

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CRAIG McCOLLUM,	:	
	:	
Complainant	:	
	:	
v.	:	PHRC Case No. 200500158
	:	EEOC Case No. 17FA562763
CIBA VISION,	:	
	:	
Respondent	:	

STIPULATED FACTS
STIPULATIONS OF FACT
FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
RECOMMENDATION OF HEARING PANEL
FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CRAIG McCOLLUM, :
Complainant :
v. : PHRC No. 200500158
CIBA VISION, :
Respondent :

STIPULATED FACTS AND JOINT EXHIBITS

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 Craig McCollum, an adult, African American (hereinafter "Complainant").
2. The Respondent herein is CIBA Vision (hereinafter "Respondent").
3. The Respondent, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about April 16, 2004, Complainant began his employment with Respondent as a Professional Account Manager. A true and correct copy of his job description is attached as Joint Exhibit 1
5. During the time period from January 1, 2003 to December 31, 2003, Respondent received 70 applications for sales representative positions. Of those 70 applications, 64 (91.4%) applicants were race, White; 3 (4.3%) were race, Hispanic; 2 (2.8%) were race, Asian and 1 (1.4%) was race, African American. A true and correct copy of the Applicant Flow report prepared by Respondent is attached hereto as Joint Exhibit 2



6. At the time of Respondent's September 7, 2004 EEO-1 Report, Respondent employed a total of 2,061 persons. Of the 2,061 persons, 917 (44.5%) were minorities. Of the 917 minorities, 640 (69.8%) were race, African American. A true and correct copy of the Respondent's EEO-1 Report is attached as Joint Exhibit 3.

7. At the time of Respondent's September 7, 2004 EEO-1 Report, it employed 225 persons in sales positions. Of those 225 persons, 207 (92.0%) were race, White; 7 (3.1%) were race, Hispanic; 7 (3.1%) were race, Asian and 4 (1.8%) were race, African American.


8. At the time of Complainant's hire, Respondent employed 125 persons in the same or similar position as Complainant. Of the 125 persons, 115 (92.0%) were race, White; 5 (4.0%) were race, Hispanic; 3 (2.4%) were race, Asian and 1 (0.8%) was race, African American. A true and correct copy of the document prepared by Respondent which details the race of its sales force at that time is attached as Joint Exhibit 4.

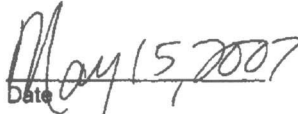
9. Complainant was supervised by Nancy McFadden (hereinafter "McFadden"), Regional Sales Director for the Mid-Atlantic Region, for approximately eight months, from the date of his hire until December 31, 2004.

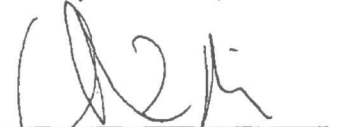
10. Complainant was supervised by David Saulino (hereinafter "Saulino"), Regional Sales Director for the Philadelphia Region, for approximately three months, from January 1, 2005 until the date of his termination.

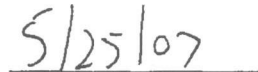
11. Complainant's employment with Respondent was terminated on or about April 12, 2005.

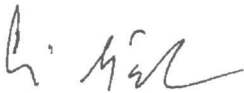
12. From April 1, 2005 through December 31, 2006, Respondent hired 39 persons into the position of Professional Account Manager, nationwide. Of the 39 persons, all were race, White. A true and correct copy of the hiring documentation is attached as Joint Exhibit 5.

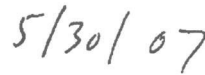

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Date





J.2

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

CRAIG MCCOLLUM,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. 200500158
	:	
CIBA VISION,	:	
	:	
Respondent	:	

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 Craig McCollum, an adult, African American (hereinafter "Complainant").

2. The Respondent herein is Ciba Vision (hereinafter "Respondent").

3. The Respondent at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.

4. On or about April 16, 2004, Complainant began his employment with Respondent as a Professional Account Manager.



5. On or about April 12, 2005, the Respondent discharged Complainant from his position.

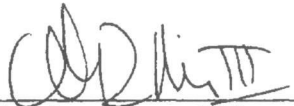
6. On or about July 11, 2005, Complainant filed a Complaint against the Respondent with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Docket No. 200500158. A copy of the complaint will be included as a docket entry in this case at time of hearing.

7. On or about August 24, 2005, Respondent filed an Answer in response to the Complaint. A copy of the response will be included as a docket entry in this case at time of hearing.

8. In correspondence dated June 12, 2006, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that the Commission believed that probable cause existed to credit the allegations found in the complaint.

