COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEVIN R. CAHILL, COMPLAINANT	:	
v.	:	DOCKET NO. E-26878
IZOD LIMITED CHILDRENS DIVISION OF GENERAL MILLS, INC., RESPONDENT	:	

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FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEVIN R. CAHILL, Complainant v. IZOD LIMITED CHILDREN'S DIVISION OF GENERAL MILLS, INC., Respondent	DOCKET NO. E-26878

STIPULATIONS OF FACT

1. Kevin Cahill was hired March 9, 1983 as an Industrial Engineer.

2. Mr. Cahill's salary was $576.92 per week ($29,999.84 per year).

3. Mr. Cahill was discharged by Izod effective July 15, 1983.

4. Mr. Cahill was an "exempt" employee under the definition set forth in the Fair Labor Standards Act.

5. Mr. Cahill stated on his application for employment that he had "M.S.". Mr. Cahill informed Izod prior to his employment that he had "M.S."

6. Izod Ltd. paid Mr. Cahill's relocation expenses from his home in New York to Reading, Pennsylvania.

7. The matter of relocation expenses was a part of the job offer to Mr. Cahill.

8. Mr. Russ Goddard was Mr. Kevin Cahill's only supervisor during Mr. Cahill's employment at Izod Ltd.

9. On or about June 30, 1983, two co-workers transported Mr. Cahill from his workplace at Izod to a hospital shortly before noon on that date. Mr. Cahill reported to work approximately three hours later.

Talmadge L. Bartelle

Ellen K. Barry

FINDINGS OF FACT *

1. Kevin Robert Cahill (hereinafter either "Cahill" or the "Complainant") achieved an Associate degree in Electrical Engineering or Technology, a Bachelor of Science degree in Industrial Engineering in 1969, and a Masters of Science degree in Industrial Engineering in 1971. (N.T. 34, 35)
2. The Complainant is a licensed Industrial Engineer. (N.T. 41)
3. During the 12 year period between the Complainant's graduation in 1971 and his application for employment with Izod Limited Children's Division of General Mills, Inc. (hereinafter either "Izod" or the "Respondent") the Complainant successfully held several industrial engineering jobs in various locations. (N.T. 36-39; C.E. 3)
4. In February, 1983, the Complainant responded to the Respondent's advertisement for a Senior Industrial Engineer. (N.T. 41)
5. Just prior to February, 1983, Izod had completed the construction and startup of a new facility which had been designed to consolidate and replace several smaller facilities. (N.T. 216)
6. The position of Senior Industrial Engineer for which the Complainant applied and for which he was hired was a new position created by the startup of the Respondent's new facility. (N.T. 216)

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*The facts contained in the "Stipulations of Fact" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout:

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

7. In February, 1983, the Complainant resided in Endicott, New York. (N.T. 42)

8. The Respondent's new building was in Reading, Pennsylvania. (N.T. 42)

9. In February, 1983, the Respondent invited the Complainant to Reading for an interview at which the Complainant independently spoke with Edward J. Bricker (hereinafter "Bricker"), the Respondent's Personnel Administrator, and Russell C. Goddard, the Respondent's Director of Engineering. (N.T. 42, 131, 214, 217)

10. During his interviews, the Complainant told both Bricker and Goddard that he had multiple sclerosis and discussed the nature of multiple sclerosis, the degree it could affect the Complainant's activities, and the possible limits on the Complainant's ability to do the job. (N.T. 43, 133, 134, 138, 218)

11. Goddard decided that the Complainant was the best qualified applicant for the new position of Senior Industrial Engineer and on or about March 4, 1983, the Respondent called the Complainant and offered him the position. (N.T. 42)

12. The Complainant formally accepted and began working for the Respondent on March 9, 1983. (N.T. 43)

13. On March 9, 1983, the Complainant completed the Respondent's employment application on which he also noted "I have M.S." (C.E. 4)

14. Bricker recognized that hiring the Complainant presented the opportunity to improve the Respondent's affirmative action plan. (N.T. 135)

15. The Respondent accepted that the Complainant had a record of multiple sclerosis. (N.T. 184)

16. The Respondent agreed to pay the Complainant's relocation and moving expenses from Endicott, New York to Reading, Pennsylvania. (C.E. 6)

17. Goddard, who was located in another building, was the Complainant's supervisor. (N.T. 47, 151)

18. The Complainant was subject to the Respondent's policy of placing a new employee on a 90 day probationary period. (N.T. 143)

19. As the Senior Industrial Engineer in the Respondent's new facility, the Complainant's job objective was to assist in making the new facility as productive as possible. (N.T. 220)

20. No written job description was given to the Complainant. (N.T. 242)

21. The Respondent's new facility was approximately 400,000 square feet, mostly on one level with approximately 76,000 square feet on a mezzanine level. (N.T. 223)

