

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BILLIE PARKER
Complainant

v.

STONE & COMPANY,
Respondent

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PHRC CASE NO. 200500657

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

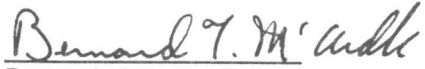
RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

STIPULATED TO:



Diane Blancett-Maddock
Assistant Chief Counsel
Counsel for the Commission



Bernard McArdle, Esquire
Counsel for Respondent

FINDINGS OF FACT

1. The Respondent is Stone & Company (hereinafter "Stone"), a concrete manufacturing plant located at 586 Plum Run Road, Canonsburg, PA 15317. (N.T. 41).
2. Stone's main offices are located in Greensburg, PA approximately 35 miles from the Canonsburg plant. (N.T. 41, 56).
3. In 2005, Stone had 16 concrete manufacturing plants for which drivers were hired for individual plants. (N.T. 96; R.E. 1).
4. Stone reduces the number of its drivers each fall as cement delivery is seasonal. (N.T. 103, 104).
5. Drivers hired by Stone receive training at Stone's main offices in Greensburg. (N.T. 41, 97).
6. Drivers hired by Stone make several trips a day to locations where the driver is required to perform physical labor in the process of delivery of cement. (N.T. 99).
7. Because of the nature of the work, Stone has difficulty retaining drivers. (N.T. 98).

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

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
S.F. Stipulation of Fact

8. In the fall of 2004, the Complainant, Billie Parker, (hereinafter "Parker"), spoke with someone at Stone's Canonsburg facility asking whether Stone was hiring. (N.T. 21).
9. Parker was told Stone would not be hiring until the spring of 2005. (N.T. 21).
10. In 2005, Parker, who is an African American, lived close to Stone's Canonsburg facility. (N.T. 15, 80).
11. In 1972, Parker graduated from High School. (N.T. 16).
12. Since 1995, Parker has maintained a Class A driver's license which permits him to drive large trucks. (N.T. 18).
13. For three to four months in 1995, Parker drove a tractor trailer in Tennessee for Pro-Line. (N.T. 18).
14. At the end of 1995 to early 1996, for approximately eight months, Parker drove a tractor trailer for Warner Enterprises. (N.T. 19).
15. In 1996, Parker drove another eight months for Hines Transportation. (N.T. 20).
16. For eight or nine months of 1997, Parker drove a tractor trailer for MHS. (N.T. 20).
17. Between 2000 and 2005, Parker drove part-time for Marvel Electric. (N.T. 50).
18. In early 2005, Parker was working hauling junk and looking for work. (N.T. 29)
19. Sometime in early 2005, Parker returned to Stone's Canonsburg facility asking for an application. (N.T. 22).

20. Parker was told that he could print an application off the computer. (N.T. 22).
21. On or about May 6, 2005, one of Parker's friends, Ryan Schwingel (hereinafter "Schwingel"), applied to become a driver at Stone's Canonsburg facility. (22; C.E. 12).
22. Stone hired Schwingel who is white. (N.T. 22, 25).
23. After Schwingel was hired, Parker asked Schwingel to bring him an application, which he did. (N.T. 22, 42).
24. Parker partially completed the application, attached a resume and delivered the application and resume to an unknown counter person at Stone's Canonsburg plant. (N.T. 23; C.E. 3).
25. Page two on Stone's application asks for an applicant's employment history. (C.E. 3).
26. Parker did not complete page 2 of his application, rather, he listed his work history on his attached resume in part as:
 - a. Delivery Driver for Marvel Electric from June 2000 to the present, listing the reason for leaving as "I have left a few times off and on to do some trucking work over the road because this job is a part-time as needed job."
 - b. Delivery Driver for MHSF, Inc., from October 11, 2000 to June 2001.
 - c. Delivery Driver for Trans Am Trucking from November 1998 to August 1999.

d. Delivery Driver for Warner Enterprise from October 1996 to February 1997.

