

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

ROBERT D. BYTHEWAY, Complainant:

v.

KELLNER EQUIPMENT CO., INC., Respondent

DOCKET NO. E-52857

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT D. BYTHEWAY, Complainant:

v.


KELLNER EQUIPMENT CO., INC., Respondent

DOCKET NO. E-52857

STIPULATIONS OF FACT

It is hereby stipulated that:

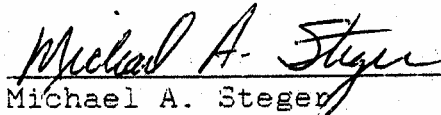
1. The Complainant, Robert Bytheway, is an individual residing at 2 Carriage Road, Greensburg, Pennsylvania.
2. The Respondent, Kellner Equipment Company, is located in the Commonwealth of Pennsylvania and employs four or more persons within the Commonwealth.
3. The Complainant was hired by the Respondent on January 22, 1990, as a sales representative.
4. On or about June 19, 1990, the Respondent gave notice to the Complainant that he was discharged as of July 15, 1990.
5. On or about October 24, 1990, the Complainant made, signed and filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter PHRC) alleging that the Respondent had discharged him because of his non-job related handicap/disability, Hodgkins Disease. In violation of § 5 (a) of the Pennsylvania Human Relations Act, 43 P.S. § 955(a).
6. The Respondent was served with a copy of the complaint on November 14, 1990.
7. On or about April 8, 1992, probable cause was found by the PHRC staff to credit the allegations in the complaint.
8. The PHRC attempted to conciliate the matter without success.
9. By letter dated March 3, 1993, the PHRC notified the parties that at its meeting on February 22, 1993, the case had been approved for public hearing and had been placed on the public hearing docket.



Lisa J. Mungin
Assistant Chief Counsel

Attorney for the PHRC in
support of the complaint

Date: 5/17/92



Michael A. Steger

Attorney for Respondent

Date: 5/25/93

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

ROBERT D. BYTHEWAY, Complainant:

v.

KELLNER EQUIPMENT CO., INC., Respondent

DOCKET NO. E-52857

STIPULATIONS OF FACT

AND NOW comes, ROBERT D. BYTHEWAY, Complainant, by his attorney, LISA MUNGIN, and KELLNER EQUIPMENT COMPANY, INC., Respondent, by its attorney, MICHAEL A. STEGER, and does stipulate as to the following facts:

1. That prior to being employed with the Kellner Equipment Company, Inc., Mr. Bytheway was employed from 1986 to 1989 by Pep-Up, Inc., a bulk petroleum facility in Georgetown, Delaware, as a Manager, Sales Representative and Marketing Representative, and earned TWENTY-TWO THOUSAND FIVE HUNDRED DOLLARS (\$22,500.00) per annum, received use of a company car and medical insurance.
2. That while at Pep-up, Inc., Mr. Bytheway managed the facility and a staff of up to seven (7) people, sold petroleum, lubricants, petroleum equipment, created advertisements, created marketing strategies, imaging programs, promotions, monitored sales and sales strategy.
3. That Robert Bytheway received a salary from the Kellner Equipment Company, Inc. from January 23, 1990 to July 31, 1990 of ONE THOUSAND NINE HUNDRED TWENTY-EIGHT and 35/100 DOLLARS (\$1,928.35) per month, the use of a 1990 Chevrolet Lumina automobile, and medical insurance for which FORTY DOLLARS (\$40.00) per month was deducted from his pay.
4. Mr. Bytheway's employment with the Kellner Equipment Company was an "at will" employment relationship with no guaranteed term of employment.
5. That on January 31, 1990, the Kellner Equipment Company, Inc. purchased a 1990 Chevrolet Lumina for TWELVE THOUSAND FOUR HUNDRED EIGHTY-NINE and 80/100 DOLLARS (\$12,489.80) and provided it to Mr. Bytheway so that he could make sales calls on behalf of the Company. A copy of the invoice for said motor vehicle is attached hereto as Exhibit "1".
6. That the Kellner Equipment Company, Inc. paid for all expenses incurred relative to the 1990 Chevrolet Lumina provided to Mr. Bytheway, including gas, maintenance and automobile insurance.
7. That the only office of the Kellner Equipment Company, Inc. in 1990 was located in Allegheny County at 4025 Route 8, Allison Park, Pennsylvania 15101.
8. That Robert Bytheway's sales territory while employed by the Kellner Equipment Company was the counties of Blair, Somerset, Armstrong, Westmoreland and some of Fayette County.
9. That Robert Bytheway's job responsibilities for the Kellner Equipment Company required him to travel to the business offices of each of Kellner's customers in the counties of Blair, Somerset, Armstrong, Westmoreland and Fayette, and make sales calls on them in person.
10. That during his employment with the Kellner Equipment Company, Mr. Bytheway made between ten (10) to thirty-five (35) calls on potential customers each week.