22. The Respondent's new facility was a distribution center where Izod's products were received, stored, packaged, and ultimately shipped. (N.T. 48-53, 222-229)

23. The Complainant was both assigned certain tasks by Goddard and independently took the initiative to attempt to resolve perceived production problems. (N.T. 222, 229, 331)

24. Goddard indicated that the Complainant was successful in solving problems and that some of the Complainant's ideas were implemented which also solved certain production problems. (N.T. 229, 234)

25. Goddard indicated that the Complainant did what Goddard asked him to do. (N.T. 243, 244)

26. Goddard also recognized that not all of the new facility's problems could be solved by application of engineering genius. (N.T. 231)

27. Except for some specific directions from Goddard to the Complainant which were successfully carried out by the Complainant, the Complainant was

simply left to recognize and correct production snags and bring the Respondent's new facility up to its full potential in a very short period. (N.T. 47, 50-56, 242)

28. The Complainant kept Goddard appraised of his progress with numerous memorandums regarding specific problem areas and by submitting required weekly reports. (N.T. 47-56; C.E. 15)

29. The Complainant successfully completed his 90 day probationary period on or about the second week of June, 1983. (N.T. 143, 145)

30. On or about June 20, 1983, Goddard told Bricker that the Complainant was performing his job satisfactorily, and that one minor noted problem had been resolved. (N.T. 161)

31. Bricker had been aware of a perceived problem that the Complainant was apparently at his desk too much, however, this was resolved by relocating the Complainant's work station to a location closer to the production area. (N.T. 161)

32. The Respondent approved the Complainant's household effects move which then occurred late June or early July, 1983. (N.T. 144)

33. While at work on June 30, 1983, the Complainant felt the need to lay down and recuperate. (N.T. 64)

34. The Complainant asked and was permitted to lie down on a cot which was coincidentally at the Respondent's facility because it was being temporarily stored there as part of the Complainant's household effects. (N.T. 64, 65)

35. On that same day, the Complainant was taken to the hospital and was examined by a neurologist who instructed the Complainant to go home and rest. (N.T. 64, 65)

36. The Complainant returned to work the following day. (N.T. 65)

37. The Respondent had a set of work rules which were designed to give employees guidance by which to comply with company expectations. (C.E. 20)

38. The work rules classified "Carelessness or inefficient performance of job duties, including the failure to maintain proper standards or workmanship and performance" as a minor offense. (N.T. 146; C.E. 20)

39. The Respondent's work rule policy procedure when a minor offense was committed was: (a) a verbal warning for the first violation; (b) a written warning for a second violation; (c) a final warning combined with probation or suspension for a third violation; and (d) discharge for a fourth violation. (C.E. 20)

40. The Respondent did not follow its work rule policies with respect to the Complainant. (N.T. 228, 248)

41. In April, 1982, the Respondent's vice president of personnel from the Respondent's New York Headquarters had also issued a memorandum regarding proper guidelines for documentation of an employee's performance activities. (N.T. 148, 149; C.E. 21)

42. The Respondent was particularly concerned that there be proper documentation because of actual problems which had been created because of inadequate documentation. (C.E. 21)

43. On July 15, 1983, shortly after the Complainant's probationary period expired, the Complainant was terminated. (N.T. 66, 143)

44. The Respondent contends that the Complainant was terminated because of a performance problem. (N.T. 235)

45. Following the Complainant's termination, Thomas R. Hawn, the Respondent's Personnel Director, instructed Bricker not to include affirmative action language in future offer of employment letters. (N.T. 140)

46. Bricker's letter dated March 8, 1983, to the Complainant stated, "In our endeavor[ment] to support our commitment to Affirmative Action, we recognize your physical handicap as you described to us and will make every reasonable effort to accommodate your needs in order to contribute to your success in your new position." (C.E. 18)

47. Hawn had also indicated to Bricker during a conversation about the Complainant's use of a cot on June 30, 1983, that "[I]f Mr. Cahill could not stand on his feet for eight hours, he was then not qualified to perform the job." (N.T. 150)

48. After the Complainant's termination, Goddard assumed the Complainant's duties. (N.T. 239)

49. Goddard's job was eliminated in June, 1985, due to steady decreases in the Respondent's business. (N.T. 215, 242)

50. Since the Complainant's termination he had one temporary job which lasted three days and for which he was paid $260.00. (N.T. 194)

51. Between the Complainant's termination and February, 1985, the Complainant exercised considerable diligence in attempting to find other employment. (N.T. 193)

52. At the time of the Complainant's termination, he was earning $30,000.00 per year. (N.T. 194)

53. On or about February, 1985, the Complainant ceased looking for alternate employment. (N.T. 201)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission ("PHRC") has jurisdiction over the parties and the subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing in this case.
3. Complainant is an individual within the meaning of the Pennsylvania Human Relations Act ("PHRA").
4. Respondent is an employer within the meaning of the Act.
5. Complainant here has met his burden of making out a prima facie case by proving that:

   a. He was a member of a protected class;
   b. He was qualified for the position he held; and
   c. He was discharged.

