

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PRISCILLA J. BURK,  
Complainant

v.

PENNSYLVANIA STATE  
UNIVERSITY,  
Respondent

Docket No. E-14372

O P I N I O N

I. INTRODUCTION

This case involves a complaint of handicap or disability discrimination in violation of §5(a) of the Pennsylvania Human Relations Act ("the Act"), 43 P.S. §955(a). Complainant missed four months of work as a Food Service Worker in the Pollock Dining Hall of Respondent because she was suffering from a disabling back pain.

On February 13, 1978 Respondent refused to reinstate Complainant to her position (N.T. 385-386, 409-411). By letter dated April 28, 1978, Respondent terminated Complainant's employment effective April 21, 1978 ( Complainant's Exhibit 14)

On May 23, 1978, Complainant filed a complaint with the Commission. After finding probable cause and attempting but failing to conciliate the matter, the Commission held a public hearing on December 4 and 5, 1980 in Bellefonte, Pennsylvania. Commissioner Doris M. Leader presided alone, the requirement of

three Commissioners having been waived by Respondent. The case on behalf of the Complainant was presented by Michael Hardiman, Assistant General Counsel in the Harrisburg Regional Office of the Commission. R. Mark Faulkner represented the Respondent. Ellen M. Doyle, Assistant General Counsel in the Pittsburgh Regional Office of the Commission, served as Legal Advisor to the Hearing Commissioner.

## II. TIMELINESS OF THE COMPLAINT

Section 9 of the Act requires that complaints of discrimination must be filed with the Commission "within ninety days after the alleged act of discrimination" (43 P.S. §959). The notarization date on the complaint indicates that it was received by the Commission on May 23, 1978.

Respondent claims that to the extent that any discrimination took place, it occurred on February 13, 1978, the date on which Respondent refused to allow Complainant to return to work. However, it was not until April 28, 1978 that Complainant was made aware that Respondent's refusal to reinstate her was permanent. (Complainant's Exhibit 14) Between February 13, 1978 and April 28, 1978 Complainant could reasonably have believed that the matter was still under consideration. During that period Complainant filed a union grievance (Respondent's Exhibit 11), and obtained another medical certificate (Complainant's Exhibit 6) while Respondent continued her on an unpaid leave of absence (Complainant's Exhibits 12 and 13).

Because in a handicap or disability case there is often a period of time given over to consideration between the experts as to if and when a person is able to perform the essential functions of the job, we find that the discriminatory act

occurs when the handicapped or disabled person is placed on reasonable notice that the employment decision with respect to the handicap or disability is permanent. In the instant case that occurred on April 28, 1978 or within ninety days of the filing of the complaint.

We further find that Complainant was not required to submit a request for a continuation of her medical leave of absence while she was challenging Respondent's refusal to reinstate her. Complainant's "refusal to answer the question, under the circumstances of this case, was justifiable. Indeed, to answer such a question was not an act the employer had a right to expect."

Marositz v. Comm., Unemployment Comp. Bd., 415 A.2d 1006, 1007 (Pa. Cmwlth 1980)

### III. LIABILITY

#### A. Complainant Is A Handicapped Or Disabled Person

Section 5 of the Act states:

"It shall be an unlawful discriminatory practice . . . [f]or any employer because of the . . . non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual . . ." 43 P.S. §955

The first issue which must be resolved is whether Complainant is a handicapped or disabled person for purposes of the Act.

Although this Complaint was filed prior to the issuance of the Commission's regulations on Discrimination On The Basis of Handicap or Disability, 16 Pa. Code §44.1 et seq., Vol. 8 Penna. Bulletin, No. 40, Saturday, October 7, 1978, 2715-2721, those regulations are at least instructive as to the definition of a "handicapped or disabled person."

As the Commission recently found:

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Robert Culver v. Interstate Motor Freight System, Docket No.E-14582  
(unpublished Opinion, dated January 6, 1981, p.3) Like Culver, Complainant Burk had inter alia degenerative arthritis. Unlike Culver, Burk was disabled by back pain for some four months and thus was restricted from performing a number of major life activi-ties including bending, stooping, and lifting. It was because Respondent believed that Complainant might never be able to perform these functions again without return of her disabling back pain that it terminated her employment.

We find that Complainant was a handicapped or disabled person for purposes of the Act.

B. Complainant's Handicap Or Disability Is Non-Job Related.

The next and most critical issue to resolve is whether or not Burk's handicap is job related. The burden of proof with respect to this issue rests with Respondent.

To be job related a handicap or disability must "sub-stantially interfere with the ability to perform the essential functions" of the job.

Respondent's physician, Dr. Hargleroad, predicted that

Complainant could suffer a recurrence of pain if she returned to her former position. His opinion was to a great extent based on Dr. Wharen's original diagnosis from the x-rays of degenerative arthritis. When Hargleroad recommended that Complainant not be allowed to return to work, he did so without discussing the origin of her back pain with her physician and without the benefit of a physical examination.

The Commission accepts the opinion of Complainant's treating physician, Dr. Wharen, that Complainant was physically able to return to work as of February 10, 1978. Dr. Wharen has substantial knowledge and expertise in the areas of physical medicine and rehabilitation. Although he was not familiar with all of the tasks of a Food Service Worker, he was generally aware of the type of work performed by Complainant. His opinion that she could physically perform the work required was based on (1) his diagnosis that the Complainant's pain was due to muscle spasms of recent origin and (2) the success of his treatment of her back pain.

We find that Complainant was physically able to perform the essential functions of a Food Service Worker as of February 10, 1978 and that her termination as of April 21, 1978, resulting from Respondent's refusal to reemploy her was discrimination in violation of §5(a) of the Act, 43 P.S. §955(a).

C. Complainant Is Entitled to An Appropriate Remedy.

The authority of the Commission to take appropriate affirmative action based upon a finding that the Respondent engaged in an unlawful discriminatory practice is clear, Section 9 of the Act - 43 P.S. §959. Such action may include but is

not limited to: reinstatement, back pay and such action as in the judgment of the Commission will effectuate the purposes of the Act. These actions are in addition to requiring that Respondent cease and desist from engaging in the unlawful discriminatory practice.

In the instant case the Commission deems it appropriate that Complainant be reinstated. However, for the reasons discussed below, Complainant shall be entitled to back pay, seniority, and other benefits only for the period of April 21, 1978 to December 15, 1978, and if Respondent does not promptly comply, from the date of this Order to the date of her reinstatement.

D. Complainant Failed In Her Duty To Mitigate.

Although there has been no court decision on the question, we find that a complainant is required to mitigate damages for purposes of back pay awards under §9 of the Act, 43 P.S. §959. The amount of a Respondent's liability will be reduced by the amount which the Complainant actually earned or could have earned with reasonable diligence.