27. Parker neither listed his employment with Pro-Line nor Hines Transportation on his resume. (N.T. 19, 20; C.E. 3).
28. On his resume, gaps in his employment history were left unexplained. (N.T. 52; C.E. 3).
29. On page three of Stone's application form, in the category "education", an applicant is asked to circle the highest grade completed. (C.E. 3).
30. The application lists "High School 1, 2, 3, 4. (C.E. 3).
31. Although he completed high school, Parker circled 1 and 2 after High School. (N.T. 16; C.E. 3).
32. Page 4 of an application asks an applicant to list courses and training attended. (C.E. 3).
33. Although he graduated from trucking school in 1995, Parker left this section blank. (N.T. 16-17; C.E. e).
34. Approximately 2/3rds of the way down his resume, Parker indicated that he obtained a diploma from high school. (C.E. 3).
35. After simply handing his application and resume to the counter person at Stone's Canonsburg plant and saying "here's an application", Parker did not follow up at the plant. (N.T. 23, 58).
36. The sole responsibility for hiring drivers rested with Jeff Simmerman (hereinafter "Simmerman"), Stone's Environmental Health and Safety Manager who also performed Stone's HR responsibilities. (N.T. 91, 95, 107).

37. Simmerman's office was in Stone's Greensburg offices. (N.T. 102).
38. When an applicant submitted a job application in one of Stone's 16 plants, Simmerman either picked applications up while visiting a plant or was forwarded an application by the plant that received an application. (R.E. 1).
39. When Simmerman received Parker's application there were no openings at Stone's Canonsburg location. (N.T. 96).
40. The qualifications important to Simmerman as he reviewed applications included: (a) a high school diploma; (b) a commercial driver's license; (c) driving experience-concrete experience preferred but not required; and (d) a history of job stability. (N.T. 97, 100, 110).
41. Selectibility also depended on:
 - (a) the number of openings;
 - (b) the urgency to fill a position; and
 - (c) the number of available applicants. (N.T. 104).
42. When Simmerman reviewed Parker's application, Simmerman formed the impression that Parker had only completed the sophomore year of high school, and that Parker's employment history revealed a negative picture regarding job stability. (N.T. 110).
43. When Simmerman reviewed Parker's application he had no reason to know Parker is an African American. (N.T. 101, 102, 103).
44. After reviewing Parker's application, Simmerman made the decision that Parker would not even be interviewed should an opening occur. (N.T. 107).

45. On June 16, 2005, Stone placed an advertisement seeking drivers. (N.T. 84).
46. It appears that Stone hired five individuals as Drivers at Stone's Canonsburg plant:
- (a) Tom Brady: 25 years of truck driving experience, including concrete trucks, pump trucks, and boom trucks.
 - (b) William Roberts: experience driving for another concrete company.
 - (c) Scott Gallagher: experience operating a variety of heavy equipment.
 - (d) Donald Cummins: past Penn-Dot employee with experience operating a front end loader, a bobcat, a backhoe, a forklift, and a boom truck.
 - (e) Brian Wooldridge: driving experience with another concrete company and training at TDI driving school. (N.T. 81, 81; C.E. 8, 10, 11, 13, 14).
47. Sometime during the summer of 2005, after not being called, Parker placed a call to Simmerman asking why he had not been hired. (N.T. 23).
48. Simmerman told Parker he had not been selected because he had only completed two years of high school, he could not follow directions, and because when applications are reviewed some are placed in a "no" pile while others are placed on a "maybe" pile. (N.T. 24, 105, 114).
49. In response, all Parker basically said was that he is black. (N.T. 24, 105).
50. Because Parker's application had been placed in the "No" pile, nothing further was done. (N.T. 106).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.
3. Parker is an individual within the meaning of the Pennsylvania Human Relations Act.
4. Stone is an employer within the meaning of the Act.
5. A Complainant may established a *prima facie* case of failure to hire by proving that:
 - a. he is a member of a protected class;
 - b. he applied for and was qualified for a position for which Stone was seeking applicants;
 - c. despite Parker's qualifications, he was not hired; and
 - d. positions were awarded to candidates with either equal or less qualifications, and who are not in Parker's protected class.
6. Parker failed to establish a *prima facie* case.

OPINION

This case arises on a complaint initially filed by Billie Parker (hereinafter "Parker") against Stone Company (Hereinafter "Stone"), on or about August 16, 2005, at Case Number 200500657. In his complaint Parker generally alleged that Stone failed to hire him as a driver. On or about June 12, 2006, Parker filed an amended complaint correcting the name of the Respondent to Stone & Company. Parker alleged the refusal to hire him was race-based discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter "PHRA"),

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated Parker's allegation, and at the conclusion of the investigation concluded that probable cause existed. Thereafter, the PHRC attempted to eliminate the alleged unlawful failure to hire through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently the PHRC notified the parties that it had approved a public hearing of Parker's allegation.

The Public Hearing was held on June 18, 2008 in Washington, Pennsylvania, before Permanent Hearing Examiner Phillip A. Ayers. The case on behalf of the complaint was presented by PHRC staff attorney Diane Blancett-Maddock, Esquire. Bernard T. McArdle, Esquire, appeared on behalf of Stone.

