

BEFORE THE IOWA CIVIL RIGHTS COMMISSION

RALPH W. PHILLIPS, JR., COMPLAINANT

VS.

HEYL TRUCK LINES, INC., RESPONDENT

CP #03-85-12793

THIS MATTER, a complaint filed by Ralph W. Phillips, Jr. (complainant) with the Iowa Civil Rights Commission (Commission) charging Heyl Truck Lines, Inc. (Respondent) with discrimination in employment on the basis of age came on for hearing in Des Moines, Iowa on the 16th day of June 1987 before Hearing officer Ione G. Shaddock. Complainant, appearing by telephone conference call, was represented by Teresa Baustian, Assistant Attorney General. Respondent was represented by A. J. Swanson, attorney from Sioux Falls, South Dakota. Attorney Swanson appeared by telephone conference call. Counsel for the parties agreed that Double D Produce is no longer a party to this action. Counsel also agreed to proceed in examination of Complainant by phone conference and that the testimony of Respondent's witnesses would be submitted by affidavit on or before July 6, 1987. The affidavit of MILTON R. SCHNEIDER was received on July 6, 1987, and will be marked Respondent's Exhibit A. The affidavit of ALAN L. HEYL was received on July 6, 1987, and will be marked Respondent's Exhibit B. On July 6, 1987. Attorney Swanson requested a 30-day continuance to submit an additional affidavit. On July 30, 1987, a letter from CHETTA I. McBRIDE of RAY GIBBINS INDUSTRIES, INC., was submitted as evidence and will be marked Respondent's Exhibit C. Respondent's Exhibit A, B, and C are admitted into evidence. Complainant was given 7 days from receipt of the affidavit to notify the hearing officer if there would be any cross examination based on the submitted affidavits.

On August 13, 1987, Complainant's Application for an Order Scheduling a Hearing was received. Although this Application was untimely, this Hearing Officer ruled that the Complainant could submit cross examination questions in writing to the witnesses who submitted testimony by affidavit. Cross examination questions were submitted to Witness Milton R. Schneider on August 21, 1987 and response was received on September 9, 1987. The questions and response shall be marked Joint Exhibit 1. With this evidence admitted, the Hearing is adjourned.

Any rulings on motions and objections reserved and not ruled on in this decision are denied.

The issue in this case is: DID HEYL TRUCK LINES, INC. FAIL TO HIRE RALPH W. PHILLIPS, Jr. BECAUSE OF HIS AGE?

Having reviewed the testimony, exhibits and record, the Hearing Officer makes the following findings of fact, conclusions of law, recommended decision and order.

FINDINGS OF FACT

1. The Complainant, Ralph W. Phillips, Jr., filed verified complaint CP #03-85-12793 on March 22, 1985, charging Heyl Truck Lines, Inc. with discrimination in employment on the basis of age.

2. The complaint was investigated, probable cause found, conciliation attempted but failed and Notice of Hearing issued on March 5, 1987.

3. On February 5, 1985, Complainant filled out an application for a driver position with Heyl Truck Lines. He listed prior employment as follows:

Illini Express, Sioux City, Iowa, 12/31/84 - 1/31/85; L. B. Truck Lines, Carson, California, 1/84 - 9/84; and Ray Gibbins, Port Sulphur, Louisiana, 4-81 - 12-83.

Complainant left the Illini Express job because he did not want to run the East coast; the L.B. Truck Lines job because they went out of business; and, the Ray Gibbin's job because he was laid off.

Complainant's date of birth was also given on the application as 8-13-85.

Complainant indicated that he had lived at the Sioux City address for two months and at a Phoenix, Arizona address for 4 years. (Complainant's Exhibit 1).

4. On a return trip for Illini, Complainant found out from a Heyl driver that Heyl was taking applications. He called Heyl and was told to come in and put in his application.

When Complainant turned in his application to a Milton R. Schneider, he was asked for a medical form. He did not have it with him so went home to get it. While he was home, Schneider told him on the phone that there was no need to bring the form in because he would not be hired. He was given no reason for not being hired. Complainant assumed the reason he was not hired was his age.