However, the burden of proving a failure to mitigate is on the Respondent and includes showing that there were suitable positions available and for which the Complainant was qualified. See Kaplan v. Intern Alliance of Theatrical etc., 525 F. 2d 1354 (9th Cir. 1975); Marks v. Prattco, Inc., \_\_\_\_\_ F. 2d \_\_\_\_\_, 24 EPD 18,592 (5th Cir. 1981)

In the instant case Respondent introduced evidence that there were some 300 job openings in the Food Service field from October 1, 1978 to November 30, 1980. The Commission does not need to reach today the question of whether it is reasonable to assume that a 60 year old woman with a prior back disability would obtain a job in a low-skill category, since in the instant case Complainant refused to visit an independent physician for a third opinion concerning her ability to regain her position with Respondent pending resolution of her PHRC claim.

For that reason we hold that Respondent is liable for back pay, seniority and related benefits only for that period up to the date upon which Complainant could have returned to her former employment had she been approved for such by the independent physician. Complainant refused to be examined by the doctor chosen by her union and Respondent.

Respondent's liability for running back pay will recommence as of the date of this Order if it fails to promptly comply, so that it may not profit from any delay in reinstating Complainant.

Because of our decision to terminate Respondent's running back pay liability as of the date of the offer to reinstate with an independent physician's approval, we see no prejudice to Respondent arising out of any possible laches on the part of the Commission in processing the complaint.

The general rule, which we now adopt is that the passage of time alone is not sufficient for a showing of laches. Respondent must show that it has been prejudiced by the delay, Melnick v. Melnick, 361 Pa. 378, 64 A. 2d 773 (1949); Manson v. First National Bank in Indiana, 366 Pa. 211 (1951); Leedom v. Thomas, 473 Pa. 193 (1977)



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PENNSYLVANIA STATE :  
UNIVERSITY, :  
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FINDINGS OF FACT

1. The Complainant herein is Priscilla J. Burk, an adult female, who resides at 206 South Main Street, Pleasant Gap, Pennsylvania 15823. (Stipulations)

2. The Respondent herein is the Pennsylvania State University, an employer within the terms of §4 and §5 of the Pennsylvania Human Relations Act, 43 P.S. 954, 955 (Supp. 1980 to 1981) located in University Park, Pennsylvania 16802. (Stipulations)

3. The Complainant was hired by Respondent as a counter attendant on September 14, 1962 and was transferred to a full-time employee in the same position on February 1, 1963. (Stipulations)

4. The Complainant was on a scheduled vacation from July 22, 1977 through July 30, 1977. She returned to work on July 31 and also worked August 1, 1977. (Stipulations)

5. On August 2, 1977 the Complainant reported off from work noting a sore back sustained during her vacation. (Stipulations)

6. The Complainant returned to work on August 5, 1977, (August 3 and 4 were scheduled days off) and continued to work through September 18, 1977. (Stipulations)

7. The Complainant presented Respondent with a note from her chiropractor, Dr. Caldwell, dated September 20, 1977, indicating that she would require two weeks off due to her back problem. (Stipulations)

8. On October 3, 1977, the Respondent informed Complainant that she would be required to provide a doctor's certificate prior to her return to work. (Stipulations)

9. The Complainant presented Respondent with a note from her physician, Dr. Wharen, dated October 5, 1977, indicating that she would be unable to return to work for an indefinite period of time. The note indicated that she was suffering from back problems. (Stipulations)

10. An x-ray report obtained by Dr. Wharen on October 6, 1977, revealed the Complainant had a mild anterior compression fracture of the tenth thoracic vertebra associated with remote trauma and early degenerative arthritis of the lower lumbar spine. (Complainant's Ex. 16, N.T. 118-127)

11. The Complainant was placed on unpaid medical leave of absence beginning on October 8, 1977, because she had exhausted her vacation and sick leave time. (Stipulations)

12. On November 28, 1977 and January 10, 1978, Dr. Wharen filed continuing Claim Reports to Bankers Life and Casualty Company describing Complainant's condition as "Compression FX-7-10 Degenerative arthritis lumbosacral spine." (Respondent's Exhibits 2 and 3; N.T. 158-160)

13. Although he did not specifically note it in his insurance claims reports, it was Dr. Wharen's opinion that the compression fracture and degenerative arthritis were not related. (N.T. 121, 126-127, 151-161)

14. Dr. Wharen treated Complainant with the use of heat, an exercise routine and use of a back brace. (N.T. 128-129)

15. In the course of his treatment of her Dr. Wharen became convinced that the source of Complainant's back pain was not the degenerative arthritis which was remote in origin, but muscle spasms or accentuation of the fracture due to the more recent trauma experienced by Complainant. (N.T. 123-127)

16. Complainant's condition improved during the course of Dr. Wharen's treatment of her. (N.T. 131-135)

17. On February 9, 1978, Dr. Wharen examined Complainant and determined that she was able to return to work. He based his decision on a general knowledge of the duties of counter employees. He signed a release for her to return to her regular duties with the restriction that she wear a back brace. (Complainant's Exhibit S; N.T. 133-135)

18. On February 10, 1978 the Complainant informed the Respondent that she was physically able to return to work and would provide a release from her physician (Stipulations)

19. On February 13, 1978, Complainant reported to work at the Pollock dining hall to resume her employment as a food service worker. She was advised at that time that she could not return to work without the approval of the University Health Center. (N.T. 31-35, 246-250)

20. Respondent had a policy of accepting a treating physician's certificate of disability in all cases where employees are not permitted to work; however, Respondent did not always accept the treating physician's certificate when employees attempted to return to work. (N.T. 332-333)

21. On February 13, 1978, Dr. Hargleroad of the University Health Center refused to allow Complainant to return to work, because in his opinion she might aggravate her back condition or suffer a recurrence of her back pain at some point in the future. (N.T. 385-386, 409-411)

22. Dr. Hargleroad made his decision without examining Complainant, reviewing her x-rays or viewing her job site. He did have a brief discussion with Dr. Wharen, but did not seek Dr. Wharen's opinion on the origin of Complainant's back pain. (N.T. 395-399)

23. On February 13, 1978, Complainant filed a grievance with Teamsters Union Local 8, the collective bargaining agent for the Respondent's food service workers, protesting Respondent's refusal to allow her to return to her job when her doctor had released her to do so. (Respondent's Exhibit 11; N.T. 256, 257, 362)

24. On April 10, 1978, Respondent manager of personnel and training, John Dombroski, wrote to Complainant advising her that her leave of absence from the University had expired and that she would have to request a medical leave of absence in order to avoid termination. (Complainant's Exhibit 12) A leave of absence would only entitle her to certain limited benefits but would, nevertheless result in her termination.

