IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Pocono Mountain School District, Petitioner	: :	
v.	:	No. 816 C.D. 2007
Pennsylvania Human Relations Commission, Respondent	:	Submitted: March 12, 2008

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: June 26, 2008**

The present case involves the issue of whether the Pocono Mountain School District (District) violated the Pennsylvania Human Relations Act (PHRA)[1] when it declined to hire Leonard E. Williams (Williams) as a school bus driver: (1) who, by his own acknowledgement, is not able to fully extend or completely flex his fingers on his right hand; and (2) who, was assessed by the District's school transportation physician, Cary A. Davidson, M.D., as being medically unable to operate a school

[1] Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951-963.

bus. The District petitions this Court for review of the March 27, 2007 order of the Pennsylvania Human Relations Commission (Commission), which ordered the District to cease and desist from failing to make informed individualized assessments of disabled job applicants and to give Williams back pay, plus interest.

In January 2001, Williams applied for a school bus driver position with the District. To become a school bus driver for the District, Williams was required to undergo a physical examination by Dr. Davidson. (Commission's Final Opinion and Order,[2] Findings of Fact (FOF) ¶¶ 21, 25.) Dr. Davidson gave Williams a bus driver physical on May 8, 2001. (FOF ¶ 28.)

During the physical, Williams discussed with Dr. Davidson injuries that Williams had sustained to his right hand and arm in an industrial accident when he was eighteen or nineteen years of age. (FOF ¶ 29.) Williams was asked to hold Dr. Davidson's fingers so that the doctor could assess Williams' grip strength. (FOF ¶ 30.) Williams also informed Dr. Davidson that he had type II diabetes, which was controlled by diet. (FOF ¶ 36.) Dr. Davidson requested that Williams provide him with medical records so that he could verify that Williams controlled his diabetes by diet. (FOF ¶¶ 37-38.) Before completing the physical, Dr. Davidson told Williams that there was a very good chance he would not be hired by the District; however, Dr. Davidson added that he would not be surprised if Williams could find doctors in other Districts who would qualify Williams as a school bus driver. (FOF ¶¶ 34-35.)[3]

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[2] By Order dated March 27, 2007, the Commission approved and adopted the Stipulations of Fact, Second Set of Stipulations of Fact, Conclusions of Law and Opinion of Hearing Panel Member Woodall.

[3] Dr. Davidson testified that:

(Continued…)

On May 29, 2001, Dr. Davidson issued a report in which he concluded that Williams was not medically qualified to drive a school bus "based upon his severe deformity of his right arm and hand." (FOF ¶¶ 42, 47 (citation omitted).)[4]

> I told Mr. Williams at the end of a physical that it was certainly likely that because of the impairment on his hand that he may not pass the physical, but I did tell him at that time that I would not be the least bit surprised if he could find other physicians and other school districts who would employ him.
>
> I do realize that I am quite strict. I take my job very, very seriously. I am very, very worried about hiring someone or recommending someone who may not be qualified and who may not be qualified according to the statutes.
>
> But I realize that there are other physicians out there who may not be as strict as myself, and there certainly will be maybe other physicians who are worried that they'll get caught up in a lawsuit if they deny somebody employment or that they'll be afraid that the patient will leave their practice and get angry if they deny them the signing of the bus driver form.
>
> So that for multiple reasons there certainly are other physicians out there who would sign his physical for him to drive, and I guess that's why Pocono Mountain has myself doing all of the physicals because I'm not as concerned about personal repercussions toward myself as I am toward the safety of the children.

(N.T. at 99-100.)

[4] Describing Williams' severe deformity, Dr. Davidson incorrectly stated that Williams "is missing fingers." (FOF ¶ 44.) However, photographic evidence established that Williams is missing portions of several fingers. Dr. Davidson's discussion does not focus on the absence of fingers but, rather, focuses on impairments caused by "the severe deformity" that impeded overall strength. In particular, Dr. Davidson finds that:

> I do find that . . . Williams is not qualified to drive a school bus possibly based upon his diabetic history but more importantly based upon his severe deformity of his right arm and hand. It is necessary that he have good strength of his arm in order to operate the bus door and in order to handle the steering wheel, and in order to help or assist disabled or injured students from the bus. He certainly does not have the strength, sensation, or orthopedic ability to handle such tasks. I do not see any possible way in which this disability with his arm could be overcome. I cannot allow him to drive with his diabetes because I cannot obtain the necessary documentation from his physician because his physician office notes are not legible. I do not accept a letter from the doctor stating that his control is excellent, I will only accept the documentation of all of his office visits.

(Continued…)

Explaining the disqualification, Dr. Davidson stated that "it is necessary that he have good strength of his arm in order to operate the bus door and in order to handle the steering wheel, and in order to help or assist disabled or injured students from the bus," (FOF ¶ 48 (citation omitted)), but Williams "certainly does not have the strength, sensation, or orthopedic ability to handle such tasks." (FOF ¶ 49 (citation omitted).) Dr. Davidson did "not see any possible way in which this disability with his arm could be overcome." (FOF ¶ 49 (citation omitted).)

As for Williams' diabetes, Dr. Davidson reported that Williams and his personal physician both informed Dr. Davidson that Williams controlled his diabetes

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(Report of Dr. Davidson (May 29, 2001), Complainant Ex. No. 2.) In a subsequent report, Dr. Davidson also opined that:

> Unfortunately, Mr. Williams had a tragic industrial accident to his right hand and forearm. He has extensive surgical scars and very noticeable muscle atrophy. There are no missing digits. He has very limited motor strength in that arm and hand and certainly a lot of loss of fine motor coordination. . . . I do not believe he has the strength to assist a 90 lb child off the bus in all situations [as is listed as a requirement in the job description]. Certainly, his loss of strength and fine motor coordination makes it more difficult to drive a bus and open a manual door.
>
> . . . .
>
> Again, the law says that if there is impairment, the person is disqualified. Any perceived lack of strength, any lack of fine motor control, and any lack of sensation is such impairment. It certainly doesn't mean that someone can't physically drive a bus, but rather means if there is any condition which makes it at all more difficult to drive a bus, they are not qualified. Mr. Williams is not only impaired, but I would call him very seriously impaired.