6. Respondent has met its burden of production by articulating a non-discriminatory reason for the Complainant's discharge.
7. The Complainant established by the preponderance of the evidence that the Respondent's stated reason for the Complainant's discharge was pretextual.
8. The Complainant is entitled to relief including lost wages, with interest of six percent on lost wages.

O P I N I O N

This case arises on a complaint filed by Kevin R. Cahill (hereinafter the "Complainant") against Izod Limited Children's Division of General Mills, Inc. (hereinafter either "Respondent" or "Izod") with the Pennsylvania Human Relations Commission ("PHRC") on or about October 17, 1983, at Docket No. E-26878. The Complainant alleged that Izod discriminated against him on the basis of his non-job related handicap/disability, multiple sclerosis, by terminating him from his position as a Senior Industrial Engineer, in violation of Section 5 (a) of the Pennsylvania Human Relations Act, 43 P.S. §§951 et seq. ("PHRA").

Following an investigation, PHRC staff found probable cause to credit the Complainant's allegation of discrimination. The parties and the PHRC then attempted to resolve the situation through conference, conciliation and persuasion. When these efforts were not successful, the case was approved for public hearing. The hearing was held in Harrisburg on November 18 and 19, 1986, before Hearing Examiner, Carl H. Summerson.

The Respondent first posed a procedural argument that the PHRC lacks jurisdiction over the Complainant's complaint because the complaint was not timely filed. During the public hearing, the Respondent moved to dismiss this case, however, the Respondent's motion was denied. The Complainant was terminated on July 15, 1983, however, the Complainant did not file his formal complaint until October 17, 1983, 94 days after the date of discharge.

At the time the Complainant filed his complaint, Section 9 (g) of the PHRA required that "[A]ny complaint filed. . . must be so filed within 90 days after the alleged act of discrimination." Equitable principles which emerge from federal fair employment law cases are useful and have precedential value

in this situation as the PA Supreme Court has suggested that federal discrimination law is an analogue to the PHRA. General Electric Corp. v. PHRC, 365 A.2d 649, 654 (1976).

Many federal cases have indicated that statutory requirements which dictate that discrimination charges must be filed within a certain number of days of the alleged unlawful practice are not jurisdictional prerequisites but are merely statutes of limitation. Bonham v. Dresser Industries, Inc., 569 F.2d 187, 192, 16 FEP 510 (3rd Cir. 1977), cert. denied 439 U.S. 821 (1978); Butz v. Hertz Corp., 30 FEP 1311 (W.D.Pa. 1983); Zipes v. TWA, Inc., 455 U.S. 385, 28 FEP 1 (1982). Agreeing with the predominant federal view on this issue, the PHRA's 90 day limitation period is considered a statute of limitation subject to equitable tolling.

Federal fair employment law cases often consider whether equitable principles warrant tolling of a limitation period. Of particular concern to us are the line of cases which hold that a Complainant should not suffer because of errors made by the agency to which a Complainant has brought a complaint. See, e.g. Lanyon v. University of Delaware, 29 FEP 943 (D.C.Del. 1982); Graves v. State of Colorado, 30 FEP 1344 (D.C.Colo. 1982); Jarrell v. U.S. Postal Service, 36 FEP 1169 (D.C.Cir. 1985); McKee v. McDonnell-Douglas Technical Services Co., Inc., 31 EPD ¶33,441 (5th Cir. 1983); McAdams v. Thermal Industries, Inc., 13 EPD ¶11,610 (W.D.Pa. 1977).

The evidence presented in this matter reveals that shortly after the Complainant's discharge, the Complainant first contacted the Reading-Berks Human Relations Council, which agency told the Complainant about the PHRC. Once the Complainant knew about the PHRC, the Complainant's first contact with the PHRC was by telephone on September 27, 1983. The Complainant testified

that during his telephone call to the PHRC, the Complainant was told to send a letter and that the phone call covered him until the letter arrived.

The Complainant then wrote a letter to the PHRC Harrisburg Regional Office dated September 27, 1983. This letter was time stamped as received by the PHRC on September 29, 1983. At the public hearing, this letter was introduced into evidence as Respondent's Exhibit 1.

The contents of the Complainant's letter of September 27, 1983, corroborates the Complainant's testimony that he was told the limitation period would be extended. Specifically, the Complainant wrote, "As per our phone conversation today this letter will be time-dated and thus extend the statute of limitations on my case. . ."

