

C/3522 7/8/82
4/8/85

THE STATE OF NEW HAMPSHIRE
COMMISSION FOR HUMAN RIGHTS

EPH 2260-1149-88

Michael E. Galuszka

v.

Department of Personnel

and

EPH 2220-1151-81

Raymond L. Landry

v.

Fish and Game Department

FINDINGS AND ORDER

PROCEDURAL BACKGROUND

1. Complainant Raymond L. Landry filed a timely charge of discrimination in employment on the basis of physical handicap against the New Hampshire Department of Personnel with the New Hampshire Commission for Human Rights (hereinafter Commission) on February 22, 1982. (Docket Number EPH 2220-1115-81)
2. Complainant Michael E. Galuszka filed a timely charge of discrimination in employment on the basis of physical handicap against the Fish and Game Department with the Commission on May 24, 1982. (Docket Number EPH 2260-1149-88)
3. Both complainants alleged that they applied for positions as Conservation Officer Trainees with the New Hampshire Department of Fish and Game and were refused permission to complete the testing process for this position because of their poor eyesight, and specifically because they were unable to pass a required vision test without the use of glasses or contact lenses.

4. The two cases were consolidated for the purpose of investigation, with the agreement of all parties.

5. As a result of the investigation, Commissioner Lionel Johnson found probable cause to credit complainants' allegation that they had been discriminated against on the basis of a physical handicap, poor eyesight.

6. All attempts at conciliation failed, and a four-day public hearing was held before Commissioners Robert J. Normandeau, Kenneth E. Fredette and Barry J. Palmer, on September 21, 1984 and October 25-27, 1984.

FINDINGS OF FACT

Based on its consideration of all the evidence presented at the hearing along with the parties' stipulations of facts, the Commission finds as follows:

1. The New Hampshire Department of Fish and Game and the New Hampshire Department of Personnel (hereinafter Respondents) are employers within the meaning of RSA 354-A.

2. The position of Conservation Officer Trainee is an entry-level position within the Department of Fish and Game, and Trainees may in due course become Conservation Officers and rise to higher rank.

3. Hiring requirements for the position of Conservation Officer Trainee include a visual acuity standard of 20/40 or better in each eye.

4. Respondents are jointly responsible for the hiring requirements of the Trainee position.

5. The eye test is given by employees of the Fish and Game Department on the same machine used to test vision for drivers licenses. Once the test is given and an applicant is hired as a Conservation Officer Trainee, the only follow-up is a yearly fire arms test which the officers may take with their glasses on.

6. Both Complainants applied for positions as Conservation Officer Trainees in late 1981. Both took and passed the required written test, Galuszka with a score of 90% and Landry with a score of 76%, and both also took and passed the required physical agility test. Both were called to take an eye test and oral examination, and were rejected, and refused permission to take the oral exam, after failing the eye test.

7. One hundred fifty-four candidates took the written

test for the Trainee position in late 1981 and six were hired. Five of those hired had written test scores below Galuszka's score. No candidate whose score was at or below Landry's was hired, the lowest score among those hired being 81.

8. Both Complainants are nearsighted (myopic) and have vision worse than 20/40 in each eye.

9. Complainant Galuszka's visual acuity is 20/200 in one eye and 20/400 in the other.

10. Complainant Landry's visual acuity is, according to one report (Ex. 6), 20/200 in one eye and 20/500 in the other, and according to another report (Ex. 13), 20/200 in each eye.

11. Both Complainants visual acuity can be corrected to 20/20 or better. Both wear glasses and Landry sometimes wears contact lenses. Galuszka has never worn contact lenses.

12. Except with respect to applying for the position of Conservation Officer Trainee, Complainants offered no evidence that their nearsightedness has in any way limited their life activities or occupations.

13. Both Complainants offered evidence that they are able to engage in a great variety of activities, including outdoor activities such as hunting and hiking. Complainant Galuszka has been able to hold a variety of jobs and join the Navy, and Complainant Landry has been able to work as a part-time police officer and a volunteer firefighter in addition to his regular job as a quality control inspector.

14. Conservation Officers and Officer Trainees are responsible for enforcement of laws and regulations concerning hunting and fishing, as well as for search and rescue operations. They have powers of arrest and carry firearms in the line of duty. Their work clearly impacts on the public safety.

15. Officers and Trainees work outdoors, often in conditions of hazardous weather and terrain, including pursuit through heavily wooded areas, extreme cold and sudden changes in temperature in going in and out of heated ice-fishing huts to check for violations, and water work including skin diving and work on boats.