Following the public hearing, the parties were afforded an opportunity to submit briefs. The post-hearing briefs were received in September 2008.

In his complaint, Parker makes a general reference to having applied for a job with Stone in 2004, and allegedly being told no positions were available. Parker's main allegation points to June 2005, when he submitted an application

to become a Driver. In effect, Parker's complaint alleges that in June 2005, he was told a position was available by a "person in charge", and that the person hired would be the person whose application stood out. Parker's complaint alleges the only requirement for the Driver position was to have driving experience. Parker's complaint then claims that on July 4, 2005, he was told he was not hired because he lacked concrete experience. Parker's complaint then points to Ryan Swingle (sic), a Caucasian, as the individual hired and alleges he too had no concrete experience but only one year driving experience while Parker had 10 years driving experience.

The specificity of Parker's PHRC complaint is set forth in detail because as the evidence developed in this case, it became abundantly clear that the version of events claimed in Parker's complaint are drastically different from what actually happened.

For example, Parker never applied in 2004. Instead, in the fall of 2004, a period when the cement business slows dramatically, Parker simply asked whether Stone was hiring. (N.T. 21). There is no evidence that Parker "applied" in 2004.

Next, Parker claims that Swingle (sic) was hired instead of him. The evidence in this case reveals that Ryan Schwingel, Parker's friend, was hired before Parker ever even applied. Indeed, Parker testified that upon learning from Schwingel that he had been hired, Parker asked Schwingel to bring him an application. (N.T. 22). Clearly, Parker applied after Schwingel had already been hired. (N.T. 40). Further, Parker's claim that he was told he was not hired because he did not have concrete experience is not supported by the evidence.

Parker testified that in the summer of 2005, he called Stone's main offices asking why he had not been hired. (N.T. 24). Parker indicated the reason he was given was that he only had two years of high school and that he could not follow directions. (N.T. 24). Further, Parker stated that he said nothing further and that he did not attempt to discuss his application. (N.T. 24, 25).

Finally, Parker's PHRC Complaint states that the only requirement to be a Driver for Stone was that an applicant simply have experience as a driver. Clearly, this allegation was speculation on Parker's part. The evidence shows that Stone's HR person had a well defined set of criteria as he reviewed applications.

To prevail, Parker is required to prove that Stone had a discriminatory intent or motive when he was not selected to be interviewed and ultimately not hired. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A. 2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Parker must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "*prima facie* case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated

against the employee. *Id.* At 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. *Id.* It raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. Furnco Construction corp. v. Waters, 438 U.S. 567, 577 (1978).

In McDonnell Douglas, the U.S. Supreme Court held that a plaintiff may prove a *prima facie* case of discrimination in a failure-to-hire case by demonstrating:

- (i) the he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected; and
- (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons with Complainant's qualifications.

Id. At 802. Although the McDonnell Douglas, test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 263, 43 FEP 1018 (6th Cir. 1987).

Here under the guidance of the Pennsylvania Supreme Court, we slightly adapt the McDonnell Douglas test. To establish a *prima facie case*, Parker, must show:

1. that he is a member of a protected class;
2. that he applied for and he was qualified for a position for which Stone was seeking applicants;
3. that, despite his qualifications, Parker was not hired; and,

4. that the job opening was awarded to an applicant with either equal or fewer qualifications than Parker, and who is a different race than Parker.

PHRC v. Johnstown Redevelopment Authority, 527 Pa. 71 588 A.2d 497 (1991).

If Parker establishes a *prima facie* case, the burden would shift to Stone “to articulate some legitimate, nondiscriminatory reason” for its actions. McDonnell Douglas, 411 U.S. at 802. Stone would have to rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be “clear and reasonably specific,” *Id.* At 285, and “legally sufficient to justify a judgment” for Stone. *Id.* At 255. However, Stone would not have the burden of “proving the absence of discriminatory motive.” Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If Stone would carry this burden of production, Parker would then have to satisfy a burden of persuasion and show that any legitimate reasons offered by Stone were not its true reasons, but were a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804. This burden would merge with the burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that Stone intentionally discriminated against Parker would remain at all times with Parker. *Id.* at 253.

On the initial question of whether Parker can establish a *prima facie* case the first element is clear, Parker is an African American. However, it must be noted that Parker has not shown that at the critical moment when Parker’s application was reviewed and deemed unworthy of further consideration, Simmerman was aware of Parker’s race. It was only later, after Parker’s