Obviously, we should accept as credible that the Complainant was in effect told that he need not worry about the 90 day limitation period so long as his letter was received promptly. Also, no testimony was presented which refuted the Complainant's claim.

Clearly, the information given by PHRC staff to the Complainant was erroneous and naturally caused the Complainant to relax his vigilance. In Page v. U.S. Industries, Inc., 556 F.2d 346 (1978), equitable tolling was applied because of improper information from the EEOC. The court in Page noted "[The Complainant] was entitled to rely on [a] seemingly authoritative statement by the agency presumed to know the most about these matters." Id. at 350-51.

The Complainant in this case should not suffer because of an error made by agency staff to whom he timely brought his concerns and oral complaint. Accordingly, the Respondent's Motion to Dismiss was denied because the limitation period was equitably tolled at the point erroneous advice was

given to the Complainant by PHRC staff. The equitable modification of the 90 day limitation period therefore makes the Complainant's complaint timely.

Turning to the substantive issues in this case, the Complainant alleged that he was discharged because of his non-job related disability, multiple sclerosis. The Respondent raises a variety of arguments. It claims that the Complainant failed to establish a prima facie case. In the alternative the Respondent argues that it had a legitimate non-discriminatory business reason for the Complainant's discharge, which reason has not been shown to be pretextual.

Section 5 (a) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice. . . for any employer because of the. . . non-job related handicap or disability of any individual to. . . discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment, if the individual is the best able and most competent to perform the services required. . .

43 P.S. 955 (a).

Section 4 (p) provides the PHRA's only clarification of the reach of the cited portion of Section 5 (a):

> The term "non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in.

43 P.S. 954 (p).

Applicable regulations promulgated by the PHRC provide:

> Handicapped or disabled person -- Includes the following:
>
> (i) A person 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; or

(C) is regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

(A) "physical or mental impairment" means a physiological disorder or condition, cosmetic, disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.

(B) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(C) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(D) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i)(A) of this paragraph but is treated by an employer or owner, operator or provider of a public accommodation as having such an impairment.

16 Pa. Code §44.4.

Non-job-related handicap or disability -- Includes the following:

(i) Any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handi-

capped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group of employe insurance plan does not render a handicap or disability job-related.

(ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employe or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.

(iii) A handicap or disability may be job-related if placing the handicapped or disabled employe or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

16 Pa. Code §44.4.

These regulatory definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. Pennsylvania State Police v. PHRC, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 483 A.2d 1039 (1984), reversed on other grounds 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

In the leading case of McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973), the U.S. Supreme Court set forth the basic allocation of burdens and the order of presentation of proof in a Title VII case alleging disparate treatment. Under this formula, which has been adopted by the PA Supreme Court for analyzing evidence in a case under the PHRA, General Electric Corp. v. PHRC, 469 Pa. 202, 265 A.2d 649 (1976), the Complainant has the initial burden of proving a prima facie case of discrimination. If the Complainant succeeds, the burden then shifts to the Respondent to produce evidence which demonstrates a legitimate, non-discriminatory reason for the adverse employment decision. If the Respondent is successful, the Complainant must have a full and fair opportunity to prove by a preponderance of the evidence that the proffered reasons are a pretext for discrimination. This

burden merges with the Complainant's ultimate burden of persuading the fact finder that he has been the victim of discrimination. See Texas v. Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 25 FEP 113 (1981); United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 31 FEP 609 (1983).

A prima facie case of discrimination, identifying the discriminatory criterion "as the likely reason for the denial of a job opportunity," White v. City of San Diego, 605 F.2d 455, 458, 20 FEP 1649 (9th Cir. 1979), must be established by a preponderance of the evidence. Burdine, 450 U.S. at 252-53. A properly established prima facie case allows an inference of illegal discrimination, creating a legally mandatory, rebuttable presumption against the Respondent. Id. at 254 n. 7; Casillas v. United States Navy, 735 F.2d 338, 343, 34 FEP 1493 (9th Cir. 1984).

McDonnell-Douglas set forth the specific elements of a prima facie case of disparate treatment. Under its oft repeated test, a Complainant must show: (1) that he or she belongs to a protected group; (2) that he or she applied for and was qualified for a job for which the Respondent was seeking applicants; (3) that, despite his or her qualifications, he or she was rejected; and (4) that, after the rejection, the position remained open and the Respondent continued to seek applicants from persons of his or her qualifications. McDonnell-Douglas, 411 U.S. at 802. It has repeatedly been emphasized that this four part test is not rigid; its satisfaction depends on the facts of each case. See Furnco Construction Corp. v. Waters, 438 U.S. 567, 575-76, 17 FEP 1062 (1978); Spaulding v. University of Washington, 740 F.2d 686, 700, 35 FEP 217 (9th Cir. 1984); White, 605 F.2d at 458; Reed v. Printing Equipment Division of Western Gear, 75 Pa. Cmwlth. 360, 462 A.2d 292 (1983).