(Davidson's Answer to Williams' Complaint against Davidson (Davidson's Answer) at 1.)

by diet, without hypoglycemic medications; however, Dr. Davidson found this hard to believe and had "absolutely no way to verify this." (FOF ¶¶ 50-51 (citation omitted).)[5] Thus, Dr. Davidson stated that Williams was "possibly" disqualified as a result of his diabetes. (Report of Dr. Davidson (May 29, 2001), Complainant Ex. No. 2.) After completing his report, Dr. Davidson called Williams to inform him that he did not find Williams medically qualified to drive a school bus for the District. (FOF ¶ 52.)

The District accepted Dr. Davidson's report and refused to hire Williams as a school bus driver.[6] (FOF ¶¶ 54, 57.)

On June 28, 2001, Raymond J. Felins, M.D., wrote a letter for Williams, refuting the findings set forth in Dr. Davidson's report and stating that Dr. Davidson's conclusions were unreasonable. (FOF ¶¶ 78-83.) On October 25, 2001, Williams filed a complaint against the District with the Commission, alleging that the District refused to hire him as a school bus driver because of non-job related disabilities. (Commission's Final Opinion and Order, Stipulations of Fact (SOF) ¶ 5;

[5] Dr. Davidson also noted that the lack of complete medical information as to Williams' diabetes was a further basis for rendering him not qualified. Dr. Davidson opined that "[a]lmost all diabetics should be on some medicine, and I was indeed very surprised when he told me that he did not take any medicine." (Davidson's Answer at 2.) Dr. Davidson further opined that "[d]iabetics have a very high incidence of neuropathy in the feet and vascular disease of the feet. A diabetic foot exam including sensation and vascular exam should be done and documented at least twice per year. No legible documentation exists." (Davidson's Answer at 3.)

[6] Williams sought employment as a school bus driver elsewhere. In November 2001, Williams was hired by Ricky Haldaman Busing as a school bus driver for the Wallenpaupack School District; he continued to drive the school bus into 2004 and experienced no difficulties doing so. (FOF ¶¶ 62-63.) In 2002, Williams was hired to drive a passenger bus for Monroe County Transit and continued in that job into 2006. (FOF ¶ 64.)

Complaint ¶ 3.) The Commission found probable cause to credit the allegations in Williams' complaint and attempted to resolve the matter by conciliation, but was unable to do so. (SOF ¶¶ 15-16.) The Commission conducted a hearing on the matter.

Section 5(a) of the PHRA, 43 P.S. § 955(a), states that it is unlawful discrimination for an employer to refuse to hire an individual because of a "non-job related handicap or disability." In employment discrimination cases under the PHRA, the complainant bears the burden of establishing a prima facie case which, in general, requires proof that the complainant is a member of a protected class, that he applied for a job for which he was qualified, that his application was refused, and that the employer continued to seek other applicants with equal qualifications. Taylor v. Pennsylvania Human Relations Commission, 681 A.2d 228, 231 (Pa. Cmwlth. 1996). Once the prima facie case is established, the burden shifts to the employer to establish a legitimate, non-discriminatory reason for the denial of employment. Id. at 232. If the employer rebuts the prima facie case, the burden shifts back to the complainant to establish that the proffered reason is a pretext for intentional discrimination. Action Industries, Inc. v. Pennsylvania Human Relations Commission, 518 A.2d 610, 612 (Pa. Cmwlth. 1986).

Applying this standard to the evidence deduced at the hearing, the Commission concluded that Williams made a prima facie case of discrimination by proving that: (1) Williams has a disability within the meaning of the PHRA; (2) Williams applied for a position for which he was otherwise qualified; (3) the District rejected Williams' application because of his disability; and (4) the District continued to seek applicants of equal qualifications. The Commission then concluded that the District

articulated a legitimate non-discriminatory reason for not hiring Williams, i.e., the report of Dr. Davidson. However, the Commission concluded that Williams proved that the *District's reliance on Dr. Davidson's report was unreasonable* and, thus, was a pretext for *intentional discrimination*.[7] The Commission ordered the District to cease and desist from failing to make individualized assessments of disabled job applicants and to pay Williams back pay, plus interest. The District petitions this Court for review of that order.[8]

[7] The Commission essentially concluded that, because Williams had already passed the Pennsylvania Department of Transportation School Bus Driver's test and because Williams' own physician had physically qualified him to take that test, the District should have evaluated Dr. Davidson's report more closely than it did. The Commission concluded that "[t]he report does not provide Pocono with sufficient information about the nature, extent, and implications of Williams' injury to adequately advise Pocono that an individualized inquiry had been made." (Commission's Final Opinion and Order at 37.) The Commission concluded that "Dr. Davidson's decision and report are neither based upon a good-faith assessment of Williams' capabilities nor supported by objective scientific and medical evidence." (Commission's Final Opinion and Order at 37.) The Commission concluded that, under the applicable regulations, one can obtain a waiver from disqualifying impairments such as those that Williams had and that, given his passing the Pennsylvania Department of Transportation School Bus Driver's test, such a waiver should have been granted.