25. On April 13, 1978, Complainant obtained from Dr. Wharen a second certification of her ability to return to work, this time without restrictions. (Complainant's Exhibit 6)

26. By letter dated April 14, 1978, Mr. Dombroski advised Complainant that she would have to choose between seeking a medical leave of absence and termination by Respondent. (Complainant's Exhibit 14)

27. Complainant took no action to extend her medical leave of absence. (N.T. 35-37)

28. By letter dated April 28, 1978, Mr. Dombroski advised Complainant that she was terminated by Respondent retroactive to April 21, 1978. (Complainant's Exhibit 14)

29. Complainant's termination as of April 21, 1978 was involuntary and resulted from Respondent's refusal to reinstate her. (N.T. 331-332)

30. On May 23, 1978, Complainant filed a complaint with the Pennsylvania Human Relations Commission alleging that Respondent had refused to allow her to return to work on account of her non job-related handicap or disability. (Stipulations) The Complaint was filed within 90 days of Complainant's termination by Respondent.

31. The complaint was served upon Respondent on August 24, 1978. (Stipulations)

32. In correspondence dated October 18, 1979, the Commission notified the Respondent that probable cause existed to credit the allegations contained in the complaint. (Stipulations)

33. Subsequent to the determination of probable cause the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion but were unable to do so. (Stipulations)

34. Food service workers work 40 hours per week on 5 of 7 days. Work assignments are made on a daily basis to each of five groups of employees. Work assignments are rotated among the five groups on a varying basis. (N.T. 269-724)

35. The work assignments of food service workers fall within two broad areas: food preparation and cleaning. Both kinds of work require the worker to lift and bend. (N.T. 273-311)

36. Complainant had been performing all of the functions of a food service worker up to the time of her accident in 1977, even though subsequent medical examination indicated that she had had degenerative arthritis for some time prior to that. (N.T. 13, 125-127, 133)

37. Complainant had back pain resulting from her accident in 1977. She responded favorably to treatment. This would not have occurred had the pain been caused by the degenerative arthritis. (N.T. 133-134)

38. On February 13, 1978, Complainant was physically able to perform the functions of a food service worker.

39. Had Complainant returned to work February 13, 1978, she would have posed no threat of harm to herself or other employees. (N.T. 134-135)

40. Respondent paid unemployment compensation in total amount of \$3,368.00 to the Complainant for the period April 23, 1978 through May 12, 1979. (N.T. 325) During that time Complainant did not seek other employment. (N.T. 92)

41. In December of 1978, Complainant's union, Teamsters Local Union No. 8, and Respondent agreed to have Complainant examined by an independent physician for the purpose of determining whether she was physically able to perform the functions of her employment. If, in the opinion of the physician, Complainant was able to perform her job Respondent was prepared to accept her back as a regular employee. Appointments were made for Complainant to see an independent physician, Dr. Reed Babcock, on any one of six dates: December 5, 7, 8, 13, 14 or 15 of 1978. Complainant did not appear for an examination by Dr. Babcock on any of those dates. (N.T. 215-216, 363)

42. Respondent and the union's agreement with respect to the independent physician was without prejudice and did not affect Complainant's right to continue her complaint with the Commission. Although the proposal did not include back pay, it did not preclude recovery of back pay through the Commission complaint. (N.T. 217, 364)

43. Had Complainant returned to work on February 13, 1978, and continued in the employ of Respondent she would have continued to work at pay grade 11 at an hourly rate of \$3.96 per hour for the period February 13, 1978 through August 9, 1978. (Stipulations)

44. Had the Complainant continued in the employ of the Respondent during the period August 10, 1978 through December 31, 1978, she would have received \$4.20 per hour gross pay. (Stipulations)

45. Had the Complainant returned to work on February 13, 1978, and continued in the employ of Respondent during the period February 13, 1978 through July 1978, she would have been eligible to accumulate 1 and 1-1/2 days of vacation leave per month, or a total of 9 vacation days during this period. (Stipulations)

46. Had the Complainant continued in the employ of the Respondent during the period August 10, 1978 to the present, she would have been eligible to accumulate 1-3/4 days of vacation leave per month of employment. (Stipulations)

47. Had Complainant been permitted to return to work on February 13, 1978 and continued in the employ of the Respondent to the present she would have been eligible to accumulate 1 day sick leave per month for each month of active employment. (Stipulations)

48. Had Complainant continued in the employ of the Respondent during the period April 21, 1978 to the present, she would have been eligible to continue receiving the retirement and life insurance benefits from the Respondent, under the plan in which she was enrolled prior to her termination on April 21, 1978. (Stipulations)



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CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant and the Respondent and the subject matter of the Complaint under the Pennsylvania Human Relations Act, pursuant to §9 of the Pennsylvania Human Relations ("Act"), 43 P.S. §959.

2. The Complaint was filed in a timely fashion according to the requirements of §9 of the Act, 43 P.S. §959.

3. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter, pursuant to §9 of the Act, 43 P.S. §959.

4. Respondent is a an "employer" within the meaning of §4(b) and 5(a) of the Act, 43, P.S. §954(b) and §955(a).

5. Complainant is an "individual" within the meaning of §5(a) of the Act, 43 P.S. §955(a).

6. Complainant's back problems including degenerative arthritis, a compression fracture of the thoracic vertebra of the spine and muscle spasms were handicaps or disabilities within the meaning of §§4 and 5 of the Act, 43 P.S. §954, 955.

7. A handicap or disability is job-related when it substantially interferes with the individual's ability to perform the essential functions of the position sought, 43 P.S. §954(p).

8. At the time that she sought to return to work, Complainant's handicap or disability did not substantially ~~interfere with her ability to perform the duties of a Food Service Worker.~~

9. Respondent's refusal to allow Complainant to return to work on account of her non job-related handicap or disability constituted an unlawful discriminatory practice in violation of §5(a) of the Act, 43 P.S. §955(a)

10. Respondent had no right to expect Complainant to affirmatively request an extension of her medical leave of absence while she was actively seeking reinstatement to her position as a Food Service Worker.

11. Complainant is entitled to an award of back pay with interest calculated at a rate of six percent per year together with reinstatement and accrued seniority and other applicable benefits.

12. Complainant was under a continuing obligation to mitigate Respondent's back pay liability which she did not meet when she failed to seek other employment and failed to appear for an appointment with Dr. Babcock.