11. That between February 10, 1990 to June 1, 1990, the gross sales generated by Robert Bytheway on behalf of the Kellner Equipment Company, Inc. totalled EIGHT THOUSAND SIX HUNDRED FIFTY- FIVE and 00/100 DOLLARS (\$8,655.00) and the net profit realized by the Kellner Equipment Company on said sales totalled TWO THOUSAND SIX HUNDRED THIRTY-THREE and 00/100 DOLLARS (\$2,633.00).
12. That Mr. Bytheway was diagnosed as having Hodgkin Disease on May 5, 1990 and underwent a Staging Laparotomy at Westmoreland Hospital on June 5, 1990. Mr. Bytheway remained in said hospital until June 14, 1990.
13. That Mr. Bytheway was not permitted by his physicians to drive an automobile from June 5, 1990 until June 22, 1990.
14. That after a month of recuperation, Mr. Bytheway began two (2) sessions of radiation therapy. The first session of radiation therapy ran from approximately July 17, 1990 to August 20, 1990 and he received radiation almost daily. The second session of radiation therapy ran from September 25, 1990 to October 22, 1990, and again he received therapy almost daily.
15. That Mr. Bytheway experienced nausea, weakness, fatigue and secondary layer hair loss from the radiation therapy. Mr. Bytheway also acknowledges being lightheaded when he went up ladders and often required naps after the radiation therapy to recover his strength.
16. Mr. Bytheway had the opportunity to resume employment with Pep-Up, Inc. in January of 1991 at the same salary and benefit level he received in 1989, but declined this employment opportunity.
17. After his 1990 hospitalization and radiation therapy, Mr. Bytheway did not wish to return to work until April of 1991 and remained unemployed until that time.
18. That Mr. Bytheway received unemployment compensation as a result of his employment with the Kellner Equipment Company of FIVE THOUSAND NINE HUNDRED TWENTY-EIGHT DOLLARS (\$5,928.00) from August 31, 1990 to January 31, 1991. A copy of the statement from the Commonwealth of Pennsylvania Department of Labor and Industry is attached as Exhibit "2".
19. That Mr. Bytheway paid or remains responsible for the following medical bills as a result of the treatment that he received for Hodgkin Disease:

Provider	Amount
a. Travers and Fahmy Associates	\$33.00

20. That from January 23, 1990 to July 31, 1990, Mr. Bytheway received wages totalling TWELVE THOUSAND SEVEN HUNDRED SEVENTEEN and 04/100 DOLLARS (\$12,717.04) as a result of his employment with the Kellner Equipment Company, Inc.
21. Assuming that Mr. Bytheway had continued to be employed with the Kellner Equipment from August 1, 1990 through December 30, 1990, he would have received an additional NINE THOUSAND SIX HUNDRED FORTY-ONE AND 75/100 DOLLARS (\$9,641.75) in salary and his total earnings for 1990 would have been TWENTY-TWO THOUSAND THREE HUNDRED FIFTY-EIGHT and 79/100 DOLLARS (\$22,358.79).
22. That the maximum wage loss sustained by Mr. Bytheway in 1990 was THREE THOUSAND SEVEN HUNDRED THIRTEEN and 75/100 DOLLARS (\$3,713.75), calculated as follows:


1. Estimated maximum 1990 wages from Kellner Equipment Company, Inc.	\$22,358.79
2. Less 1990 actual wages received from Kellner Equipment Company, Inc.	<u>(-12,717.04)</u>
3. Subtotal	\$9,641.75
4. Less unemployment compensation received	<u>(-5,928.00)</u>
5. Maximum 1990 wage loss	\$3,713.75

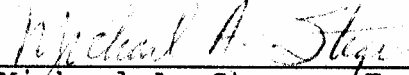
23. That in April of 1991, Mr. Bytheway obtained employment as a laborer at Kings Nursery. In July of 1991, Mr. Bytheway became self-employed, first as a painter and then in October of 1991, as co-owner of Wibco Incorporated which operates a Meineke Muffler Shop at 1087 East Pittsburgh

Street, Greensburg, Pennsylvania 15601. Mr. Bytheway is the shop manager and receives a salary and vehicle from the corporation in addition to his other rights as a fifty percent (50%) shareholder.