16. Many conditions occur in the course of an officer's duties which could cause eye glasses or contact lenses to be lost, broken, or disabled. These conditions include flying branches, dust and dirt, physical attack, fogging caused by a sudden temperature change, and the need to dive into the water without warning in the course of pursuit or rescue.

17. Officers sometimes work alone and the conditions of their work are such that, if glasses or contact lenses fell off, or were broken or made useless by dirt or fog, there would be no time to call for help or pull out a spare pair of glasses.

18. An officer's sudden inability to see clearly during the apprehension of a violator or a search and rescue operation could endanger the officer's own safety and also the safety of other officers and of the public.

19. Three expert witness, all professionals in the field of diagnosis and correction of vision problems, testified at hearing.

20. One of Complainants' experts, Dr. William D. Foord, is an ophthalmologist with extensive experience treating the vision problems of people who hunt, fish and hike.

21. Dr. Foord testified that a person whose eyesight is worse than 20/40 but can be corrected to 20/20 is not visually handicapped.

22. Dr. Foord further testified that a person whose visual acuity is 20/80 or worse could not safely and effectively perform the duties of a Conservation Officer without some type of vision correction.

23. Dr. Foord further testified that there would be a risk in Complainant Galuszka working as a Conservation Officer with his present corrective device (eyeglasses), that hard contact lenses would not be appropriate for a Conservation Officer's work, and that there are periods in the life of every wearer of soft contact lenses when he is unable to wear the soft lenses.

24. Certain types of vision problems, such as presbyopia is more likely to develop with age.

25. Respondents' expert, Dr. Paul Michael Pender, an ophthalmologist, testified that he has performed an operation known as radial keratotomy, by means of which he is able surgically to correct the visual acuity of the seriously myopic. Dr. Pender testified that he has performed this operation on twenty-five eyes and fourteen patients.

26. Two Conservation Officers testified that their visual acuity is worse than 20/40.

27. Both officers whose vision is worse than 20/40 are Lieutenants with supervisory duties and more than thirty years experience as Conservation Officers. Both testified that their visual acuity fell below 20/40 at least fifteen years after they were originally hired as Conservation Officers.

RULINGS OF LAW

Complainants allege that Respondent has denied them employment due to a handicap, myopia, in violation of RSA 354-A:8, I and the Rules of the New Hampshire Commission for Human Rights, Part HUM 405. Respondents argue that Complainants' myopia does not constitute a handicap within the meaning of RSA 354-A:3(13) and Commission Rule HUM 405.06 and that the rule which forbids the firing of Conservation Officer Trainees whose uncorrected vision is below 20/40 is justified and allowable because of the special requirements of the position.

Clearly, Respondents' eyesight rule discriminates against those whose vision is below 20/40. The issues to be decided here are the following:

1) Is Complainants' myopia a handicap within the meaning of New Hampshire law and Commission rules and do Respondents therefore discriminate on the basis of handicap?

2) If Respondents do so discriminate, what is the appropriate standard for determining whether or not the eyesight rule is nevertheless justified and allowable?

3) Has Respondent met the appropriate standard?

The question of whether Complainants' myopia constitutes a covered handicap must be answered with reference to Commission Rule HUM 405.06, which defines the coverage of the statutory prohibition of discrimination on the basis of handicap. Rule 405.06 states:

Discrimination in employment on the basis of handicap shall include discrimination against any individual who:

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

The phrase "such an impairment" used in clauses (b) and (c) can only refer to the qualification on the word "impairment" used in clause (a), that is: "a[n]... impairment which substantially limits one or more major life activities." Therefore only those conditions which do substantially impair a major life activity are covered handicaps under RSA 354-A and Rule 405.06.

In this case, both Complainants are able to correct their eyesight to 20/20 with glasses. Both Complainants have attended school, held a variety of jobs, and engaged in extensive outdoor activity. Complainant Galuszka joined the Navy, and Complainant Landry has functioned as a part-time police officer. No evidence was offered that Complainants' myopia has interfered with any of their usual, day-to-day, life activities, or had ever in fact prevented them from doing anything other than obtain employment as Conservation Officer Trainees with the New Hampshire Fish and Game Department.

Two ophthalmologists and an optometrist testified at public hearing in this case. While no statistics were submitted, it is obvious from the testimony that myopia of the type that affects Complainants is not an unusual condition. It is in fact extremely common. All three eye specialists testified to extensive experience with this level of nearsightedness, and it was clear that complete correction to 20/20 vision through the use of glasses or contact lenses is routine and widely available. All three experts also testified that, with proper correction, nearsightedness at the level affecting Galuszka and Landry would not present Complainants from engaging in a very active life. Dr. Foord stated explicitly that he did not consider Galuszka's myopia to be a handicap, and both Complainants testified that they did not regard themselves as handicapped. (Although one of the specialists, Dr. Pender, also testified that myopia could be surgically corrected so that glasses or contact lenses would be unnecessary, the Commission does not rely on this testimony since the sample described was so small as to make it impossible to draw any conclusions about the safety and reliability of the procedure.)