[8] Our scope of review is limited to determining whether the Commission violated constitutional rights or committed an error of law or whether its necessary findings of fact are supported by substantial evidence. Canteen Corp. v. Pennsylvania Human Relations Commission, 814 A.2d 805, 810 n.3 (Pa. Cmwlth. 2003)

I. Prima Facie Case

A. Disability

1. Williams' Testimony

The District argues that Williams failed to make a prima facie case that he has a disability within the meaning of the PHRA because he did not regard himself as disabled. The District's argument runs contrary to the plain language of Section 4(p.1) of the PHRA, 43 P.S. § 954(p.1). Under Section 4(p.1.) of the PHRA, the term "handicap or disability" is defined to include: "(1) a physical or mental impairment which substantially limits one or more of [a] person's major life activities; (2) a record of having such an impairment; or (3) **being regarded as** having such an impairment . . . ." 43 P.S. § 954(p.1)(emphasis added). The Commission's regulations expand on the "being regarded as" language contained in Section 4(p.1) of the PHRA, providing that a person is regarded as having a physical impairment that substantially limits major life activities, including working, where an employer treats the person as having such impairment. 16 Pa. Code § 44.4.

While Williams' own testimony indicates that he does not regard himself as disabled, his own belief does not preclude him from attempting to show that *the District regarded* him as having substantially limiting impairments. Accordingly, we reject this aspect of the District's argument.

2. Regarded As Disabled

The District argues, in the alternative, that Williams failed to prove that the District regarded him as having a physical impairment that substantially limits a major life activity such as working.

A physical impairment substantially limits a person's ability to work if the impairment restricts the person's ability to perform either a class of jobs or a broad range of jobs in various classes. Williams v. Philadelphia Housing Authority Police Department, 380 F.3d 751, 763 (3d Cir. 2004), cert. denied, 544 U.S. 961 (2005). A class of jobs consists of jobs that utilize similar training, knowledge, skills or abilities. Black v. Roadway Express, Inc., 297 F.3d 445, 453 n.11 (6th Cir. 2002) (citing 29 C.F.R. § 1630.2(j)(3)(ii)(B)). For example, truck driving constitutes a class of jobs. Id. at 453-54.

Here, the District refused to hire Williams as a school bus driver because the report of its physician, Dr. Davidson, indicated that Williams has a severe deformity to his right arm and hand and that he does not have the strength, sensation, or orthopedic ability in that hand and arm to operate a bus door, handle a steering wheel, or help students exit the bus. (Report of Dr. Davidson (May 29, 2001), Complainant Ex. No. 2.) Accepting this report, the District believed that Williams could not operate a bus door or handle a bus steering wheel and, thus, was incapable of driving any bus. Like truck driving, bus driving constitutes a class of jobs that includes public school bus driving, private school bus driving, local public transit bus driving, intercity bus driving, charter bus driving, tour bus driving, airport shuttle bus driving, and others. All of these jobs utilize similar training, knowledge, skills and abilities, and all require the ability to operate a bus door, handle a bus steering wheel and help passengers exit the bus. Therefore, Williams established that the District regarded him as having an impairment to his right arm and hand that substantially limits a major life activity.

B. Qualified for the Position

The District argues that Williams failed to make a prima facie case that he was qualified for the school bus driver position, i.e., that Williams met the physical qualifications for school bus drivers set forth in 67 Pa. Code § 71.3.

The regulation at 67 Pa. Code § 71.3(b)(3) provides that a person is physically qualified to drive a school bus if the person has no impairment of: (1) "[a] hand or finger likely to impair prehension or power grasping, or has been granted a waiver by the Department [of Transportation] after competency has been demonstrated through a driving examination"; and (2) "[a]n arm . . . likely to impair the ability to perform normal tasks associated with driving a school bus . . . [or h]as been granted a waiver by the Department [of Transportation] after competency has been demonstrated through a driving examination."

Here, the Commission inferred from Williams' work experience as a school bus driver,[9] the "S" endorsement on his driver's license,[10] and his ability to pass the District's own driving test[11] that Williams has no applicable impairments. Because

[9] Williams worked as a school bus driver in the state of New York from April 1988 to August 1995. Williams then began working as a driver for a trucking company. He also worked as a school bus driver for Hudson Valley Bus in New York through January 2001. Williams had passed a physical examination to work as a school bus driver in New York, and Williams had no difficulty safely driving a school bus. (FOF ¶¶ 1-5; Commission Hr'g Tr. at 28-32.)

[10] Williams passed a Pennsylvania Department of Motor Vehicles school bus driving test, which allowed an "S" endorsement to be placed on Williams' driver's license. The "S" endorsement on a driver's license means that the licensee may drive a school bus. (FOF ¶¶ 12-13.)

[11] Part of the District's application process involved a twenty-hour bus driver study program with the District. The program included fourteen hours of classroom study and six hours of driver training. In addition, the District appointed drivers to take prospective drivers on the road to evaluate their driving skills. Williams participated in this program and did pass the District's bus driver skills test. (FOF ¶¶ 6-11.)

the Commission found that Williams did not have such impairments, it was not necessary for Williams to show that the Department of Transportation had granted him a waiver after he demonstrated competency through a driving examination.[12]

With respect to Williams' diabetes, the regulation at 67 Pa. Code § 71.3(b)(4) states that a person is physically qualified to drive a school bus if the person "[h]as no established medical history or clinical diagnosis of diabetes mellitus currently requiring use of insulin or other hypoglycemic medication." The primary evidence Williams offered in support of his diabetes being under control was his medical records from his treating physician, Charles S. Deck, M.D., which Dr. Davidson found to be illegible and lacking information. However, Williams did also present deposition testimony from Dr. Deck, as well as a letter from Dr. Deck to Dr. Davidson, dated May 16, 2001, in which Dr. Deck opined that Williams did not need any drug treatment for his Type II diabetes mellitus. This evidence sufficiently establishes Williams' prima facie case as to his being qualified for the position.

C. Non-job Related Disability

The District argues that Williams failed to make a prima facie case that he has a non-job-related disability. However, in making his prima facie case, Williams was not required to establish a non-job-related disability. Williams was required only to establish that he has a disability, i.e., that he is a member of a protected class. Taylor,

[12] The District argues that the Commission erred in concluding that the District had a legal obligation to advise Williams that he could obtain a waiver. (District's Br. at 34-35.) However, the Commission did not reach such a conclusion. The Commission stated only that, when the District reviewed Dr. Davidson's report, the District was aware that because of the possibility of a waiver from the Department of Transportation, an arm or hand impairment did not automatically disqualify Williams from a school bus driver job. (See Commission's Final Opinion and Order at 26-27.)