Since McDonnell-Douglas involved a refusal to hire, not a discharge, the four prong formula must be adapted. In the PHRC case of Oliver et al v. Miley Security Services, Inc., Docket Nos. E-18942 and E-18943, we outlined the elements of a prima facie case in a case alleging a discriminatory discharge. These elements are:

1. That Complainant belongs to a protected group;
2. That Complainant was qualified for the job;
3. That Complainant was discharged; and
4. That the job remained available after Complainant's discharge.

Citing Ray v. Safeway Stores, 614 F.2d 729, 22 FEP 49 (10th Cir. 1980).

This prima facie adaption can be even further modified to fit the particular circumstances of this case. The exact elements of a prima facie case are not hard and fast rules, but rather a set of standards whose application to differing factual situations requires individualized variations, Spruill v. PA Dept. of Transportation, Docket No. E-18816 (PA Human Relations Commission, February 28, 1983); Fisher v. Montgomery County Sheriff's Dept., Docket No. E-21522 (PA Human Relations Commission, August 9, 1984); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

The Respondent vigorously argues that the Complainant's prima facie case must include a demonstration that other individuals, not members of the protected class, were treated differently. Additionally, the Respondent urges that the fourth prong of a prima facie case must also include a showing that someone not in the Complainant's protected class was hired to fill his former position. The facts show that no one was hired to fill the Complainant's job. Instead, the Complainant's functions were absorbed by the Complainant's Supervisor, Goddard.

Under the circumstances of this case, the Respondent's view of the requisite showing of a prima facie case is much too restrictive. Since the

U.S. Supreme Court has declared that the Complainant's initial burden should not be onerous, see Burdine, supra, we choose to adopt a less rigid, mechanical and ritualistic prima facie standard in this case. From a practical perspective, requiring the Complainant to demonstrate that his job was filled by a newly hired person not in the protected class creates an insurmountable obstacle.

We believe the appropriate inquiry should simply be whether:

1. The Complainant was a member of a protected class;
2. He was capable of performing the job; and
3. He was discharged.

Until recently, this minimal requirement only appeared in federal fair employment cases. See e.g. Boner v. Board of Commissioners, 28 FEP 767 (8th Cir. 1982); Scott v. Coca Cola Bottling Co., 36 FEP 1875 (E.D.Mo. 1984). In Pennsylvania, an even less onerous standard was recently announced in Thomas v. PHRC, ___ Pa. Commonwealth Ct. ___, ___ A.2d ___ (No. 1206 C.D. 1986, filed June 15, 1987). In Thomas, the court declared that in a discharge case, a prima facie case is established by a showing that the Complainant was a member of a protected minority, with a desire to remain at his employment, and was discharged. Id. slip op. at 4.

Clearly, there is no dispute that the Complainant was discharged. Similarly, the Respondent concedes that the Complainant was qualified for the position he held. The Respondent does challenge the job performance of the Complainant, however, the analysis of this part of the Respondent's challenge will be made during the discussion of whether the Respondent's articulated reason for the discharge was pretextual.

The Respondent does contend that the remaining element of the Complainant's prima facie case has not been shown. The Respondent argues that

the Complainant offered no medical evidence to support that he had multiple sclerosis, and therefore it is the Respondent's position that the Complainant had not established that he was a member of a protected class.

As previously noted, 16 Pa. Code §44.4 (i) lists three ways a person can be considered handicapped or disabled for purposes of the PHRA. Section 44.4 (i)(B) includes persons who have a record of a physical impairment which substantially limits one or more major life activities. During the interview process, the Complainant specifically told the Respondent that he had a history of multiple sclerosis. In fact, the Complainant was first diagnosed with multiple sclerosis in 1973. During the interview, the Complainant also discussed the nature of multiple sclerosis. Multiple sclerosis is a progressive disease of the central nervous system. Further, the Complainant's testimony clearly shows that several major life activities are substantially limited by multiple sclerosis: i.e. talking, and walking.

In the Respondent's letter to the Complainant, in which the Respondent acknowledged the Complainant's acceptance of employment, the Respondent stated, "In our [endeavorment] to support our commitment to Affirmative Action, we recognize your physical handicap as you described to us. . ." Clearly, the Respondent recognized that the Complainant had a record of a handicap. Finally, testimony at public hearing by Edward Bricker, Respondent's personnel administrator at the time of the Complainant's hire, specifically admitted that the Respondent accepted that the Complainant had a record of multiple sclerosis. Accordingly, the Complainant has met his burden of establishing a prima facie case by a preponderance of the evidence.