RECOMMENDATION OF HEARING COMMISSIONER

AND NOW, this 27th day of July, 1981, in consideration of the entire record in this matter, including the Complaint, Stipulations of Fact, Exhibits, Record of the Hearing, and Briefs filed on behalf of parties, the Hearing Commissioner hereby adopts the attached as her proposed Findings of Fact, Conclusions of Law, Opinion and Final Order and hereby recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS  
COMMISSION

BY:

Doris M. Leader  
Doris M. Leader  
Hearing Commissioner

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O R D E R

AND NOW, this 12th day of August, 1981, upon consideration of the Findings of Fact, Conclusions of Law and Opinion of the Pennsylvania Human Relations Commission ("PHRC"), it is hereby ORDERED:

1. That Respondent shall cease and desist from terminating from employment handicapped or disabled individuals unless the handicap or disability substantially interferes with the ability of the individual to perform the essential functions of the particular position involved.
2. That within thirty days of this Order the Respondent shall pay to the Complainant a sum of money representing that amount which Complainant would have earned as wages for the period of April 21, 1978 to December 15, 1978 together with six percent interest compounded annually. The check shall be made out payable to Priscilla Burk and delivered to Michael Hardiman, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, Pennsylvania 17102. Respondent shall provide the Commission with the calculations used to determine

the total payment made.

3. That the Respondent shall make a written offer of immediate reinstatement to the Complainant for the position she held immediately prior to her termination. Reinstatement shall include retroactive seniority for the period of February 21, 1978 to December 15, 1978. Written verification of the offer shall be provided to the Commission and the Complainant within thirty days of the date of this Order.

4. That the Respondent shall provide the Complainant with all benefits which would have accrued to her during the period February 21, 1978 to December 15, 1978 including but not limited to accrued vacation entitlement, accrued sick leave, medical insurance benefits, life insurance benefits and accrued pension benefits. Satisfactory proof of compliance, including a written description of all benefits provided, should be furnished to the Commission within thirty days of the date of this Order.

5. That the Respondent shall reimburse the Complainant for all medical expenses incurred between February 21, 1978 and December 15, 1978 which were otherwise covered by the medical insurance benefit program which the Complainant was enrolled in while an employee. Respondent shall furnish the Commission with written proof of its manner of compliance within thirty days of the date of this Order.

6. That failure to comply with the terms of this Order within thirty days shall result in an assessment of back pay, seniority and related benefits against Respondent from the date of the Order until date of compliance.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: \_\_\_\_\_

*Joseph X. Yaffe*  
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Chairperson

ATTEST:

*Elizabeth M. Scott*  
Elizabeth M. Scott  
Secretary

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occurs when the handicapped or disabled person is placed on reasonable notice that the employment decision with respect to the handicap or disability is permanent. In the instant case that occurred on April 28, 1978 or within ninety days of the filing of the complaint.

We further find that Complainant was not required to submit a request for a continuation of her medical leave of absence while she was challenging Respondent's refusal to reinstate her. Complainant's "refusal to answer the question, under the circumstances of this case, was justifiable. Indeed, to answer such a question was not an act the employer had a right to expect."

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To be job related a handicap or disability must "sub-stantially interfere with the ability to perform the essential functions" of the job.

Respondent's physician, Dr. Hargleroad, predicted that

Complainant could suffer a recurrence of pain if she returned to her former position. His opinion was to a great extent based on Dr. Wharen's original diagnosis from the x-rays of degenerative arthritis. When Hargleroad recommended that Complainant not be allowed to return to work, he did so without discussing the origin of her back pain with her physician and without the benefit of a physical examination.

The Commission accepts the opinion of Complainant's treating physician, Dr. Wharen, that Complainant was physically able to return to work as of February 10, 1978. Dr. Wharen has substantial knowledge and expertise in the areas of physical medicine and rehabilitation. Although he was not familiar with all of the tasks of a Food Service Worker, he was generally aware of the type of work performed by Complainant. His opinion that she could physically perform the work required was based on (1) his diagnosis that the Complainant's pain was due to muscle spasms of recent origin and (2) the success of his treatment of her back pain.

We find that Complainant was physically able to perform the essential functions of a Food Service Worker as of February 10, 1978 and that her termination as of April 21, 1978, resulting from Respondent's refusal to reemploy her was discrimination in violation of §5(a) of the Act, 43 P.S. §955(a).

C. Complainant Is Entitled to An Appropriate Remedy.

The authority of the Commission to take appropriate affirmative action based upon a finding that the Respondent engaged in an unlawful discriminatory practice is clear, Section 9 of the Act - 43 P.S. §959. Such action may include but is

not limited to: reinstatement, back pay and such action as in the judgment of the Commission will effectuate the purposes of the Act. These actions are in addition to requiring that Respondent cease and desist from engaging in the unlawful discriminatory practice.

In the instant case the Commission deems it appropriate that Complainant be reinstated. However, for the reasons discussed below, Complainant shall be entitled to back pay, seniority, and other benefits only for the period of April 21, 1978 to December 15, 1978, and if Respondent does not promptly comply, from the date of this Order to the date of her reinstatement.

D. Complainant Failed In Her Duty To Mitigate.

Although there has been no court decision on the question, we find that a complainant is required to mitigate damages for purposes of back pay awards under §9 of the Act, 43 P.S. §959. The amount of a Respondent's liability will be reduced by the amount which the Complainant actually earned or could have earned with reasonable diligence.

However, the burden of proving a failure to mitigate is on the Respondent and includes showing that there were suitable positions available and for which the Complainant was qualified. See Kaplan v. Intern Alliance of Theatrical etc., 525 F. 2d 1354 (9th Cir. 1975); Marks v. Prattco, Inc., \_\_\_\_ F. 2d \_\_\_\_, 24 EPD 18,592 (5th Cir. 1981)

In the instant case Respondent introduced evidence that there were some 300 job openings in the Food Service field from October 1, 1978 to November 30, 1980. The Commission does not need to reach today the question of whether it is reasonable to assume that a 60 year old woman with a prior back disability would obtain a job in a low-skill category, since in the instant case Complainant refused to visit an independent physician for a third opinion concerning her ability to regain her position with Respondent pending resolution of her PHRC claim.

For that reason we hold that Respondent is liable for back pay, seniority and related benefits only for that period up to the date upon which Complainant could have returned to her former employment had she been approved for such by the independent physician. Complainant refused to be examined by the doctor chosen by her union and Respondent.

Respondent's liability for running back pay will recommence as of the date of this Order if it fails to promptly comply, so that it may not profit from any delay in reinstating Complainant.

Because of our decision to terminate Respondent's running back pay liability as of the date of the offer to reinstate with an independent physician's approval, we see no prejudice to Respondent arising out of any possible laches on the part of the Commission in processing the complaint.