5. In his Affidavit, submitted as Respondent's Exhibit A, Milton Schneider, former safety director for Heyl Truck Lines, Inc., stated that he had made the decision not to hire Phillips based on his qualifications as a driver. In checking the references given by Phillips, Schneider was only able to verify 30 days of experience as to Phillips work record. This was the job at Illini, Complainant's immediate prior employer. Illini, the only former employer who could be contacted in regard to driving experience, did not give Phillips a favorable reference. There was also a concern with the "no passenger" rule because Phillips had his wife accompany him on trips.

6. In his Affidavit submitted as Respondent's Exhibit B, Alan L. Heyl, Secretary/Treasurer of Heyl Truck Lines, Inc., stated that he exercises general supervision over matters of employment and personnel. Although he was not directly involved with the refusal to hire Phillips, his Affidavit sets forth all of the background information upon which the refusal was made. (See Respondent's Exhibit B)

7. Respondent's Exhibit C establishes that Phillips worked for Ray Gibbins Industries, Inc. in Louisiana from September 4, 1981 through November 27, 1981 and again from August 17, 1984 through November 10, 1984. Phillips' application claims he worked from April 1981 to December 1983. His work for Gibbins was as a painter, not a driver.

8. Within this same approximate time period, Respondent hired 7 persons in an age range from 21 to 34. David Bryant had 8 months experience, Heyl supervised his qualification as a driver and he had a Form 214, apparently service-connected driving. Ray Phelan had 3 months experience, was a graduate of Western Iowa Tech (WIT) and was hired as a team driver. He also had an Iowa driver's license. Richard Gunther had no experience but had a WIT certificate. Rebecca Gum had no experience, but had a WIT certificate and started as a relief driver. Dallas Baker had a WIT certificate and was hired as a second driver. Kim Dorchner's experience as a driver occurred 9 years prior to his application, but he had a Form 214. On two of these applicants, Respondent was unable to verify prior employment. Troy Kelly had no prior driving experience, but held a WIT certificate and was lured as a relief driver. Heyl testified that employment with them was a continuation of the training program at Western Iowa Tech (WIT) and that they sometimes employed recent graduates from WIT, a local area community college. Heyl also testified that in hiring "solo" drivers, they must adhere to standards imposed by their insurance carrier which include 2 years experience with equipment of the type used by Heyl. This requirement can be waived for "second" or "relief" drivers. Phillips was considered for the 'solo' position.

9. Phillips application indicated he only held a Louisiana license; his work experience in Louisiana was given as 4/81 to 12/83, as a painter, not a driver. The work for Ray Gibbins in Louisiana was actually September 4, 1981 through November 10, 1981 and again from August 17, 1984 through November 10, 1984. His Louisiana license was issued September 18, 1984. (See Respondent's Exhibit C, Transcript p. 62). His Arizona license number was not given, but had expired anyway. His Ohio license number was not given. He had no Iowa license and his driving records in Arizona and Ohio could not be checked. Other than the 30 days with Illini Express, the only driving experience listed was with L. B. Truck Lines, who had gone out of business and could not be contacted. That experience was given as 9 months in 1984. he was actually in Louisiana August 17 - November 10, 1984. He, therefore, did not meet the qualification of 2 years driving experience for "solo" driver based on the work record he provided Respondent.

10. Phillips listed his current address as Sioux City, Iowa, and his prior address as Phoenix, Arizona. He did not have a driver's license for either of those two states.

11. Phillips had only worked for Illini Express for 30 days. He quit because he didn't know the northeast coast route. That is a route that is also used by the Heyl Truck Lines. He also felt Illini was not keeping him busy enough and was dissatisfied that Illini had their tractors set down at a low speed. He stated that he could not make time to make money.

12. Phillips had approximately 10 years driving experience off and on over a period of 31 years. The longest continuous time period was about 2 years during 1955-1957.

CONCLUSIONS OF LAW

1. The complaint, CP #03-85-12793, was timely filed, processed and the issues are properly before the Hearing Officer and ultimately before the Commission.

2. Heyl Truck Lines, Inc. is an "employer" and "person" as defined in Iowa Code §601A.2(2) and (5) (1985) and is therefore subject to Iowa Code §601A.6 and does not fall under any of the exceptions of §601A.6(5). The applicable statutory provision is as follows:

1. It shall be an unfair or discriminatory practice for any:

a. Person to refuse to hire ... for employment ... any applicant for employment ... because of the age of such applicant...