It is clear from the above that myopia at the level affecting the Complainants does not "substantially limit" any major life activities and therefore cannot be considered a covered handicap under New Hampshire law. Myopia at this level is not a handicap or disability, but a variation within the normal population.

However, even if Complainants' level of nearsightedness were to be considered a covered handicap, it is our position that Respondents' visual acuity rule is justified and allowable under New Hampshire law.

The standard that we use in making this determination is the standard of bona fide occupational qualification (BFOQ). RSA 354-A:8(I) states that it is unlawful "for an employer, because of the ...handicap...of any individual, to refuse to hire or employ...such individual...unless based upon a bona fide occupational qualification." Section 3(13) of chapter 354-A defines the term "physical or mental handicap" to mean "handicap... unrelated to a person's ability to perform a

particular job available to him for hire or promotion..." Since section 3(13) was added to the statute at the same time that handicap was added to the list of characteristics on the basis of which an employer may not discriminate without a BFOQ, we find that the Legislature in doing so confirmed the BFOQ standard and did not replace it with a less strict "relatedness" standard, as Respondent contends. If the Legislature had chosen not to apply the BFOQ standard to handicap discrimination, it could easily have done so by adding handicap discrimination to Chapter 354-A, section 8(I) in a separate sentence, rather than as part of the list of forms of discrimination allowable only on the basis of a BFOQ. The Legislature chose to apply the same standard to handicap as to other types of discrimination, and we must assume that the statute means what it says: that an employer may not discriminate "unless on the basis of a bona fide occupational qualification."

Where there is no New Hampshire case law on the question at hand, it is appropriate to consider relevant federal cases. Scarborough v. Arnold 117 N.H. 803, 32 F.E.P. Cases 206 (Scarborough I). The standard for a BFOQ in employment discrimination was established by the federal courts in the cases of Weeks v. Southern Bell Telephone 408 F.2d 228, 1 F.E.P. Cases 656 (5th Cir., 1969) and Diaz v. Pan American World Airways 442 F.2d 385, 3 F.E.P. Cases 337 (5th Cir., 1971, cert. denied 404 U.S. 950, 3 F.E.P. Cases 1218), and approved by the U.S. Supreme Court in Dothard v. Rawlinson 433 U.S. 321, 25 F.E.P. Cases 11 (1977). The standard established in those cases for sex discrimination has since been applied to issues relevant to this case, especially in age discrimination cases involving public safety issues and the physical disabilities naturally attendant upon increasing age. The standard was most clearly restated in Orzel v. City of Wauwatosa Fire Department which held that: "in order to prevail on a BFOQ defense, an employer must show that the challenged age qualification is reasonably related to the 'essential operation' of its business, and must demonstrate either that there is a factual basis for believing that all or substantially all persons above the age limit would be unable to effectively perform the duties of the job, or that it is impossible or impracticable to determine job fitness on an individualized bases." 6979 F.2d 743, 30 F.E.P. Cases 1070 (7th Cir., 1983, emphasis in the original).

Orzel and numerous other federal court cases have held that an employer whose business directly affects public safety may establish general qualifying standards without a requirement for individual evaluation of physical abilities, where the job in question satisfies the BFOQ standard quoted above. 30 F.E.P. Cases at 1079; Usery v. Tamiami Trail Tours 531 F.2d 244, 12 F.E.P. Cases 1233, 1242 (5th Cir., 1976); Mahoney v. Trabucco 738 F.2d 35, 35 F.E.P. Cases 97, 101-102 (1st Cir., 1984); Johnson v. Mayor and City Council of Baltimore 731 F.2d 209, 34 F.E.P. Cases

854, 857 (4th Cir., 1984); EEOC v. Missouri State Highway Patrol 36 F.E.P. Cases 401, 408 (8th Cir., 1984). In jobs affecting public safety the level of proof required to establish a BFOQ may be "relatively low." Tuohy v. Ford Motor Company 675 F.2d 842, 28 F.E.P. Cases 1116, 1119 (6th Cir., 1982), Maki v. Commissioner of Education of State of New York, 32 F.E.P. Cases 630, 631 (N.D.N.Y., 1983).