The general rule, which we now adopt is that the passage of time alone is not sufficient for a showing of laches. Respondent must show that it has been prejudiced by the delay, Melnick v. Melnick, 361 Pa. 378, 64 A. 2d 773 (1949); Manson v. First National Bank in Indiana, 366 Pa. 211 (1951); Leedom v. Thomas, 473 Pa. 193 (1977)

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PRISCILLA J. BURK, . :  
Complainant :  
v. : Docket No. E-14372  
PENNSYLVANIA STATE :  
UNIVERSITY, :  
Respondent. :

FINDINGS OF FACT

1. The Complainant herein is Priscilla J. Burk, an adult female, who resides at 206 South Main Street, Pleasant Gap, Pennsylvania 15823. (Stipulations)

2. The Respondent herein is the Pennsylvania State University, an employer within the terms of §4 and §5 of the Pennsylvania Human Relations Act, 43 P.S. 954, 955 (Supp. 1980 to 1981) located in University Park, Pennsylvania 16802. (Stipulations)

3. The Complainant was hired by Respondent as a counter attendant on September 14, 1962 and was transferred to a full-time employee in the same position on February 1, 1963. (Stipulations)

4. The Complainant was on a scheduled vacation from July 22, 1977 through July 30, 1977. She returned to work on July 31 and also worked August 1, 1977. (Stipulations)

5. On August 2, 1977 the Complainant reported off from work noting a sore back sustained during her vacation. (Stipulations)

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7. The Complainant presented Respondent with a note from her chiropractor, Dr. Caldwell, dated September 20, 1977, indicating that she would require two weeks off due to her back problem. (Stipulations)

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9. The Complainant presented Respondent with a note from her physician, Dr. Wharen, dated October 5, 1977, indicating that she would be unable to return to work for an indefinite period of time. The note indicated that she was suffering from back problems. (Stipulations)

10. An x-ray report obtained by Dr. Wharen on October 6, 1977, revealed the Complainant had a mild anterior compression fracture of the tenth thoracic vertebra associated with remote trauma and early degenerative arthritis of the lower lumbar spine. (Complainant's Ex. 16, N.T. 118-127)

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12. On November 28, 1977 and January 10, 1978, Dr. Wharen filed continuing Claim Reports to Bankers Life and Casualty Company describing Complainant's condition as "Compression FX-7-10 Degenerative arthritis lumbosacral spine." (Respondent's Exhibits 2 and 3; N.T. 158-160)

13. Although he did not specifically note it in his insurance claims reports, it was Dr. Wharen's opinion that the compression fracture and degenerative arthritis were not related. (N.T. 121, 126-127, 151-161)

14. Dr. Wharen treated Complainant with the use of heat, an exercise routine and use of a back brace. (N.T. 128-129)

15. In the course of his treatment of her Dr. Wharen became convinced that the source of Complainant's back pain was not the degenerative arthritis which was remote in origin, but muscle spasms or accentuation of the fracture due to the more recent trauma experienced by Complainant. (N.T. 123-127)

16. Complainant's condition improved during the course of Dr. Wharen's treatment of her. (N.T. 131-135)

17. On February 9, 1978, Dr. Wharen examined Complainant and determined that she was able to return to work. He based his decision on a general knowledge of the duties of counter employees. He signed a release for her to return to her regular duties with the restriction that she wear a back brace. (Complainant's Exhibit S; N.T. 133-135)

18. On February 10, 1978 the Complainant informed the Respondent that she was physically able to return to work and would provide a release from her physician (Stipulations)

19. On February 13, 1978, Complainant reported to work at the Pollock dining hall to resume her employment as a food service worker. She was advised at that time that she could not return to work without the approval of the University Health Center. (N.T. 31-35, 246-250)

20. Respondent had a policy of accepting a treating physician's certificate of disability in all cases where employees are not permitted to work; however, Respondent did not always accept the treating physician's certificate when employees attempted to return to work. (N.T. 332-333)

21. On February 13, 1978, Dr. Hargleroad of the University Health Center refused to allow Complainant to return to work, because in his opinion she might aggravate her back condition or suffer a recurrence of her back pain at some point in the future. (N.T. 385-386, 409-411)

22. Dr. Hargleroad made his decision without examining Complainant, reviewing her x-rays or viewing her job site. He did have a brief discussion with Dr. Wharen, but did not seek Dr. Wharen's opinion on the origin of Complainant's back pain. (N.T. 395-399)

23. On February 13, 1978, Complainant filed a grievance with Teamsters Union Local 8, the collective bargaining agent for the Respondent's food service workers, protesting Respondent's refusal to allow her to return to her job when her doctor had released her to do so. (Respondent's Exhibit 11; N.T. 256, 257, 362)

24. On April 10, 1978, Respondent manager of personnel and training, John Dombroski, wrote to Complainant advising her that her leave of absence from the University had expired and that she would have to request a medical leave of absence in order to avoid termination. (Complainant's Exhibit 12) A leave of absence would only entitle her to certain limited benefits but would, nevertheless result in her termination.

25. On April 13, 1978, Complainant obtained from Dr. Wharen a second certification of her ability to return to work, this time without restrictions. (Complainant's Exhibit 6)

26. By letter dated April 14, 1978, Mr. Dombroski advised Complainant that she would have to choose between seeking a medical leave of absence and termination by Respondent. (Complainant's Exhibit 14)

27. Complainant took no action to extend her medical leave of absence. (N.T. 35-37)

28. By letter dated April 28, 1978, Mr. Dombroski advised Complainant that she was terminated by Respondent retroactive to April 21, 1978. (Complainant's Exhibit 14)

29. Complainant's termination as of April 21, 1978 was involuntary and resulted from Respondent's refusal to reinstate her. (N.T. 331-332)

30. On May 23, 1978, Complainant filed a complaint with the Pennsylvania Human Relations Commission alleging that Respondent had refused to allow her to return to work on account of her non job-related handicap or disability. (Stipulations) The Complaint was filed within 90 days of Complainant's termination by Respondent.

31. The complaint was served upon Respondent on August 24, 1978. (Stipulations)

32. In correspondence dated October 18, 1979, the Commission notified the Respondent that probable cause existed to credit the allegations contained in the complaint. (Stipulations)

33. Subsequent to the determination of probable cause the Commission and the Respondent attempted to eliminate the alleged unlawful discriminatory practice through conference, conciliation and persuasion but were unable to do so. (Stipulations)

34. Food service workers work 40 hours per week on 5 of 7 days. Work assignments are made on a daily basis to each of five groups of employees. Work assignments are rotated among the five groups on a varying basis. (N.T. 269-724)

35. The work assignments of food service workers fall within two broad areas: food preparation and cleaning. Both kinds of work require the worker to lift and bend. (N.T. 273-311)

36. Complainant had been performing all of the functions of a food service worker up to the time of her accident in 1977, even though subsequent medical examination indicated that she had had degenerative arthritis for some time prior to that. (N.T. 13, 125-127, 133)

37. Complainant had back pain resulting from her accident in 1977. She responded favorably to treatment. This would not have occurred had the pain been caused by the degenerative arthritis. (N.T. 133-134)