9. Subsequent to the determination of probable cause, Commission staff and the parties attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but were unable to do so.

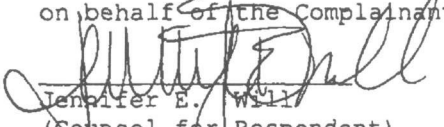
10. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.



Charles Nier, III
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

11/12/07

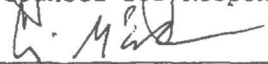
Date



Jennifer E. Wall
(Counsel for Respondent)

12/19/06

Date



Craig McCollum
(Complainant)

5/30/07

Date

FINDINGS OF FACT *

1. The Complainant herein is Craig McCollum, an adult African American male (hereinafter "Complainant"). (S. F. A. 1; S. F. B. 1).
2. The Respondent herein is CIBA Vision Corp., an employer of four or more persons within the Commonwealth of Pennsylvania. (S. F. A. 2, 3; S. F. B. 2).
3. On or about July 11, 2005, Complainant filed a complaint against the Respondent with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Docket No. 200500158. (S. F. B. 6).
4. On of about August 24, 2005, the Respondent filed an Answer in response to the Complaint. (S. F. B. 7).
5. In correspondence dated June 12, 2006, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that the Commission believed probable cause existed to credit the allegations found in the complaint. (S. F. B. 8).

The foregoing "Stipulations of Facts" are hereby incorporated herein as if fully set forth, to the extent that the Dismiss which follows recites facts in addition to those here tested each facts shall be considered additional Findings of Fact. The following abbreviations will be utilized throughout these findings of Fact for reference purposes:

N. T.	Notes of Testimony
J. E.	Joint Exhibit
C. E.	Commission Exhibit
R. E.	Respondent Exhibit
S. F. A.	Stipulated Facts
S. F. B.	Stipulations of Fact

6. Subsequent to the determination of probable cause, Commission staff and the parties attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but were unable to do so. (S. F. B. 9).
7. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved. (S. F. B. 10).
8. At all times relevant to this case, the Respondent was in the business of selling contact lens and contact lens care solution. (N. T. 34, 188).
9. The Respondent is a national company that employs a sales force that is assigned to various geographical regions throughout the United States. (N. T. 189-190).
10. At the time of Respondent's 2004 EEO – 1 Report, 44.5% of Respondent's employees were not white. (S. F. A. 6).
11. During the time period from January 1, 2003 to December 31, 2003, Respondent received 70 applications for sales representatives. (S. F. A. 5).
12. Of those 70 applications, 64 applicants were race-White, three were race-Hispanic, two were race-Asian, and one was race African-American. (S. F. A. 5).
13. Prior to his employment with the Respondent, Complainant was a pharmaceuticals sales representative. (N. T. 33).
14. On or about April 16, 2004, Complainant began his employment with Respondent as a Professional Account Manager. (S. F. A. 4).
15. Since the Respondent does not maintain a physical office, it utilizes several computer systems, including; AIM and Power Sales, as well as e-mail and voice mail to monitor the performance of its sales force. (N. T. 197-198).

16. The AIM system lists all of the accounts in a sales representative's region and allows the sales representative to input data related to appointments and call notes. (N. T. 197-198).
17. The Power Sales system provides a wide variety of sales information on each account in a sales representative's region. (N. T. 198).
18. The size of Complainant's region was comparable in size to territories he covered in prior pharmaceutical sales positions. (N. T. 41).
19. The Complainant worked out of his home. (N. T. 42, 196).
20. The Respondent maintains a discipline policy which states:
- There are three primary classifications of disciplinary action. These classifications are separate and distinct from each other and do not represent a progressive disciplinary procedure.
1. Verbal Counseling... 2. Written Warnings... 3. Notice of Probation. (C. E. 2).
21. The type of discipline implemented by Respondent's managers is totally within the manager's discretion. (N. T. 240).
22. Respondent managers are not required to consult with Respondent's Human Resources Department before implementing discipline. (J. E. 3).
23. The Complainant was supervised by Nancy McFadden (hereinafter "McFadden"), Regional Sales Director from the Mid-Atlantic Region, for approximately eight months, from the date of Complainant's hire until December 31, 2004. (S. F. A. 9).
24. Following his hire, Complainant successfully completed an eight week training program followed by a three week training course at Respondent's office in Georgia. (N. T. 207-208).