24. That Mr. Bytheway remains employed with Wibco Incorporated at the present time.
25. That Mr. Bytheway has not sought employment in the petroleum and petroleum equipment handling industry since April of 1991.
26. The adjusted gross income reported by Robert Bytheway on his 1991 income taxes as SEVEN THOUSAND SIXTY-FIVE and 17/100 DOLLARS (\$7,065.17). Mr. Bytheway's adjusted gross income reported on his 1992 income taxes was THIRTEEN THOUSAND SEVEN HUNDRED EIGHTY-EIGHT and 92/100 DOLLARS (\$13,788.92).
27. That while employed at the Kellner Equipment Company, Mr. Bytheway had FORTY DOLLARS (\$40.00) per month deducted from his pay check to pay for medical insurance premiums and would have paid a total of TWO HUNDRED DOLLARS (\$200.00) in medical insurance premiums, had he remained employed with the Kellner Equipment Company, Inc. from August 1, 1990 to December 31, 1990.
28. That from August 1, 1990 through December 31, 1990, Mr. Bytheway paid a total of SIX HUNDRED TWENTY-FOUR and 89/100 DOLLARS in medical insurance premiums.
29. That the maximum medical insurance premium loss that Mr. Bytheway could have incurred between August 1, 1990 and December 31, 1990 was FOUR HUNDRED TWENTY-FOUR and 89/100 DOLLARS, calculated as follows:

1. Medical insurance premiums paid 8/1/90 through 12/31/90	\$624.89
2. Estimate medical insurance premiums paid if employed at Kellner Equipment Company, Inc.	<u>(-200.00)</u>
3. Maximum medical insurance premium loss	\$424.89

By: 
Lisa Mungin, Esquire
Attorney for Robert Bytheway

By: 
Michael A. Steger, Esquire
Attorney for Kellner Equipment
Company, Inc.

FINDINGS OF FACT *

1. The Complainant, Robert D. Bytheway, is an individual residing at Two Carriage Road, Greensburg, Pennsylvania, at the time of the public hearing. (JE 1.)
2. The Respondent, Kellner Equipment Co., Inc. is located in the Commonwealth of Pennsylvania and employs four or more persons within the Commonwealth. (JE 1.)
3. The Complainant was hired by the Respondent on January 22, 1990, as a sales representative. (JE 1.)
4. The Complainant's employment with the Respondent was an "at will" employment relationship, with no guaranteed term of employment. (NT 6.)
5. On or about June 19, 1990, the Respondent notified the Complainant he was discharged as of July 15, 1990. (JE 1.)
6. When he was hired, the Complainant was given a list of customers in various counties. (NT 45.)

* The foregoing "Stipulations of Fact" are 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.

JE	Joint Exhibit
NT	Notes of Testimony
SF	Stipulations of Fact

7. The Complainant spent three or four weeks in the office familiarizing himself with the product line and office literature. (NT 45.)
8. The Complainant did this preliminary work to also familiarize himself with the clientele base. (NT 46.)
9. The Complainant did not call ahead and arrange appointments before he went on a call. (NT 46.)
10. The Complainant never attempted to arrange a meeting with the purchasing agent at a particular company. (NT 46.)
11. The Complainant spent time trying to develop a catalogue for the Respondent. (NT 47-48.)
12. The Respondent owners not only did not want the Complainant to develop a catalogue; they were against the concept altogether. (NT 48.)
13. The primary responsibility of a sales person is to make sales calls on the customers. (NT 99.)
14. The Complainant was terminated for lack of sales production. (NT 106.)
15. The Complainant's sales production did not support what the Respondent was paying him. (NT 106.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.
2. All procedural prerequisites for a public hearing in this matter have been met.
3. The Complainant is an "individual" as defined by the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. The Respondent is an "employer" as defined by the PHRA. 5. The Complainant must establish a prima facie case by showing that:
 - a. Complainant is a member of a protected class;
 - b. he was qualified to perform his job duties;
 - c. he was terminated from his position by the Respondent; and

- d. others not in Complainant's protected class were not treated the same under similar circumstances.
6. The Complainant has not established a prima facie case.
7. The Respondent has articulated legitimate, nondiscriminatory reasons for its action in terminating the Complainant.

OPINION

This matter arises out of a complaint filed by Robert D. Bytheway (hereinafter "Complainant") against the Kellner Equipment Co., Inc. (hereinafter "Respondent"), Docket No. E-52857, with the Pennsylvania Human Relations Commission (hereinafter "the Commission" or "PHRC").

On or about October 24, 1990, the Complainant filed a complaint with the Commission alleging that the Respondent discharged him because of his non-job-related handicap/disability, Hodgkin's Disease, in violation of section 5(A) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 951, et seq. (hereinafter "PHRA").

PHRC staff conducted an investigation into the allegations raised by the complaint. On or about April 8, 1992, PHRC staff found probable cause to credit the allegations in the complaint. PHRC staff then attempted to conciliate the matter without success. On March 3, 1993, PHRC notified the parties that, at its meeting on February 22, 1993, the instant case was approved for public hearing and placed on the public hearing docket.