38. On February 13, 1978, Complainant was physically able to perform the functions of a food service worker.

39. Had Complainant returned to work February 13, 1978, she would have posed no threat of harm to herself or other employees. (N.T. 134-135)

40. Respondent paid unemployment compensation in total amount of \$3,368.00 to the Complainant for the period April 23, 1978 through May 12, 1979. (N.T. 325) During that time Complainant did not seek other employment. (N.T. 92)

41. In December of 1978, Complainant's union, Teamsters Local Union No. 8, and Respondent agreed to have Complainant examined by an independent physician for the purpose of determining whether she was physically able to perform the functions of her employment. If, in the opinion of the physician, Complainant was able to perform her job Respondent was prepared to accept her back as a regular employee. Appointments were made for Complainant to see an independent physician, Dr. Reed Babcock, on any one of six dates: December 5, 7, 8, 13, 14 or 15 of 1978. Complainant did not appear for an examination by Dr. Babcock on any of those dates. (N.T. 215-216, 363)

42. Respondent and the union's agreement with respect to the independent physician was without prejudice and did not affect Complainant's right to continue her complaint with the Commission. Although the proposal did not include back pay, it did not preclude recovery of back pay through the Commission complaint. (N.T. 217, 364)

43. Had Complainant returned to work on February 13, 1978, and continued in the employ of Respondent she would have continued to work at pay grade 11 at an hourly rate of \$3.96 per hour for the period February 13, 1978 through August 9, 1978. (Stipulations)

44. Had the Complainant continued in the employ of the Respondent during the period August 10, 1978 through December 31, 1978, she would have received \$4.20 per hour gross pay. (Stipulations)

45. Had the Complainant returned to work on February 13, 1978, and continued in the employ of Respondent during the period February 13, 1978 through July 1978, she would have been eligible to accumulate 1 and 1-1/2 days of vacation leave per month, or a total of 9 vacation days during this period. (Stipulations)

46. Had the Complainant continued in the employ of the Respondent during the period August 10, 1978 to the present, she would have been eligible to accumulate 1-3/4 days of vacation leave per month of employment. (Stipulations)

47. Had Complainant been permitted to return to work on February 13, 1978 and continued in the employ of the Respondent to the present she would have been eligible to accumulate 1 day sick leave per month for each month of active employment. (Stipulations)

48. Had Complainant continued in the employ of the Respondent during the period April 21, 1978 to the present, she would have been eligible to continue receiving the retirement and life insurance benefits from the Respondent, under the plan in which she was enrolled prior to her termination on April 21, 1978. (Stipulations)



7. A handicap or disability is job-related when it substantially interferes with the individual's ability to perform the essential functions of the position sought, 43 P.S. §954(p).

8. At the time that she sought to return to work, Complainant's handicap or disability did not substantially interfere with her ability to perform the duties of a Food Service Worker.

9. Respondent's refusal to allow Complainant to return to work on account of her non job-related handicap or disability constituted an unlawful discriminatory practice in violation of §5(a) of the Act, 43 P.S. §955(a)

10. Respondent had no right to expect Complainant to affirmatively request an extension of her medical leave of absence while she was actively seeking reinstatement to her position as a Food Service Worker.

11. Complainant is entitled to an award of back pay with interest calculated at a rate of six percent per year together with reinstatement and accrued seniority and other applicable benefits.

12. Complainant was under a continuing obligation to mitigate Respondent's back pay liability which she did not meet when she failed to seek other employment and failed to appear for an appointment with Dr. Babcock.



RECOMMENDATION OF HEARING COMMISSIONER

AND NOW, this 27th day of July, 1981, in consideration of the entire record in this matter, including the Complaint, Stipulations of Fact, Exhibits, Record of the Hearing, and Briefs filed on behalf of parties, the Hearing Commissioner hereby adopts the attached as her proposed Findings of Fact, Conclusions of Law, Opinion and Final Order and hereby recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS  
COMMISSION

BY:

Doris M. Leader  
Doris M. Leader  
Hearing Commissioner

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PRISCILLA J. BURK,  
Complainant

v.

PENNSYLVANIA STATE  
UNIVERSITY,  
Respondent

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:  
:  
:  
:  
:  
:

Docket No. E-14372

O R D E R

AND NOW, this 12th day of August, 1981, upon consideration of the Findings of Fact, Conclusions of Law and Opinion of the Pennsylvania Human Relations Commission ("PHRC"), it is hereby ORDERED:

1. That Respondent shall cease and desist from terminating from employment handicapped or disabled individuals unless the handicap or disability substantially interferes with the ability of the individual to perform the essential functions of the particular position involved.

2. That within thirty days of this Order the Respondent shall pay to the Complainant a sum of money representing that amount which Complainant would have earned as wages for the period of April 21, 1978 to December 15, 1978 together with six percent interest compounded annually. The check shall be made out payable to Priscilla Burk and delivered to Michael Hardiman, Pennsylvania Human Relations Commission, 301 Muench Street, Harrisburg, Pennsylvania 17102. Respondent shall provide the Commission with the calculations used to determine

the total payment made.

3. That the Respondent shall make a written offer of immediate reinstatement to the Complainant for the position she held immediately prior to her termination. Reinstatement shall include retroactive seniority for the period of April 21, 1978 to December 15, 1978. Written verification of the offer shall be provided to the Commission and the Complainant within thirty days of the date of this Order.

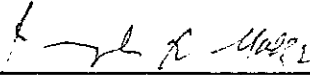
4. That the Respondent shall provide the Complainant with all benefits which would have accrued to her during the period April 21, 1978 to December 15, 1978 including but not limited to accrued vacation entitlement, accrued sick leave, medical insurance benefits, life insurance benefits and accrued pension benefits. Satisfactory proof of compliance, including a written description of all benefits provided, should be furnished to the Commission within thirty days of the date of this Order.

5. That the Respondent shall reimburse the Complainant for all medical expenses incurred between April 21, 1978 and December 15, 1978 which were otherwise covered by the medical insurance benefit program which the Complainant was enrolled in while an employee. Respondent shall furnish the Commission with written proof of its manner of compliance within thirty days of the date of this Order.


6. That failure to comply with the terms of this Order within thirty days shall result in an assessment of back pay, seniority and related benefits against Respondent from the date of the Order until date of compliance.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: \_\_\_\_\_

  
Joseph X. Yaffe  
Chairperson

ATTEST: \_\_\_\_\_

  
Elizabeth M. Scott  
Secretary

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COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
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PRISCILLA J. BURK, :  
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45. Had the Complainant returned to work on February 13, 1978, and continued in the employ of Respondent during the period February 13, 1978 through July 1978, she would have been eligible to accumulate 1 and 1-1/2 days of vacation leave per month, or a total of 9 vacation days during this period. (Stipulations)

46. Had the Complainant continued in the employ of the Respondent during the period August 10, 1978 to the present, she would have been eligible to accumulate 1-3/4 days of vacation leave per month of employment. (Stipulations)

47. Had Complainant been permitted to return to work on February 13, 1978 and continued in the employ of the Respondent to the present she would have been eligible to accumulate 1 day sick leave per month for each month of active employment. (Stipulations)

48. Had Complainant continued in the employ of the Respondent during the period April 21, 1978 to the present, she would have been eligible to continue receiving the retirement and life insurance benefits from the Respondent, under the plan in which she was enrolled prior to her termination on April 21, 1978. (Stipulations)

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

PRISCILLA J. BURK,  
Complainant

v.