681 A.2d at 231. Once Williams made his prima facie case that he was regarded as having a disability, the burden shifted to the District to produce evidence showing that the District refused to hire Williams because it believed that the disability was job related. Id. at 232. Once the District did so by producing Dr. Davidson's report, the burden of proof shifted back to Williams to show that the District's proffered reason of job relatedness is a pretext for intentional discrimination. Id.

II. Pretext for Intentional Discrimination

The District argues that Williams failed to meet his burden of showing that the District's proffered reason of job relatedness was a pretext for intentional discrimination. We agree with the District.

A complainant can meet the burden of showing that the employer's proffered reason was a pretext for intentional discrimination either, directly, by showing that a discriminatory reason more likely motivated the employer or, indirectly, by showing that the employer's proffered explanation is unworthy of credence. Action Industries, Inc. v. Pennsylvania Human Relations Commission, 518 A.2d 610, 613 (Pa. Cmwlth. 1986). Where an employer's proffered reason is that it reasonably relied upon the opinion of a medical expert, a complainant could establish the intent to discriminate by showing that reliance upon the doctor's opinion was unreasonable under the circumstances. Id.

Thus, an employer has a good faith defense that negates its intent to discriminate where it reasonably relies upon the opinion of a medical expert in refusing to hire an applicant. Id. Because it is virtually certain that contradictory medical opinions will exist, except in the most extreme cases, the fact that a

complainant can find a doctor to contradict the opinion of the employer's doctor should not give rise to liability if the employer reasonably relied upon the doctor in good faith. Id.

In this case, the District relied on the expert opinion of its own medical evaluator, Dr. Davidson, who had an extensive background, and practiced medicine for twenty-one years. (FOF ¶ 26.) He had conducted physical examinations of applicants and personnel for the District for seventeen consecutive years. (FOF ¶ 25.) Additionally, Dr. Davidson had performed hundreds of physical examinations yearly for a local trucking company. (N.T. at 79-80.) His evaluation was based, in part, on this extensive experience.[13] Further, we note that Dr. Davidson's opinion was also based, in part, upon medical records that themselves appear to be deficient, that were provided in direct response to Dr. Davidson's request.[14]

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[13] Dr. Davidson testified that:

> If during the course of the history and the physical, a problem is obvious, or if there is a condition, such as diabetes or if there is a condition such as heart disease, before the person is qualified, I need to get extra information.
>
> I also realize that during the course of a physical these are people who need the employment. They need the job. And if they don't have this job, they sometimes don't get their health insurance, they won't have a salary. And so I sometimes don't get the entire truth and nothing but the truth.
>
> And because it is such a serious job where the lives and safety and welfare of many, many children are at stake, I need to get the best information available to make an educated decision. If the information that I receive is not good and accurate, the decision that I make will not be a good and accurate decision.
>
> So when things fall out of the normal, I ask for more information, or supporting information. And that is especially critical in terms of diabetes.

(N.T. at 80-81.)

[14] The Commission relied on Dr. Deck's testimony in which he opined, as characterized by the Commission, that "he considered Mr. Williams' diabetes to have been well-controlled with diet." (FOF ¶ 85.) However, it must be noted that Dr. Davidson was without the benefit of Dr. Deck's testimony at the time that Dr. Davidson conducted his own examination.

(Continued…)

Williams, himself, acknowledged that there is some impairment of his hand, in particular, that he was unable to fully extend or completely flex his fingers. The District relied on the expert report of its long-time medical evaluator, Dr. Davidson, who opined that Williams does not have the strength, sensation, or orthopedic ability to operate a bus door, handle a steering wheel, or help disabled or injured students from a bus and that, moreover, there was no possible way for Williams to overcome his disability.[15] Given the evidence, we cannot say that the District was unreasonable in relying on its expert's opinion.[16]

The record also shows that Dr. Davidson kept his examination record open for three weeks after conducting his examination of Williams so as to enable Williams to provide additional, supporting documentation before Dr. Davidson issued his recommendation. As noted earlier, the record contains a letter from Dr. Deck to Dr. Davidson, dated May 16, 2001 in the middle of this three week period, in which Dr. Deck opined that Williams did not need any drug treatment for his Type II diabetes mellitus. The Commission does not reference this letter in either its decision or its brief before this Court. However, Williams presents nothing from this three week time frame that shows that he or his agents presented Dr. Davidson with any medical evidence supporting his belief that his hand disability did not prevent him from being able to operate a bus. What were provided, were the treatment notes of Dr. Deck.

To the extent Dr. Deck's treatment notes supported his testimony, we again note that these notes were illegible, a fact acknowledged by Dr. Deck. Additionally, it wasn't until some five years after the examination that Dr. Deck's notes were transcribed and provided to the District, and then only in preparation for this particular litigation.

[15] Dr. Davidson testified that:

> I did not deem him qualified because I have to follow the regulations that are set forth in the code for bus drivers. I cannot just use my personal opinion of whether or not he is a good driver. I have to see if he meets the physical requirements as set forth by the code.
>
> ….
>
> The code specifically says that there is no impairment of a finger, thumb, or hand and that Mr. Williams had many impairments of his hand, that the fact that the finger is bent down is a very, very bad impairment, because when you get to grasp a wheel, that bent down finger can certainly get in your way and prohibit the other fingers from grasping around the wheel. So having the one finger bent down is a very, very serious impairment.