3. The United States Supreme Court set out the basic allocation of burden and order of presentation of proof in a case alleging discriminatory treatment in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1093, 67 L.Ed. 2d 207, 215 (1981), the Court summarized that burden and order from McDonnell as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving a prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Id. at 802, 5 FEP Cases, at 969. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination. Id. at 804, 5 FEP Cases at 907.

This basic allocation of burdens and order of presentation of proof was adopted by the Iowa Supreme Court in Linn Cooperative Oil Co.v. Quigley, 305 N.W.2d 729, 733 (Iowa 1981).

4. The complainant carries the initial burden of offering evidence adequate to create an inference that actions by a respondent were based on a discriminatory criterion which is illegal under the law, International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358, 97 S.Ct. 1843 (1977). In evaluating the evidence to determine whether the complainant has succeeded in establishing that inference, which is referred to as a "prima facie" case, the Commission and the Iowa Court have relied on McDonnell Douglas. The criteria established in McDonnell Douglas, however, were specific to a qualified applicant of a protected class who applied for a job and was rejected despite the qualification. Since then the Supreme Court has made it clear that the McDonnell Douglas criteria were to be neither "rigid, mechanized, or ritualistic." Furnco Const. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943 (1978). Courts have been flexible in adopting the criteria to other types of cases.

5. In cases of failure to hire, a prima facie case can be established by proving the following:

- a. Complainant was a member of a class protected under the statute;
- b. complainant applied for and was qualified for an available position;
- c. respondent failed to hire complainant despite the qualifications;
- d. after the rejection, the position remained open and the employer continued to seek applicants with similar qualifications.

In the case at issue, Phillips was approximately 49 years of age and therefore a member of a protected class. He applied for the position of driver. He was not hired. Under "b" above, "qualified for the job" is a necessary element of the prima facie case. In the case at issue, Complainant has failed to prove that he was qualified. Even, if the record would now indicate that he was qualified in February 1985 when he applied for the position, Heyl Truck Lines could not have known that he was qualified by the information which Complainant provided on his application form.

If any element of the prima facie case fails, then the Complainant will not prevail under the disparate treatment theory of discrimination set out in McDonnell-Douglas Corporation v. Green, 411 U.S. 792, 802 (1973).

It is noted that Heyl did, in fact, hire 7 employees, 4 of which were hired after Phillips was rejected. All four were younger, two had less verifiable experience:

Guenther, born in 1958, WIT certified.

Ginn, born in 1954, WIT certified.

All except one, Bryant, who had known experience, were hired in non-solo positions.

If Phillips was in fact qualified for a solo position with Heyl, the information provided on his application was inadequate for verification of that qualification. The fact that Heyl hired several younger applicants during the same time period does not in and of itself prove that they intentionally did not hire Phillips because of his age. It was not clear from the evidence that he was applying for a solo position. However, it can be so concluded since he had been driving solo for Illini. Those hired who were younger were placed in non-solo positions. Complainant's testimony on his driver's licenses, his residences, and his driving experience was confusing and less than credible. Although it is true that Heyl could have called Phillips in to question him on his background, there is no evidence that such would be ordinary procedure. There was no evidence that Heyl intentionally refused to hire Phillips because of his age. Heyl's reasons for not hiring Phillips were credible.

It is concluded that Complainant has failed to meet his burden of proof and this case should be dismissed.

RECOMMENDED DECISION AND ORDER

1. In the event that the complaint against Double D Produce has not officially been dismissed, it is hereby dismissed.
2. The Complainant, Ralph W. Phillips, Jr. has failed to establish a violation of the Iowa Civil Rights Act by showing illegal employment discrimination based on age.
3. This case, CP #03-85-12793, shall be dismissed.

Signed this 24th day of September, 1987.

IONE G. SHADDUCK,

Hearing Officer

FINAL DECISION AND ORDER

The Iowa Civil Rights Commission has received and reviewed the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, Recommended Decision and Order dated September 24, 1987.

On October 30, 1987, the Iowa Civil Rights Commission, at its regular meeting, adopted the Hearing Officer's proposed decision as its own Findings of Fact, Conclusions of Law, Decision and order.

Signed this 18th day of November 1987.

JOHN STOKES, Chairperson

Iowa Civil Rights Commission