PENNSYLVANIA STATE  
UNIVERSITY,  
Respondent

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: Docket No. E-14372  
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O P I N I O N

I. INTRODUCTION

This case involves a complaint of handicap or disability discrimination in violation of §5(a) of the Pennsylvania Human Relations Act ("the Act"), 43 P.S. §955(a). Complainant missed four months of work as a Food Service Worker in the Pollock Dining Hall of Respondent because she was suffering from a disabling back pain.

On February 13, 1978 Respondent refused to reinstate Complainant to her position (N.T. 385-386, 409-411). By letter dated April 28, 1978, Respondent terminated Complainant's employment effective April 21, 1978 ( Complainant's Exhibit 14)

On May 23, 1978, Complainant filed a complaint with the Commission. After finding probable cause and attempting but failing to conciliate the matter, the Commission held a public hearing on December 4 and 5, 1980 in Bellefonte, Pennsylvania. Commissioner Doris M. Leader presided alone, the requirement of

three Commissioners having been waived by Respondent. The case on behalf of the Complainant was presented by Michael Hardiman, Assistant General Counsel in the Harrisburg Regional Office of the Commission. R. Mark Faulkner represented the Respondent. Ellen M. Doyle, Assistant General Counsel in the Pittsburgh Regional Office of the Commission, served as Legal Advisor to the Hearing Commissioner.

## II. TIMELINESS OF THE COMPLAINT

Section 9 of the Act requires that complaints of discrimination must be filed with the Commission "within ninety days after the alleged act of discrimination" (43 P.S. §959). The notarization date on the complaint indicates that it was received by the Commission on May 23, 1978.

Respondent claims that to the extent that any discrimination took place, it occurred on February 13, 1978, the date on which Respondent refused to allow Complainant to return to work. However, it was not until April 28, 1978 that Complainant was made aware that Respondent's refusal to reinstate her was permanent. (Complainant's Exhibit 14 ) Between February 13, 1978 and April 28, 1978 Complainant could reasonably have believed that the matter was still under consideration. During that period Complainant filed a union grievance (Respondent's Exhibit 11), and obtained another medical certificate (Complainant's Exhibit 6) while Respondent continued her on an unpaid leave of absence (Complainant's Exhibits 12 and 13).

Because in a handicap or disability case there is often a period of time given over to consideration between the experts as to if and when a person is able to perform the essential functions of the job, we find that the discriminatory act



occurs when the handicapped or disabled person is placed on reasonable notice that the employment decision with respect to the handicap or disability is permanent. In the instant case that occurred on April 28, 1978 or within ninety days of the filing of the complaint.

We further find that Complainant was not required to submit a request for a continuation of her medical leave of absence while she was challenging Respondent's refusal to reinstate her. Complainant's "refusal to answer the question, under the circumstances of this case, was justifiable. Indeed, to answer such a question was not an act the employer had a right to expect." Marositz v. Comm., Unemployment Comp. Bd., 415 A.2d 1006, 1007 (Pa. Cmwlth 1980)

### III. LIABILITY

#### A. Complainant Is A Handicapped Or Disabled Person

Section 5 of the Act states:

"It shall be an unlawful discriminatory practice . . . [f]or any employer because of the . . . non-job related handicap or disability of any individual to refuse to hire or employ, or to bar or to discharge from employment such individual . . ." 43 P.S. §955

The first issue which must be resolved is whether Complainant is a handicapped or disabled person for purposes of the Act.

Although this Complaint was filed prior to the issuance of the Commission's regulations on Discrimination On The Basis of Handicap or Disability, 16 Pa. Code §44.1 et seq., Vol. 8 Penna. Bulletin, No. 40, Saturday, October 7, 1978, 2715-2721, those regulations are at least instructive as to the definition of a "handicapped or disabled person."

As the Commission recently found:

"The prohibition against discrimination due to handicap or disability was added to other anti-discrimination provisions of the PHRA by a 1974 amendment. From that time forward the terms 'handicap or disability' necessarily meant something. And when, in 1978, the Commission adopted a regulatory definition of the terms, it obviously deemed it to be a lawful, fair and reasonable definition. Using the definition for in-structive purposes in this case is thus '... not the type of retroactivity which is con-demned by law.' Securities and Exchange Commission v. Chernery, 322 U.S. 194, 203 (1974)"

Robert Culver v. Interstate Motor Freight System, Docket No.E-14582

(unpublished Opinion, dated January 6, 1981, p.3) Like Culver, Complainant Burk had inter alia degenerative arthritis. Unlike Culver, Burk was disabled by back pain for some four months and thus was restricted from performing a number of major life activi-ties including bending, stooping, and lifting. It was because Respondent believed that Complainant might never be able to perform these functions again without return of her disabling back pain that it terminated her employment.

We find that Complainant was a handicapped or disabled person for purposes of the Act.

B. Complainant's Handicap Or Disability Is Non-Job Related.

The next and most critical issue to resolve is whether or not Burk's handicap is job related. The burden of proof with respect to this issue rests with Respondent.

To be job related a handicap or disability must "sub-stantially interfere with the ability to perform the essential functions" of the job.

Respondent's physician, Dr. Hargleroad, predicted that

Complainant could suffer a recurrence of pain if she returned to her former position. His opinion was to a great extent based on Dr. Wharen's original diagnosis from the x-rays of degenerative arthritis. When Hargleroad recommended that Complainant not be allowed to return to work, he did so without discussing the origin of her back pain with her physician and without the benefit of a physical examination.

The Commission accepts the opinion of Complainant's treating physician, Dr. Wharen, that Complainant was physically able to return to work as of February 10, 1978. Dr. Wharen has substantial knowledge and expertise in the areas of physical medicine and rehabilitation. Although he was not familiar with all of the tasks of a Food Service Worker, he was generally aware of the type of work performed by Complainant. His opinion that she could physically perform the work required was based on (1) his diagnosis that the Complainant's pain was due to muscle spasms of recent origin and (2) the success of his treatment of her back pain.

We find that Complainant was physically able to perform the essential functions of a Food Service Worker as of February 10, 1978 and that her termination as of April 21, 1978, resulting from Respondent's refusal to reemploy her was discrimination in violation of §5(a) of the Act, 43 P.S. §955(a).