(Continued…)

For similar reasons, we find that the District's actions cannot be found to have been in bad faith.[17] At its essence, Williams' argument is that the District used as a pretext Dr. Davidson's refusal to medically clear him to operate a bus because of his

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> The second impairment is that the grip strength is not good. I compared the grip strength on the right hand to the grip strength on the left hand. And the right hand should match the left hand, especially because – he's right-handed and it's his dominant hand, the right hand should match the left and the strength was not there.

(N.T. 85-86.) Worth noting are several statements made by Dr. Deck, Williams' own treating physician, that the Commission did not address in its discussion: (1) an acknowledgement that his "handwriting is hard for some people to read" (Deck Dep. at 36); (2) an acknowledgement that he refused to sign a form for Williams indicating that Williams was able to physically drive a school bus, because of his own professional opinion that Williams had weakness in his right hand (Deck Dep. at 38-40, 43-47; see also, Dr. Deck's treatment notes for 2-8-01 (the notes were typed for his June 30, 2006 deposition because of the difficulty in reading his handwritten notes, and provided that "can't sign bus driver's certificate because of hand weakness.")); and (3) an acknowledgement that the type of diabetes Williams suffered from was "relatively rare" for a person with Williams' bodily characteristics. These statements, by-in-large, are consistent with, and support Dr. Davidson's own conclusions.

[16] While there was evidence that could be used to support a contrary conclusion (i.e., that Williams operated a school bus in New York and had passed the Department of Transportation's licensing requirements), that evidence does not necessarily require a finding that the District's reliance was unreasonable. Action Industries, Inc., 518 A.2d at 613.

[17] Our review is limited to determining whether the Commission's determination accords with the law, "whether the necessary findings of fact are supported by substantial evidence, and whether there has been a violation of constitutional rights." Borough of Economy v. Pennsylvania Human Relations Commission, 660 A.2d 143, 146 (Pa. Cmwlth. 1995). In this case, as discussed, it appears that the Commission made findings of fact not supported by substantial evidence, which is defined as "such relevant evidence which a reasonable mind might accept as adequate to support a conclusion." Id. at 147.

The Commission also focused on what it considered to be the District's error in failing to apprise Williams that he could pursue a waiver with the Pennsylvania Department of Transportation of his hand and finger impairment. We agree with the District's argument that neither Williams, nor the Commission, has pointed to any authority, statutory, regulatory or precedential, that requires the District to apprise an applicant of the waiver process. Accordingly, we conclude that the Commission erred as a matter of law.

hand disability. What we are left with, factually, is that Williams' own treating physician, independently, declined to sign the medical clearance form for Williams.

The Commission attempts to explain this factual anomaly away by finding that Dr. Deck declined to sign the medical clearance because he told Williams that "he was not sufficiently familiar with the state Department of Transportation's qualifications and that Williams should go to a doctor who had such familiarity." (FOF ¶ 20.) The problem with this finding is that it ignores the transcribed treatment notes and Dr. Deck's own testimony. The treatment notes state only that "[I] can't sign bus driver's certificate because of hand weakness…. Inquire about qualifications for driving with hand dysfunction elsewhere." (Deck Transcribed Treatment Notes at 5.) The finding is also inconsistent with Dr. Deck's testimony. Dr. Deck testified that he did not sign the certificate because of Williams' hand weakness and that "he suggested that he could inquire about qualifications for driving with hand dysfunction elsewhere." (Deck Dep. at 35.) The record reveals that, after District's counsel read the standards set forth in the applicable regulations to Dr. Deck, Dr. Deck acknowledged that his reasons for declining to grant the medical clearance were based essentially on those standards. (Deck Dep. at 44-47.)

Even without Dr. Deck's conclusions, for the reasons discussed above, we find the record lacks sufficient evidence "to convince a reasonable mind, to a fair degree of certainty," that the District violated the PHRA. Borough of Economy v. Pennsylvania Human Relations Commission, 660 A.2d 143, 147 (Pa. Cmwlth. 1995).

Accordingly, we reverse the Commission's order.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Pocono Mountain School District, Petitioner	:	
v.	:	No. 816 C.D. 2007
Pennsylvania Human Relations Commission, Respondent	:	

O R D E R

NOW, June 26, 2008, the order of the Pennsylvania Human Relations Commission in the above-captioned matter is hereby **reversed**.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

The Pocono Mountain School District, Petitioner	:	
v.	:	No. 816 C.D. 2007
	:	Submitted: March 12, 2008
Pennsylvania Human Relations Commission, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE FRIEDMAN FILED: June 26, 2008

I vigorously dissent. In this case, the Pennsylvania Human Relations Commission (Commission) determined that The Pocono Mountain School District (District) discriminated against Leonard E. Williams (Williams) when the District refused to hire Williams as a school bus driver because of his physical disabilities. The majority reverses, concluding that Williams failed to prove that the District's proffered reason for refusing to hire him, i.e., a doctor's disqualification report, was a pretext for intentional discrimination. I cannot agree.

In January 2001, Williams applied for a school bus driver position with the District, indicating that he had worked in New York as a bus driver for Hudson Valley Bus and for County Coach Corporation. (Findings of Fact, No. 3; R.R. at

191a.) In February, Raymond J. Felins, M.D., gave Williams a physical examination and signed a form certifying that Williams was physically qualified to drive a school bus pursuant to section 1509 of the Vehicle Code, 75 Pa. C.S. §1509.[1] (Findings of Fact, Nos. 68, 70; R.R. at 325a.) Dr. Felins' report certifies that Williams has no hand or arm impairment and that Williams does not have diabetes requiring the use of insulin or other hypoglycemic medication. (R.R. at 326a.)

Also in February, Williams began a twenty-hour bus driver program offered by the District.[2] The program included fourteen hours of classroom study and six hours of driver training. In April, Williams passed the District's bus driver skills test. Subsequently, Williams passed the Pennsylvania Department of Motor Vehicles school bus driver test, earning the endorsement on his driver's license that allows him to drive a school bus.[3] (Findings of Fact, Nos. 8-9, 11-13.)