The public hearing in this matter was held on two dates: October 18, 1993, and November 3, 1993, with Phillip A. Ayers, Permanent Hearing Examiner, presiding. The Commission's interest on behalf of the complaint was represented by Lisa J. Mungin, Assistant Chief Counsel. The Respondent was represented by Michael A. Steger, Esquire. Both Respondent Counsel and Commission Counsel filed post-hearing briefs in the matter.

In reviewing the Complainant's allegations we recognize the issue of disparate treatment. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a Pennsylvania Supreme Court case. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The Pennsylvania 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, nondiscriminatory reason...for [its action]." If the Respondent meets this production burden, in order to prevail, the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. 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).

Following its instruction on the effect of a prima facie showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The court stated that:

As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard:

Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes."

The Complainant is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that the evidence does preponderate to prove discrimination. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up." Allegheny Housing, supra. at 319.

In this court-designed burden allocation, the Complainant must, of course, first establish a prima facie case. The prima facie showing should not be an onerous burden. In the instant case, a prima facie case of disability discrimination can be established by showing that:

1. Complainant is a member of a protected class;
2. Complainant was qualified to perform his job duties;
3. Complainant was terminated from his position by the Respondent; and,
4. others not in Complainant's position were not treated the same under similar circumstances.

Firstly, the Complainant is a handicapped individual within the meaning of the Commission's regulations set forth at 16 Pa. Code §44.4. A "handicapped or disabled person" is defined as,"

(i) A person who:

- (A) has a physical or mental impairment which substantially limits one or more major life activities;
- (B) has a record of such an impairment; or
- (C) is regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

- (A) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; 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 having a mental or physical 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 Complainant has shown that he is a member of a protected class. It has been stipulated that the Complainant has been diagnosed as having Hodgkin's Disease, which is cancer of the lymph system. The Complainant has a physiological condition which affects his lymphatic system which impacts on at least one major life activity, working.

The second element of the prima facie case is whether the Complainant was qualified to perform his job duties. The record is clear that the Complainant was qualified to perform his job duties. The Complainant also has met the third element of the prima facie case. The Complainant was obviously terminated from his position by the Respondent.

Lastly, a review of the record indicates that the Complainant did not show that others were treated differently. Respondent witness, David O. Smith, testified that there was a warehouse employee who contracted a serious illness, and the Respondent retained him. The Complainant's position is severely hampered by the fact that the Complainant did not present any witness other than himself.

Accordingly, the Complainant did not establish a prima facie case. However, since the Respondent did produce evidence of a legitimate, nondiscriminatory reason for its action, we will analyze the entire case. The Respondent indicated that it terminated the Complainant for lack of sales. The Respondent noted that the Complainant's profit after four months of sales barely covered one month's salary and benefits. With that assertion, the Respondent has met its burden of production. Once the Respondent has done so, the Complainant could prevail by showing that the proffered explanations are pretextual, or unworthy of credence. The Complainant still has the ultimate burden of demonstrating by a preponderance of the evidence that he is a victim of intentional discrimination.

The Complainant has not presented any evidence to dispute the Respondent's contention that he was not a productive employee. As stated above, the Complainant has not produced a witness to indicate that he was a productive employee. The Complainant attempts to rely on a vague statement ("good work") in a letter from one of Respondent owners. However, that statement falls far short of what the Complainant must show to sustain his burden of demonstrating by a preponderance of the evidence that he is a victim of intentional discrimination.

After review of the record in this matter, having found that the Complainant has failed to prove discrimination, an appropriate Order follows.

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

ROBERT D. BYTHEWAY, Complainant:

v.


KELLNER EQUIPMENT CO., INC., Respondent

DOCKET NO. E-52857

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned case, it is the Permanent Hearing Examiner's recommendation that the Complainant has failed to prove discrimination in violation 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, Opinion and Order be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

By:



Phillip M. Ayers
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROBERT D. BYTHEWAY, Complainant:

v.

KELLNER EQUIPMENT CO., INC., Respondent

DOCKET NO. E-52857

FINAL ORDER

AND NOW, this 22nd day of December, 1994, after a review of the entire record in this case, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Recommendation by the Permanent Hearing Examiner, and hereby

ORDERS

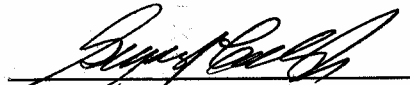
that the instant complaint, docketed at E-52857, be dismissed.

By:



Robert Johnson Smith
Chairperson

ATTEST:



Gregory J. Celia, Jr.
Secretary