C. Complainant Is Entitled to An Appropriate Remedy.

The authority of the Commission to take appropriate affirmative action based upon a finding that the Respondent engaged in an unlawful discriminatory practice is clear, Section 9 of the Act - 43 P.S. §959. Such action may include but is

not limited to: reinstatement, back pay and such action as in the judgment of the Commission will effectuate the purposes of the Act. These actions are in addition to requiring that Respondent cease and desist from engaging in the unlawful discriminatory practice.

In the instant case the Commission deems it appropriate that Complainant be reinstated. However, for the reasons discussed below, Complainant shall be entitled to back pay, seniority, and other benefits only for the period of April 21, 1978 to December 15, 1978, and if Respondent does not promptly comply, from the date of this Order to the date of her reinstatement.

D. Complainant Failed In Her Duty To Mitigate.

Although there has been no court decision on the question, we find that a complainant is required to mitigate damages for purposes of back pay awards under §9 of the Act, 43 P.S. §959. The amount of a Respondent's liability will be reduced by the amount which the Complainant actually earned or could have earned with reasonable diligence.

However, the burden of proving a failure to mitigate is on the Respondent and includes showing that there were suitable positions available and for which the Complainant was qualified. See Kaplan v. Intern Alliance of Theatrical etc., 525 F. 2d 1354 (9th Cir. 1975); Marks v. Prattco, Inc., \_\_\_\_ F. 2d \_\_\_\_, 24 EPD 18,592 (5th Cir. 1981)

In the instant case Respondent introduced evidence that there were some 300 job openings in the Food Service field from October 1, 1978 to November 30, 1980. The Commission does not need to reach today the question of whether it is reasonable to assume that a 60 year old woman with a prior back disability would obtain a job in a low-skill category, since in the instant case Complainant refused to visit an independent physician for a third opinion concerning her ability to regain her position with Respondent pending resolution of her PHRC claim.

For that reason we hold that Respondent is liable for back pay, seniority and related benefits only for that period up to the date upon which Complainant could have returned to her former employment had she been approved for such by the independent physician. Complainant refused to be examined by the doctor chosen by her union and Respondent.

Respondent's liability for running back pay will recommence as of the date of this Order if it fails to promptly comply, so that it may not profit from any delay in reinstating Complainant.

Because of our decision to terminate Respondent's running back pay liability as of the date of the offer to reinstate with an independent physician's approval, we see no prejudice to Respondent arising out of any possible laches on the part of the Commission in processing the complaint.

The general rule, which we now adopt is that the passage of time alone is not sufficient for a showing of laches. Respondent must show that it has been prejudiced by the delay, Melnick v. Melnick, 361 Pa. 378, 64 A. 2d 773 (1949); Manson v. First National Bank in Indiana, 366 Pa. 211 (1951); Leedom v. Thomas, 473 Pa. 193 (1977)

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Docket No. E-14372

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant and the Respondent and the subject matter of the Complaint under the Pennsylvania Human Relations Act, pursuant to §9 of the Pennsylvania Human Relations ("Act"), 43 P.S. §959.

2. The Complaint was filed in a timely fashion according to the requirements of §9 of the Act, 43 P.S. §959.

3. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter, pursuant to §9 of the Act, 43 P.S. §959.

4. Respondent is a an "employer" within the meaning of §4(b) and 5(a) of the Act, 43, P.S. §954(b) and §955(a).

5. Complainant is an "individual" within the meaning of §5(a) of the Act, 43 P.S. §955(a).

6. Complainant's back problems including degenerative arthritis, a compression fracture of the thoracic vertebra of the spine and muscle spasms were handicaps or disabilities within the meaning of §§4 and 5 of the Act, 43 P.S. §954, 955.

7. A handicap or disability is job-related when it substantially interferes with the individual's ability to perform the essential functions of the position sought, 43 P.S. §954(p).

8. At the time that she sought to return to work, Complainant's handicap or disability did not substantially interfere with her ability to perform the duties of a Food Service Worker.

9. Respondent's refusal to allow Complainant to return to work on account of her non job-related handicap or disability constituted an unlawful discriminatory practice in violation of §5(a) of the Act, 43 P.S. §955(a)

10. Respondent had no right to expect Complainant to affirmatively request an extension of her medical leave of absence while she was actively seeking reinstatement to her position as a Food Service Worker.

11. Complainant is entitled to an award of back pay with interest calculated at a rate of six percent per year together with reinstatement and accrued seniority and other applicable benefits.

12. Complainant was under a continuing obligation to mitigate Respondent's back pay liability which she did not meet when she failed to seek other employment and failed to appear for an appointment with Dr. Babcock.



RECOMMENDATION OF HEARING COMMISSIONER

AND NOW, this 27th day of July, 1981, in consideration of the entire record in this matter, including the Complaint, Stipulations of Fact, Exhibits, Record of the Hearing, and Briefs filed on behalf of parties, the Hearing Commissioner hereby adopts the attached as her proposed Findings of Fact, Conclusions of Law, Opinion and Final Order and hereby recommends that the same be finally adopted and issued by the Pennsylvania Human Relations Commission.

PENNSYLVANIA HUMAN RELATIONS  
COMMISSION

BY:

Doris M. Leader  
Doris M. Leader  
Hearing Commissioner



the total payment made.

3. That the Respondent shall make a written offer of immediate reinstatement to the Complainant for the position she held immediately prior to her termination. Reinstatement shall include retroactive seniority for the period of April 21, 1978 to December 15, 1978. Written verification of the offer shall be provided to the Commission and the Complainant within thirty days of the date of this Order.

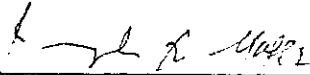
4. That the Respondent shall provide the Complainant with all benefits which would have accrued to her during the period April 21, 1978 to December 15, 1978 including but not limited to accrued vacation entitlement, accrued sick leave, medical insurance benefits, life insurance benefits and accrued pension benefits. Satisfactory proof of compliance, including a written description of all benefits provided, should be furnished to the Commission within thirty days of the date of this Order.

5. That the Respondent shall reimburse the Complainant for all medical expenses incurred between April 21, 1978 and December 15, 1978 which were otherwise covered by the medical insurance benefit program which the Complainant was enrolled in while an employee. Respondent shall furnish the Commission with written proof of its manner of compliance within thirty days of the date of this Order.


6. That failure to comply with the terms of this Order within thirty days shall result in an assessment of back pay, seniority and related benefits against Respondent from the date of the Order until date of compliance.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: \_\_\_\_\_

  
Joseph X. Yaffe  
Chairperson

ATTEST:

  
Elizabeth M. Scott  
Secretary