25. The training provided by Respondent included: day-by-day training materials, online training materials, a series of tests, professional selling skills training, role-playing, and classroom training. The training also included training on Respondent's sales techniques, such as SMART objectives, co-travels with sales representatives, meetings and co-travels with a supervisor, training on Respondent's computer system, including its AIM account database system. (N. T. 51, 98, 101, 106, 205, 276).
26. A part of McFadden's job responsibilities was to develop her sales representatives through various coaching devices. (N. T. 193-194).
27. After one month of employment with the Respondent, Complainant fell substantially behind in his training. (N. T. 96-97).
28. After two months, Complainant was notified that he had not completed the required training materials in a timely manner. (N. T. 98).
29. McFadden went on co-travels with Complainant on May 3, 27 and 28, 2004. A co-travel is a process by which a manager travels with a sales employee throughout his or her day to observe the employee and critique the sales performance. (N. T. 44, 206).
30. On or about June 4, 2004, McFadden issued a memorandum to Complainant "clearly outlining the expectations as they relate to job responsibilities" and informed him that he was not on schedule with his training materials. (N. T. 96-97, 207).
31. Both Complainant and Respondent testified that this memorandum was not a discipline warning. (N. T. 48-49, 206-207).

32. On or about June 18, 2004 McFadden issued a memorandum to Complainant indicating that he had still not completed assigned training materials by the set deadline. (N. T. 98, 207).
33. As a Professional Account Manager, Complainant was required to devote 60% of his time to selling Respondent's products, which included a requirement that he "plan and execute five to seven calls per day." (N. T. 273).
34. Complainant was repeatedly reminded throughout his employment of the need to pre-book appointments into the AIM system, by both McFadden and Saulino, his supervisor after McFadden. (N. T. 75, 103).
35. The Complainant regularly failed to pre-book his appointments. (N. T. 102-103).
36. In August of 2004, the Complainant received a memorandum from McFadden because he had no scheduled appointments for the entire month of September and his AIM calendar was completely empty. (N. T. 209-210).
37. McFadden completed Complainant's only performance evaluation in which she identified "organization" as one of Complainant's key developmental needs. (N. T. 231).
38. McFadden decided to terminate three individuals in 2003 and 2004, two of whom she had previously placed on probation (Jake Skaggs, Greg McKinley) and one she had not (Terry McGuire). (N. T. 238,240, 252-253, 261).
39. The Complainant was supervised by David Saulino (hereinafter "Saulino"). Regional Sales Director for the Philadelphia Region, from January 1, 2005 until the date of his termination, April 12, 2005. (S. F. A.10-11).

40. From January 1, 2005 through the date of his termination, the Complainant was no longer supervised by McFadden. (N. T. 294).
41. Saulino supervised eight sales employees in 2005, including, but not limited to, Complainant, Jacqueline Boyer, Joseph Carchilla and David Cacciatore. (N. T. 324, 371, 375).
42. In February 2005, Saulino counseled Complainant about pre-booking appointments and utilizing AIM. (N. T. 338, 349-351).
43. The Complainant had earlier, in August of 2004, been counseled by McFadden because he had not scheduled appointments and his AIM calendar was empty. (N. T. 209-210).
44. On February 23, 2005, the Complainant was scheduled to co-travel with Saulino. (N. T. 352-353).
45. On February 23, 2005, the Complainant did not have any appointments planned and spent the day driving around, calling doctors to see if he could drop by. (N. T. 352-353).
46. In February 2005, on a Co-Travel Certification Report, Saulino rated Complainant as "Unacceptable" in the area of Call Planning. (N. T. 140; C. E. 12).
47. Saulino instructed Complainant that "4-5" pre-booked calls should be on your schedule everyday... you need to set up appointments." (N. T. 140).
48. The Complainant was the only sales representative under Saulino's supervision who did not have five to six pre-booked appointments per day in his AIM calendar. (N. T. 149, 165).

49. In March 2005, Saulino issued a memorandum to Complainant instructing him that the minimum expectations were to have 5-6 pre-booked calls per day in his AIM calendar and the calendar should reflect his appointments for the next 4-6 weeks. (N. T. 34, C. E. 14).
50. On April 5, 2005, the Complainant had only one call pre-booked into his AIM calendar and failed to arrive on time for that appointment. (N. T. 358-360)
51. Complainant was repeatedly counseled by Saulino regarding unacceptable organizational skills. (N. T. 95).
52. Saulino took the Complainant to Office Depot to purchase calendars, notebooks and binders in an attempt to get Complainant organized. (N.T. 352).
53. Because of problems with his responsiveness, Saulino instructed Complainant to check his voicemail three times per day: at 8:00a.m.; 12:00p.m.; and 5:00p.m. (N. T. 147, 356, C. E. 14).
54. Complainant was further advised that failure to respond would result in disciplinary action. (N. T. 357, C. E. 14).
55. Even after receiving that instruction, the Complainant did not check his voice mail three times per day. (N. T. 36).
56. Complainant regularly failed to return e-mails and calls from both customers and his supervisors in a timely manner. (N. T. 356, 358).
57. Both McFadden and Saulino received complaints from Dr. Curt Gottlieb regarding the Complainant not visiting him or returning his phone calls. (N. T. 232; C. E. 37).
58. Saulino received a complaint from Dr. Steve Berger that the Complainant had not provided him with trials for his customers. (N. T. 343, 398).