However, to become a school bus driver for the District, Williams was required to undergo a physical examination by Cary A. Davidson, M.D., the school transportation physician. During the May 8, 2001, examination, Williams told Dr. Davidson about an injury he sustained to his right arm as a teenager. (Findings of

[1] Section 1509 of the Vehicle Code states that no person shall be issued an endorsement to operate a school bus unless the person: (1) has successfully completed a school bus driver training program; (2) has satisfactorily passed an annual physical examination; (3) is at least eighteen years of age; and (4) is qualified to operate school buses in accordance with applicable laws. 75 Pa. C.S. §1509.

[2] The regulation at 67 Pa. Code §71.5 requires that local public school districts administer courses of instruction for school bus driver applicants.

[3] The "S" endorsement permits licensees to drive a school bus. (Findings of Fact, No. 13.)

Fact, No. 29.) Although Dr. Davidson was not qualified to measure grip strength and had no equipment to measure Williams' grip strength, he purported to do so and then stated that he would not be surprised if Williams could find other doctors who would qualify Williams to drive a school bus, but there was a very good chance that Williams would not be hired by the District. (Findings of Fact, Nos. 32, 34-35.)

Williams also informed Dr. Davidson that he had diabetes that was controlled by diet. Dr. Davidson requested Williams' medical records to review his history of diabetes. Williams' personal physician, Charles S. Deck, M.D., provided the records, but Dr. Davidson found them illegible and incomplete. Dr. Davidson did not contact Dr. Deck for a transcription of the illegible records or for any additional information. (Findings of Fact, Nos. 14, 36-41.)

Dr. Davidson issued a report on May 29, 2001, in which he concluded that Williams was not medically qualified to drive a school bus because of a severe deformity of his right arm and hand. Describing the severe deformity, Dr. Davidson incorrectly stated that Williams "is missing fingers." (Findings of Fact, No. 44.) Dr. Davidson also stated:

> It is necessary that he have good strength of his arm in order to operate the **bus door** and in order to handle the **steering wheel**, and in order to help or **assist** disabled or injured students from the bus. **He certainly does not have the strength, sensation, or orthopedic ability to handle such tasks.** I do not see any possible way in which this disability with his arm could be overcome.[4]

[4] The regulation at 67 Pa. Code §71.3(b)(3) states that a person is physically qualified to drive a school bus if: (1) the person has no impairment of a hand or arm that is likely to impair the ability to perform normal tasks associated with driving a school bus; or (2) has been granted a **waiver** by the Department after the person has **demonstrated competency through a driving** *(Continued…)*

(R.R. at 192a) (emphasis added).

Dr. Davidson also concluded that Williams "possibly" is not qualified to drive a school bus based on his diabetic history. (R.R. at 192a.) According to the report, Williams' doctor informed Dr. Davidson in a letter that Williams' diabetes does not require any drug treatment and is controlled by diet. Dr. Davidson stated:

> Unfortunately, I find this extremely difficult to believe…. When I ask for the records from his doctor … all of his records are hand written and are totally illegible. Although his Dr. does claim that his diabetes is very well-controlled … and that he does not require medicines … I have absolutely no way to verify this because of the very poor handwriting of his doctor.[5]

(R.R. at 192a.)

The District accepted Dr. Davidson's report and refused to hire Williams as a school bus driver. (Findings of Fact, Nos. 54, 57.) The District always accepted Dr. Davidson's reports at face value and never questioned their content or rationale. (Findings of Fact, No. 53.)

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examination given under 67 Pa. Code §71.4(b)(2)(ii) and (iii). The regulations at 67 Pa. Code §71.4(b)(2)(ii) and (iii) pertain to the basic skills test, which includes opening the bus door, and the on-road driving test, which includes using the steering wheel.

[5] The regulation at 67 Pa. Code §71.3(b)(4) states that a waiver may be granted to an individual whose diabetes requires the use of insulin or hypoglycemic medications if the person's **personal physician** verifies there have been no problems for two years and the person submits to certain monitoring requirements.

On June 28, 2001, Dr. Felins wrote a letter on behalf of Williams, in which Dr. Felins disagreed with Dr. Davidson's assessment of Williams' disability. (Findings of Fact, No. 78; R.R. at 327a.) Dr. Felins opined that Dr. Davidson's conclusions were unreasonable. (Findings of Fact, Nos. 79-83.) On October 25, 2001, Williams filed a complaint against the District, alleging that the District refused to hire him as a school bus driver because of non-job related disabilities.

At the hearing on the matter,[6] Teresa Rimmey (Rimmey) testified on behalf of the District that she tracks the paperwork submitted by prospective bus drivers. (R.R. at 165a.) Rimmey testified that Williams was not hired as a school bus driver because of his hand and diabetes. (R.R. at 168a.) Rimmey also testified that an applicant for a bus driver position disqualified by Dr. Davidson due to diabetes or a cardiac condition may obtain a waiver from the Department of Transportation based on the statement of a personal physician. (R.R. at 166a-67a, 170a-72a.)

William Forte (Forte), a former administrator for the District, testified that the District accepted Dr. Davidson's reports at face value and that the District never questioned them. (R.R. at 179a.) Forte then testified regarding waivers:

> Q. Dr. Davidson disqualifies an applicant. The applicant is told by the [District] and given all the information as to how to seek a waiver. And the individual follows through, goes to the Department of Transportation and obtains a waiver, brings the waiver back….
>
> Department of Transportation says that we understand that he has this, that, or whatever. We've tested him, and we

[6] At the hearing, Williams testified on his own behalf, presented various exhibits and offered the deposition testimony of Dr. Deck and Dr. Felins.

> feel that he qualifies for a waiver to be a bus driver. What do you do?
>
> A. Within the structure of our district right now, Dr. Davidson's professional opinion **supersedes that waiver**. When that waiver comes back in, that individual would then bring that waiver to Dr. Davidson, probably would re-evaluate, whatever.
>
> **But if Dr. Davidson, in his professional opinion, is telling me that this person is not qualified to drive a school bus, I'm not going to say, well, the state just gave a waiver for this person to drive a bus**.

