32 W.D. Appeal Docket 1986. The PA Supreme Court's guidance indicates that the Complainant must first establish a prima facie case of discrimination. If the Complainant establishes a prima facie case, the burden of production then shifts to the Respondent to "simply...produce evidence of a 'legitimate, non-discriminatory reason' for... [its action) Id. at 320. ..If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. Id at 318.

A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a Respondent or indirectly by showing that a Respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 U.S. 248,256 (1981). In order to do so, the Complainant need not necessarily offer evidence beyond that offered to establish a prima facie case. Id. at 255 n.10. The trier of fact may consider the same evidence that a Complainant has introduced to establish a prima facie case in determining whether a Respondent's explanation for the employment decision is pretextual. Dial v. American Telephone & Telegraph, 752 F.2d 1356, 1358-59 (9th Cir. 1985). In McDonnell Douglas the Court noted that a Complainant in a race-based refusal to hire case could establish a prima facie case 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 applicants from persons of Complainant's qualifications.

This general four step process was later adopted for use by Pennsylvania Courts in General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976).

The present matter differs slightly from the refusal to hire circumstances in McDonnell Douglas. In McDonnell Douglas, the allegation was race-based, the Complainant's application was rejected and the Respondent continued to seek applicants of equal qualifications. In the present matter, the allegation is that the Respondent refused to hire the Complainant for three positions due to his non-job related handicap/disability, drug and alcohol addiction.

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 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 at 250, the U.S. Supreme Court declared, "The burden of establishing a prima facie case of disparate treatment is not onerous." The PA Supreme Court has adopted this standard in Allegheny Housing Rehab. Corp., supra at 8. 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. In other words, the elements set forth in McDonnell Douglas are intended to be flexible, and formulated with the particular facts of the matter.

With this in mind, the Complainant must meet his burden of a prima facie case in each of the three positions, Apprentice Keeper, Commissary Worker, and Watchman. In order to make a prima facie showing, the Complainant must show:

- 1) He is a member of a protected class;
- 2) He applied for a position for which he was qualified;
- 3) He was rejected; and
- 4) The employer continued to seek other applicants of equal qualifications.

In making an analysis of the instant case, we will look at the three positions beginning with the Watchman position. The Complainant has shown a prima facie case in that:

- 1) Complainant is a member of a protected class;
- 2) He applied for the Watchman position;
- 3) He was not selected; and
- 4) The Respondent sought other applicants.

As stated above, once the Complainant has established a prima facie case, the burden shifts to the Respondent to produce evidence of a legitimate, non-discriminatory reason. In the instant case, the legitimate non-discriminatory reason proffered by the Respondent was budgetary restraints and other Respondent priorities which have decreased the number of Watchman positions from twelve to three since 1981. This reasoning is clearly sufficient to meet the production burden. In order to prevail, the Complainant must show that the proffered reason is pretextual, and that by preponderance of the evidence, the Complainant was the victim of intentional discrimination. In the instant case, the Complainant admits that there is no proof that the Respondent's reason is pretextual. Accordingly, Complainant has not shown by a preponderance of the evidence that he was a victim of discrimination when he was not hired as a Watchman.

The second position for which the Complainant applied was that of Commissary Worker. The Complainant must show:

- 1) He is a member of a protected class;
- 2) He applied for the Apprentice Commissary position and was qualified;
- 3) He was rejected; and
- 4) The Respondent continued to seek other applicants of equal qualifications.

Regarding this position, the Complainant has also met his burden Of showing a prima facie case. The Respondent then asserts a legitimate non-discriminatory reason for failing to hire the Complainant. The Respondent stated that the Complainant could not be considered for any position until his six month probation ended.

In reviewing the evidence presented at the Public Hearing, the Complainant has not shown by a preponderance of the evidence that the proffered reason is pretextual. The Complainant's probationary period did not end until September 17, nine days after the position of Commissary Worker was filled. The Hearing Panel clearly has the discretion to decide the credibility of witnesses.

The last position in dispute is that of Apprentice/Animal Keeper for the Respondent. The Complainant has satisfied his initial burden by showing:

- 1) He is a member of the protected class;
- 2) He applied for the position of Apprentice Keeper and was qualified; and
- 3) He was rejected;
- 4) Respondent continued to seek other applicants.

Using the "shifting of burdens" analysis, the Respondent must articulate a legitimate, non-discriminatory reason for not hiring the Complainant. The Respondent, by the testimony of Richard T. Biddle, Vice President and Dr. Wilbur Amand, articulated that the Zoo was going through a number of changes to upgrade the Animal Services Department and to professionalize the staff.

In doing so, the Respondent was looking for an individual who needed to have experience with birds because of a specific program with which the Respondent was involved. Furthermore, the Respondent indicated there were negotiations with the union to revise the qualifications for the position. When the internal applicants could not meet the qualifications, the Respondent advertised in national publications for a birdkeeper position which required a minimum of two years avicultural experience and preferred a B.S. degree. (D.E. 6, 7)

With the above reasons, the Respondent has articulated several legitimate non-discriminatory reasons.

The issue is now whether the Complainant has demonstrated, by a preponderance of the evidence, that the reasons given were pretextual. There is considerable testimony in the record as to the desire on the part of the Respondent to professionalize its staff. A significant part of this case centers on the issue of the job description used for this position. The job description used was dated August 1, 1970. However, the Respondent contends that there were on-going negotiations with the union to upgrade the staff. There is no question that, in its search, the

Respondent was looking for, and found, an individual who had special expertise in a particular area. The Complainant in response to the above reasons has indicated that some of the testimony presented by the Respondent "strains credibility." However, as the Complainant notes in its brief, the Commission must resolve all issues relating to credibility, conflicts in the evidence presented, and weight to be accorded the evidence in the record. Pennsylvania State Police v. Com. Pennsylvania Human Relations Commission, Pa. Cmwlth. 542 A.2d 595, 1988. Therefore, it is the opinion of the Commission that the Complainant has not shown by a preponderance of the evidence that the Respondent's reasons were merely pretextual in nature.

The record establishes that administrative inadequacies existed with Respondent, which in all likelihood led to the filing of the instant case. However, such inefficiencies and inadequacies in Respondent's business/administrative processes are not subjects for resolution by this Commission and therefore, cannot be addressed.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARLES UNDERWOOD, Complainant

v.

ZOOLOGICAL SOCIETY OF PHILADELPHIA, Respondent

Docket No. E-35380

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above captioned matter, the Hearing Panel concludes that the Respondent did not violate the PA 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, the Hearing Panel recommends issuance of the attached Final Order.

25 September 1989
Date

25 Sept. 1989
Date

9/25/89
Date

Elizabeth Umstatt
Elizabeth Umstatt
Panel Chairperson

Aubra S. Gaston
Aubra S. Gaston
Commissioner

Alvin E. Echols, Jr.
Alvin E. Echols, Jr.
Commissioner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CHARLES UNDERWOOD, Complainant

v.

ZOOLOGICAL SOCIETY OF PHILADELPHIA, Respondent

Docket No. E-35380

FINAL ORDER

AND NOW, this 29th day of September, 1989, following review of the entire record in this case, the PA Human Relations Commission hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Panel, pursuant to Section 9 of the PA Human Relations Act. 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 Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceedings, 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

BY:

Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

Raquel O. de Yienst
Raquel O. de Yienst, Secretary