59. Saulino received a complaint from Craig Messenger that the Complainant had failed to show up for two appointments and had not provided him with product rebates. (N. T. 401-402; C. E. 37).
60. Saulino received a complaint from Dr. Brodsky that the Complainant had not returned telephone calls about rebates and order placements. (N. T. 403).
61. During his tenure as Complainant's supervisor, Saulino maintained a detailed list of Complainant's job performance. (N. T. 352).
62. Prior to Complainant's termination of employment with Respondent, he had been issued a total of twelve memoranda/counseling forms/e-mails from both McFadden and Saulino. (C. E. 1-14; C. E. 17).
63. The Complainant's employment was terminated on or about April 12, 2005. (S. F. A. 11).
64. The decision to terminate Complainant's employment was made by Saulino, in consultation with Kristen Griffen, Respondent's Human Resource Director. (J. E. 3).
65. McFadden was not involved in the decision to terminate Complainant's employment with Respondent. (N. T. 234, 294).
66. The decision to terminate Complainant was made because he was not meeting expectations in regard to responding to customers, responding to his supervisors and utilizing Respondent's sales techniques and computer systems. (N. T. 369).

CONCLUSIONS OF LAW

1. The PHRC has jurisdiction over the parties and the subject matter in this case.
2. The parties and PHRC have complied with the procedural prerequisites to a public hearing.
3. McCollum is an individual within the meaning of the PHRA.
4. CIBA Vision is an employer within the meaning of the PHRA.
5. Section 5 (a) of the Act, inter alia, prohibits employers from discriminating against individuals because of their race.
6. The Complainant has established a *prima facie* case of discrimination.
7. The Respondent has offered legitimate non-discriminatory reasons for terminating the Complainant.
8. The Complainant has failed to show that Respondent's reasons were a pretext for discrimination.

OPINION

This case arises on a complaint filed on or about July 11, 2005 by Craig McCollum (hereinafter "Complainant") against CIBA Vision (hereinafter "Respondent") with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Case No. 200500158. The Complainant alleges that he was terminated because of his race, African American. This race-based allegation alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. 951 et seq. (hereinafter "PHRA").

Commission staff investigated the allegation and informed the Respondent that probable cause existed to credit the Complainant's allegation. 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. (S. F. B. 9). In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved. (S. F. B. 10)

The public hearing in this matter was convened on May 30, 2007. M. Joel Bolstein, PHRC Commissioner and Panel Chairperson, Commissioner David Yun and Commissioner J. Whyatt Mondesire presided at the public hearing. Phillip A. Ayers, Esquire served as the Panel Advisor. Both parties filed post hearing briefs. The PHRC Philadelphia Regional Office's post-hearing brief was received on September 4, 2007 and the Respondent's post-hearing brief was filed on August 31, 2007.

Section 5(a) of the PHRA states in pertinent part:

“It shall be an unlawful practice... [f] or any employer because of the race... of any individual... to discharge from employment such individual...”

In cases where there is an allegation of disparate treatment, the evidence presented is normally viewed through the analysis set forth in McDonnell Douglas Corporation v. Green 411 U.S. 792 (1973) The analysis presents a three part allocation of proof formula which requires an initial prima facie showing by the Complainant, and if a prima facie case is established, a burden of production shifts to the Respondent to articulate a legitimate non-discriminatory reason for its action. If a Respondent meets this production burden, ultimately a burden of persuasion shifts back to the Complainant to prove by a preponderance of evidence that the reason offered by a Respondent are pretextual and that actual discriminatory reasons motivated the Respondent. The case law is very clear that, throughout the proceeding, the ultimate burden of proving that the conduct engaged in was unlawfully motivated, remains with the Respondent. Texas Department of Community Affairs v. Burdine 450 U.S. 248 253 (1980).

In General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A. 2d 649, 655 (1976), the Pennsylvania Supreme Court for the first time approved the analytical model developed by the United States Supreme Court in McDonnell-Douglas. It is an adaptable formula that may change to meet the specific facts of a particular case.

In the matter before the Commission, the Complainant alleges that he was discharged from his position as Professional Account Manager because of his race,