Since the Complainant established a prima facie case, the burden of production shifts to the Respondent to show a legitimate non-discriminatory

reason for the Complainant's termination. Department of Transportation v. PHRC, 84 Pa. Commonwealth Ct. 98, 480 A.2d 342 (1984). Here the Respondent readily met its production burden. The Respondent generally submits that the Complainant was terminated because of inadequate job performance which was unrelated to the Complainant's multiple sclerosis.

Specifically, the Respondent argued that the Complainant lacked initiative and ability to identify production delays and that he was weak regarding consistently and effectively implementing corrective action. The Complainant's job position was described as highly responsible, the performance of which the Complainant was expected to achieve with a high degree of independence.

The Respondent pointed to several conversations between the Complainant and the Complainant's Supervisor, Goddard, as evidence of performance difficulties. Also, the Respondent submits that when the Complainant applied for unemployment compensation he failed to mention that he believed his discharge was discriminatory.

The Respondent's brief cites Litner v. Commonwealth Office of Budget and Administration, 468 A.2d 903 (Pa. Commw. Ct. 1983), and states that Litner supports the proposition that one's failure to connect health to performance deficiencies prior to filing a legal complaint is a significant factor favoring a finding of non-discrimination. However, the Litner case in no way supports the stated proposition. In fact, the essence of the Litner case stands for a counter proposition. Ms. Litner was contending that the Pa. Civil Service Commission ignored evidence regarding her medical problems, which evidence had first been presented on appeal to the Pa. Civil Service Commission. The court in Litner specifically noted that such evidence,

although first raised on an appeal, was competent and relevant. Also, the court noted that the Commission had not ignored such evidence but had in fact properly considered it.

Although the Complainant may not have specifically noted on his application for unemployment that he believed his discharge was discriminatory the evidence shows that he expeditiously pursued his discrimination claim. First, the Complainant contacted the Reading-Berks Human Relations Council shortly after his discharge. He then was instructed to contact the PHRC which he did shortly thereafter.

The Complainant's failure to note discrimination when applying for unemployment compensation certainly is not a significant adverse factor. Instead, in this case, this factor is inconsequential. What is significant in this case is the evidence presented which shows that the Respondent's stated reason for discharging the Complainant was pretextual. When considered as a whole, the evidence presented creates an extremely strong case that the Complainant was not discharged because of inadequate job performance but instead because the Complainant's multiple sclerosis symptomatically manifested itself on June 30, 1983, causing the Complainant to be hospitalized and miss half a day of work.

Four specific areas will be discussed. First, although the Respondent contends that the Complainant did not perform his job adequately, the evidence clearly contradicts the Respondent's stated reason. The Complainant's qualifications and ten year work history certainly did not comport with the picture Goddard attempted to paint of the Complainant's performance. In fact, when the evidence is sifted, it is clear that the Complainant did his job commendably. The Complainant came into his job without a written job descrip-

tion and began to learn his job mainly by assumption and implication. It would appear that Goddard merely told the Complainant to bring the new facility up to potential. Direction from Goddard was minimal. One gets the impression that Goddard would have us believe that it would be reasonable to have the Complainant take immediate y measures to discover and cure problems that were primarily caused by design defects attributable to Goddard himself. If Goddard's testimony at the public hearing was indicative of the directions given to the Complainant, it is easy to see how a subordinate of Goddard's could be confused. On several occasions during his testimony, Goddard was unclear and appeared confused.

Conversely, the Complainant produced numerous memorandums from himself to Goddard which were clear and insightful. Goddard's credibility was shaken severely when he attempted to downgrade the Complainant's reports by suggesting that they were on par with a technicians reports and not the caliber of a senior industrial engineer. On several occasions, Goddard agreed that the Complainant's performance in many areas was good. The Complainant's reports were precisely on target regarding matters which Goddard says were specific areas of concern to him. Also the Complainant's reports reflect proposals for significant economic savings, and Goddard recognized that he never responded to most of the Complainant's reports.

Goddard testified to certain productivity problems and attempted to lay all the blame at the Complainant's feet. However, when prompted, Goddard revealed a multitude of contributing factors causing production problems. Clearly, union problems significantly impacted production. Goddard wanted increased production rates and at the same time, he feared rate grievances from union members. The Complainant outlined a plan for an incentive rate

structure, much of which was apparently incorporated after the Complainant's departure.

As a whole, the evidence does not find a problem employee, instead, the Complainant appears to have taken unsolicited information with respect to evidence of problems, probed the information, and offered viable solutions which were often successfully acted upon.