(R.R. at 187a) (emphasis added).

> Dr. Davidson testified for the District as follows:
>
> A. I told Mr. Williams … that it was certainly likely that because of the impairment of his hand that he may not pass the physical, but I did tell him at that time that I would not be the least bit surprised if he could find other physicians and other school districts who would employ him.
>
> I do realize that I am quite strict. I take my job very, very seriously….

(R.R. at 146a.) Although Dr. Davidson stated that he takes his job very seriously, he later testified, "The truth of the matter is, I don't follow the letter of the law…. If there is a very slight impairment … I just pass them through." (R.R. at 158a.) Moreover, Dr. Davidson conceded that he made a mistake in his report on Williams:

> Q. Now, Dr. Davidson, you've testified you are a careful, conscientious physician, yet somehow or another you indicated in your letter to the school district that Mr. Williams was missing a finger or a couple of fingers. How did that happen?

> A. Well, I'm human, and I make mistakes…. I probably did this late at night when I was tired, so I made a mistake.

(R.R. at 149a.) Dr. Davidson also suggested that he made a mistake in failing to contact Dr. Deck about the illegible medical records; he acknowledged that Dr. Deck could have indicated "what his own handwriting was." (R.R. at 151a.)

With respect to waivers given by the Department of Transportation, Dr. Davidson testified that: (1) he did not know that applicants could obtain waivers for physical impairments by demonstrating their competency through driving tests; (2) he believed that granting such waivers makes no sense; (3) he was aware that applicants could obtain waivers for diabetic and cardiac conditions; (4) he even tells applicants with such conditions to obtain diabetic and cardiac waivers; but (5) he has prevented applicants with such waivers from driving buses when "my review says that they shouldn't have the waiver." (R.R. at 154a-55a, 158a.)

After considering the evidence presented, the Commission concluded that Williams made a *prima facie* case of discrimination, that the District articulated a legitimate non-discriminatory reason for not hiring Williams, i.e., the report of Dr. Davidson, and that the District's reliance on Dr. Davidson's report was unreasonable, i.e., a pretext for intentional discrimination.[7] The PHRC ordered the District to cease

[7] In employment discrimination cases, the complainant bears the burden of establishing a *prima facie* case which, in general, requires proof that the complainant is a member of a protected class, that he applied for a job for which he was qualified, that his application was refused and that the employer continued to seek other applicants with equal qualifications. *Taylor v. Pennsylvania Human Relations Commission*, 681 A.2d 228 (Pa. Cmwlth. 1996). Once the *prima facie* case is established, the burden shifts to the employer to establish a legitimate, non-discriminatory reason for the denial of employment. *Id.* If the employer rebuts the *prima facie* case, the burden shifts back to the complainant to establish that the proffered reason is a pretext for intentional

(Continued…)

and desist from failing to make individualized assessments of disabled job applicants and to pay Williams back pay, plus interest.

The majority reverses, concluding that Williams failed to prove that the District's proffered reason for refusing to hire him, i.e., Dr. Davidson's report, was a pretext for intentional discrimination. I cannot agree.

A complainant can meet the burden of showing that the employer's proffered reason was a pretext for intentional discrimination by showing that the employer's proffered explanation is unworthy of credence. *Action Industries, Inc. v. Human Relations Commission*, 518 A.2d 610 (Pa. Cmwlth. 1986), *appeal denied*, 515 Pa. 626, 531 A.2d 433 (1987). Where an employer's proffered reason is that it reasonably relied upon the opinion of a medical expert, a complainant can establish the intent to discriminate by showing that the reliance upon the doctor's opinion was unreasonable under the circumstances. *Id.*

Thus, an employer has a good-faith defense that negates its intent to discriminate where it reasonably relies upon the opinion of a medical expert in refusing to hire an applicant. *Id*. Because it is virtually certain that contradictory medical opinions will exist, except in the most extreme cases, the fact that a complainant can find a doctor to contradict the opinion of the employer's doctor should not give rise to liability if the employer **reasonably relied** upon the doctor in **good faith**. *Id*.

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discrimination. *Action Industries, Inc. v. Human Relations Commission*, 518 A.2d 610 (Pa. Cmwlth. 1986), *appeal denied*, 515 Pa. 626, 531 A.2d 433 (1987).

I. Reasonable Reliance

A. Right Hand/Arm

The District accepted Dr. Davidson's statement that, because of a severe right hand and arm deformity, Williams lacked the ability to operate a bus door, handle a steering wheel, and assist students from a bus. However, the District knew that Williams had worked as a bus driver and had passed the District's bus driver skills test. Thus, it should have been obvious to the District that Williams could operate a bus door, handle a steering wheel and, if necessary, assist passengers from a bus. Because Dr. Davidson's report conflicted with known facts, it was unreasonable for the District to rely on that report.

Moreover, the District knew that the law allows applicants with physical impairments that affect their ability to drive a school bus to obtain waivers from the Department of Transportation by demonstrating competency through a driving test. 67 Pa. Code §71.3(b)(3). Knowing that Williams had worked as a bus driver and had passed the bus driving skills test, the District knew that Williams would have been entitled to a waiver. However, the District did not hire Williams because it believed, without justification, that Dr. Davidson's medical opinion supersedes waivers.

In my view, the Department of Transportation provides for waivers so that the law does **not** discriminate against persons with disabilities. Thus, waivers are granted to persons with physical impairments who have **demonstrated competency** to perform the job duties of a school bus driver. If a school district refuses to hire an applicant with a physical impairment, when the applicant has obtained a physical impairment waiver, the school district is refusing to hire the applicant based solely on

his or her handicap, **not** the inability to perform the duties of the job. This is intentional discrimination.