In light of these cases, the Commission finds that a hiring requirement which satisfies the Orzel BFOQ standard is acceptable under New Hampshire law and that, when this standard is satisfied and particularly when the public safety may be in question, Commission Rule HUM 405.05 does not require individual evaluation for ability or hazard.¹

In Southeastern Community College v. Davis the U.S. Supreme Court held that federal statutes which forbid discrimination on the basis of handicap do not prevent the establishment of "necessary physical qualifications" for training in particular occupations. 442 U.S. 397, 99 S.Ct. 2361, 2363 (1979) Considerations of public safety must be taken into account in determining what physical qualifications are necessary; and the fact that a handicapped applicant may be able safely to perform some of the tasks required, as Complainants could safely perform many of the tasks of a Conservation Officer Trainee, does not invalidate the qualification. An employer is entitled to require that each applicant be able to perform all tasks required. As the Court held in Davis, a qualified handicapped person is "one who is able to meet all of a program's requirements in spite of his handicap." Ibid.

In the case of McCrea v. Cunningham the Nebraska Supreme Court found that a minimum eyesight requirement of 20/30 for entry-level firefighters was a reasonable and bona fide occupational requirement. This decision was based on the dangers of the firefighter's job, the need for firefighters to be able to function at full capacity in conditions under which visual correction appliances may easily be lost, broken, or otherwise disabled, and on the prevalence of minimum eyesight standards in other city fire departments. 30 F.E.P. Cases 415 (1979).

New Hampshire Conservation Officers are law enforcement officers with powers of arrest. They go armed in the line of

1. Rule 405.05 states, "The decision as to whether a handicapped applicant or employee is able to perform the functions of a job and/or whether he/she will pose a hazard on the job shall be made on an individual basis and not on the basis of general assumptions or stereotypes about the particular handicap involved."

duty. They are required to pursue law breakers and effect search and rescue operations outdoors in the most adverse conditions of both weather and terrain. An officer's inability to see clearly under these conditions would endanger not only his own safety, but that of the public. Safety is the essence of a Conservation Officer's work, and the requirement that an officer be able to see clearly at all times is unquestionably related to this essential function.

Officers work under conditions in which glasses or contact lenses may be easily knocked off by a stray branch in the woods or by a violent attack, or rendered useless by dust or dirt or by fogging caused by coming out of the cold into a heated ice-fishing hut. They may be required to work alone and may not have time to call for help or pull out a spare pair of glasses. They may also be required to work in boats and in the course of rescue or pursuit to dive quickly and without warning into the water without taking time to switch from glasses to goggles or pull goggles on over contact lenses. The testimony of three vision professionals and several conservation officers at hearing established that an officer with uncorrected vision worse than 20/40 would be unable to perform safely in many required tasks if that officer's correction appliance were to be lost, broken or disabled. This testimony clearly established that for conservation officer trainees, substantially all applicants whose vision is worse than 20/40 would be unable to perform safely and effectively and that it is impossible and impracticable to determine fitness on an individualized basis.

This conclusion is not undermined by the fact that Respondents do not periodically re-test the eyesight of active conservation officers nor by the fact that there are conservation officers who wear glasses, and a small number of officers whose vision is worse than 20/40. The courts have established that a BFOQ may exist for an entry-level hiring standard. Usery, 12 F.E.P. Cases 1233, Missouri State Highway Patrol, 36 F.E.P. Cases at 408.

In this case, vision experts testified that certain types of vision problems are more likely to develop with age. Those applying for the entry-level position of correction officer trainee are likely to be young people looking forward to careers as conservation officers. Since vision may effectively deteriorate with age, the existence of Respondents' minimum vision requirement for entry-level hiring provides an effective assurance that officers will have near-perfect vision at the start of their careers and that if their vision does begin to deteriorate, it will occur only after they have accumulated sufficient experience to allow them to compensate for a small decrease in vision, and also at a point in their lives when they will have attained sufficient seniority so that a good deal of their responsibility may be supervisory as opposed to constantly

dangerous patrol work. At this stage in their careers the value of their knowledge and experience will offset the difficulties caused by decreased vision.

For the reasons set forth above, the Commission finds and rules that Complainants' myopia does not constitute a handicap within the meaning of New Hampshire law and regulation, and that if said condition were to be considered a covered handicap, Respondents' minimum visual acuity requirement for hiring is acceptable under RSA 354-A as a bona fide occupation qualification.

Both complaints are hereby dismissed.

March 18, 1985
Date

Robert J. Normandeau
Robert J. Normandeau

Mar 25, 1985
Date

Kenneth E. Fredette
Kenneth E. Fredette

Mar. 25, 1985
Date

Barry J. Palmer
Barry J. Palmer