Second, and even more disturbing is the question of the timing of the Complainant's discharge. When the Complainant began working he was placed on a 90 day probationary period. Since the Complainant was hired on March 9, 1983, his 90 day probationary status would have ended approximately the second week of June, 1983. Obviously, the Complainant's performance was good enough to carry him through the probationary period: the very period during which employers customarily scrutinize an employee for potential unacceptable work habits and performance. It is not in line with common experience that an employee who has just passed a probationary period would be reevaluated one month later and discharged for non-performance without some blatent intervening performance problem of great monument.

Another timing problem involves a company policy of relocating newly hired employees. The Complainant's move from New York State to the Reading area occurred in the later part of June, 1983. Bricker testified that before activating the Complainant's move he went to Goddard to insure the Complainant was working out. This occurred approximately June 20th, and at that time, Goddard had indicated that a minor problem had been corrected and it was okay to relocate the Complainant. This brings us even closer to July 15, 1983. The Respondent's entire credibility is placed in question by the timing issues presented in this case.

It appears that the root of the Respondent's negative attitude towards the Complainant did not begin to flower until after June 30, 1983. On that day, the Complainant began to experience an exaserbation of his multiple sclerosis and was taken to the hospital. Two weeks later, the Complainant was fired.

This brings us to the third discussion area. Although formal policies existed regarding documentation of performance problems and disciplinary steps prior to discharge, the Respondent utterly failed to adhere to its own written policies. About a year prior to the Complainant's employment, the Respondent had apparently experienced much difficulty during an arbitration matter because of insufficient personnel documentation. The problems were significant enough to cause the Respondent's corporate headquarters to issue a memorandum dated April 12, 1982, urging that all personnel interactions be adequately documented. Specific areas covered by the memorandum included, performance feedback, and disciplinary action.

In this matter, everyone agreed that the Complainant never received written notice of poor performance and the Complainant was clearly never told he was on the verge of termination. This directly conflicts with the stated concerns of the Respondent's corporate headquarters.

Also, although some dispute exists regarding their applicability to the Complainant, detailed work rules were in effect at the Respondent's facility during the Complainant's tenure with the Respondent. These work rules categorize offenses as either major or minor. Item number 12 under minor offenses states: "Carelessness or inefficient performance of job duties, including the failure to maintain proper standards of workmanship and performance."

Accordingly, the Respondent's rationale for discharge was the Complainant's commission of a minor offense. The work rules also define what procedures to follow when there has been a minor offense. These procedures include:

1. The first violation of ANY of the minor offenses will result in the receipt of a verbal warning.
2. The second violation of ANY of the minor offenses will result in receipt of a written warning.
3. The third violation of ANY of the minor offenses will result in final warning combined with probation and/or suspension.
4. The fourth violation of ANY of the minor offenses will result in discharge.

The Respondent's articulated action skipped the first three procedures. Whether these procedures applied to the Complainant, and the evidence weighs in favor of such a conclusion, or whether they did not, the Respondent's discharge was an extremely harsh measure which was outside of the parameters of prior terminations. The evidence contains reference to other supposed performance problem employees who received much more favorable treatment when performance problems were noted prior to the ultimate disciplinary action, i.e. termination. Bricker even gave unshaken testimony that the Complainant's handicap was a big factor in the decision.

The fourth and final discussion area deals with direct evidence of the existence of high level animus towards the Complainant's medical condition. Bricker credibly testified that following the Complainant's termination, Thomas Hawn, the Respondent's Personnel Director, made several references which are indicative of his discriminatory motivation.

During a discussion with Bricker regarding the June 30, 1983, exasperbation incident, Hawn stated that if the Complainant could not stand on his feet for eight hours, he was then not qualified to perform the job. On another

occasion, Hawn expressed his displeasure that Bricker had included handicap/disability affirmative action language in early correspondence with the Complainant. Bricker was instructed to refrain from using such comments in future correspondence.

These factors considered in combination lead to the conclusion that the Complainant has shown by a preponderance of the evidence that the Respondent's stated reason for discharging the Complainant was pretextual. Accordingly, after a careful review of the entire record in this case, it is my conclusion that the Respondent discriminated against the Complainant by discharging him in violation of Section 5 (a) of the PHRA.

Liability being established, the focus turns to the issue of damages. Section 9 of the PHRA provides that, upon a finding of discrimination:

> . . .the Commission shall. . . issue an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action including but not limited to. . . upgrading of employees, with or without backpay. . . as, in the judgment of the Commission, will effectuate the purposes of this Act. . . 43 P.S. 959.

The obvious purpose of an award is, within the legislative grant of authority, to restore the Complainant to the economic position in which he would have been had it not been for the act of discrimination. In the case at hand, the Complainant does not seek reinstatement but does seek backpay for the period between July 15, 1983, and February, 1985.