Here, because Dr. Davidson believes that physical impairment waivers make no sense and because the District accepts Dr. Davidson's opinions without questioning, i.e., because the District accepts that Dr. Davidson is above the law, the District would **never** hire an applicant with a physical impairment waiver. Thus, it is the District's **policy to discriminate** against persons with physical handicaps who, despite the handicaps, have demonstrated their competency to perform the duties of a school bus driver by obtaining a waiver.

Given this policy, it is irrelevant that Williams did not obtain a waiver in this case. Our supreme court has stated that the law does not require the performance of futile acts, *Commonwealth v. Myers*, 485 Pa. 519, 403 A.2d 85 (1979). Unless Dr. Davidson and the District were willing to accept physical impairment waivers, it would have been futile for Williams to obtain such a waiver. Thus, to the extent the District refused to hire Williams because of Dr. Davidson's opinion on Williams' physical impairment, the refusal was nothing less than intentional discrimination.

B. Diabetes

The District's witnesses testified that the decision not to hire Williams as a school bus driver was based, in part, on his diabetes. However, Dr. Davidson stated in his report that: (1) Williams' personal physician reported that Williams' diabetes was controlled by diet; and (2) Williams only was "possibly" disqualified based on his diabetes because Williams' medical records were illegible. I submit that it was unreasonable for the District to refuse to hire Williams based on Dr. Davidson's

refusal to accept the statement of Williams' personal physician and a "possible" disqualification for diabetes based on Dr. Davidson's admitted error in failing to contact the doctor for help in deciphering the illegible medical records.

Indeed, the District knew that the law allows an applicant with diabetes requiring medication to obtain a waiver based on a **statement by the applicant's personal physician**. 67 Pa. Code §71.3(b)(4). If the statement of a personal physician is sufficient to obtain a waiver where an applicant's diabetes requires medication, then, certainly, the statement of a personal physician is sufficient to establish that an applicant's diabetes does not require medication.

II. Good Faith

The majority also concludes that the District relied on Dr. Davidson's report in good faith and, thus, the District's reliance was not a pretext for intentional discrimination. I disagree.

In *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11 (1st Cir. 2002), the court considered whether an employer's good-faith reliance on a medical report puts to rest any legitimate question about its intentions. The court stated that an employer cannot slavishly defer to a physician's opinion without first pausing to assess the objective reasonableness of the physician's conclusions, **and** an employer cannot evade its obligations under the law by contracting out personnel functions to third parties. *Id.*

Here, the District accepted Dr. Davidson reports at face value and never questioned them. Thus, the District did not assess the objective reasonableness of Dr.

Davidson's conclusions and, in effect, contracted out its hiring of disabled applicants to Dr. Davidson. Under *Gillen*, this is bad faith.

III. Majority's Analysis

A. Reasonable Reliance

The majority concludes that the District reasonably relied upon Dr. Davidson's report because Dr. Davidson had been evaluating school bus driver applicants for seventeen years. (Majority op. at 13.) However, this is not the proper test for determining reasonable reliance, and it does not make the District's reliance on Dr. Davidson's report *per se* reasonable.

These are seventeen years of reports by a doctor who: (1) makes mistakes while drafting his reports late at night when he is tired; (2) considers legal waivers for physical impairments to be nonsense; (3) will not accept a personal physician's statement regarding the status of a patient's diabetes, contrary to law; (4) would rather penalize an applicant by rendering a "possibly" disqualified opinion based on illegible medical records than learn the truth about the applicant's medical condition by making a phone call; and (5) has no qualifications or equipment to measure an applicant's grip strength but will disqualify applicants based on grip strength. Simply stated, the fact that the District has relied on Dr. Davidson's reports for seventeen years does not, by itself, establish that such reliance was reasonable.

B. Good Faith

The majority also concludes that the District's actions were in good faith because **Dr. Deck** would not certify that Williams is medically qualified to be a school bus driver. (Majority op. at 16.) However, the test for good faith is whether

the District objectively assessed the reasonableness of **Dr. Davidson's** report. Dr. Deck's actions are irrelevant **unless** the District was aware of them and considered them in assessing Dr. Davidson's report. As indicated, the District **never** questioned Dr. Davidson's reports but, rather, accepted them at face value.

Moreover, the Commission found that Dr. Deck would not certify Williams because Dr. Deck was not familiar with the legal qualifications for school bus drivers. (Findings of Fact, No. 20.) The majority concludes that the record does not contain substantial evidence to support such a finding. (Majority op. at 16.) However, Dr. Deck testified that he suggested to Williams "that [Williams] could inquire about qualifications for driving with [a] hand dysfunction elsewhere." (R.R. at 247a.) I submit that this testimony constitutes substantial evidence to support a finding that Dr. Deck was not familiar with the legal qualifications for driving with a physical impairment. Indeed, Dr. Deck would not have suggested that Williams make some inquiries elsewhere if Dr. Deck had been sufficiently familiar with the qualifications himself.

C. Appellate Review

Finally, the majority notes that substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. (Majority op. at 16 n.17.) The majority also notes that the record contains evidence that could be used to support a conclusion that the District did not reasonably rely on the report of Dr. Davidson. (Majority op. at 15 n.16.) **Thus, the majority acknowledges that the record contains substantial evidence to support the Commission's result.** Yet, the majority fills its opinion with evidence from the record to support a contrary result.

This court has stated that the existence of evidence to support contrary findings is irrelevant; the relevant inquiry for appellate review is whether substantial evidence exists to support the findings actually made. *Westmoreland County v. Workers' Compensation Appeal Board (Fuller)*, 942 A.2d 213 (Pa. Cmwlth. 2008). In other words, in reversing the Commission, the majority has exceeded this court's scope of review, re-weighing the evidence and making its own findings of fact.

For the foregoing reasons, I would affirm.

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ROCHELLE S. FRIEDMAN, Judge