At the time the Complainant was discharged, he was a salaried employee making $30,000 per year. The Complainant was also given a separation allowance but could not remember how much it was. In calculating lost wages, the method of calculation need not be mathematically precise but should be a reasonable means to determine the amount the Complainant would probably have

earned but for the discriminatory act. PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Cmwlth. Ct. 1975), aff'd, 387 A.2d 58 (1978).

The Respondent correctly points out that in February, 1985, the Complainant ceased looking for alternate employment. It has long been recognized that amounts earnable with reasonable diligence shall operate to reduce the backpay otherwise allowable. See Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973). Here, however, the Complainant's efforts beginning in February, 1985, are not significant because the Complainant seeks lost backpay up to February, 1985, only.

The Respondent raises another consideration which has the effect of further reducing the Complainant's eligibility for a backpay award. The Complainant testified that beginning in February, 1985, he was classified as permanently and totally disabled and began receiving social security disability. The Complainant testified that he had a physical, completed paperwork, and awaited a "time frame." The Complainant was cut off before he gave further evidence regarding the meaning and effect of a "time frame." In the Respondent's brief, the Respondent cites 42 U.S.C. Section 423 (a)(1) which most likely refers to the time frame to which the Complainant alluded.

The Social Security Act provides that an individual may not receive disability benefits until at least the 5th month after which he has been continously eligible for the same. 42 U.S.C. Sec. 423 (C)(2).

Section 423 (C)(2)(A) indicates that an applicant had to be under a disability for five months, and Section 423 (d)(1)(A), and (2)(B) defines a disability as an "inability to engage in any substantial gainful activity. . . and an individual shall be determined to be under a disability only if his physical. . . impairments are of such severity that he is not only unable to

do his previous work but cannot. . . engage in any other kind of substantial gainful work which exists in the national economy. . ."

If the Complainant was totally disabled for at least five months prior to February, 1985, the Complainant would be deemed unavailable for work as early as September, 1984. In Canora v. N.L.R.B., 708 F.2d 1498 (9th Cir. 1983), the court indicated that ". . .an employer is not liable for backpay during periods that an improperly discharged employee is unavailable for work due to a disability." Accordingly, the Respondent's continuing liability for backpay is cut off beginning in September, 1984, due to the Complainant's status as permanently and totally disabled beginning as early as September, 1984.

The Respondent further argues that the Complainant should be ineligible for any backpay because his job search activities were neither reasonable nor diligent. On the contrary, the record portrays the Complainant, at least until February, 1985, as taking both reasonable and diligent measures to secure other suitable employment. The Complainant wrote numerous personal letters, made phone calls, answered ads, registered with both private and state employment agencies, sent out many resumes, and had approximately thirty job interviews. Just because the Complainant was unsuccessful does not mean that his efforts were not reasonable. It is the Respondent's burden to provide evidence that the Complainant failed to actively and diligently pursue other employment. In this case, the Respondent has not shown evidence of either a lack of diligence and reasonableness or an amount which could have been earned

The Complainant did find one very short temporary job for which he was paid $260.00. Of course, amounts earned from substitute employment are normally deductible. Accordingly, $260.00 must be deducted from the ultimate backpay award.

The Complainant's brief argues that he is entitled to job search expenses. Although expenses incurred in seeking interim employment have been approved by some federal courts, see Williams v. Albemarle City Board of Education, 508 F.2d 1242 (4th Cir. 1974), we should set off an award for these expenses with the separation allowance the Complainant said he received. See Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975). Since the Complainant did receive a separation payment but cannot remember how much, it is appropriate to deduct something. In this case, the expenses incurred in seeking interim employment were also not completely defined. It is equitable to have one party's mathematically imprecise expense set off the other.

One final damage calculation issue deserves comment before the general backpay calculations are made. That is, a Complainant's backpay award will not be diminished by unemployment compensation received. See Craig v. Y & Y Snacks, Inc., 721 F.2d 77, 33 FEP 187 (3rd Cir. 1983).

Based on the principles discussed, the following calculations are made to determine the Complainant's backpay plus interest award:

July 15, 1983 to December 31, 1983		
5½ months at $2,500 per month		$13,750.00
6% interest / 2.525%		347.19
minus interim earnings	-	260.00
		$13,837.19
January 1, 1984 to August 31, 1984		
7 months at $2,500 per month		$17,500.00
- SUBTOTAL -		$31,337.19
6% interest 1984		1,880.23
- SUBTOTAL -		$33,217.42
6% interest 1985		1,993.04
- SUBTOTAL -		$35,210.46
6% interest January, 1986 Mid November 1986 / 5.25%		1,848.54
Total lost wages plus interest		$37,059.00

Having concluded that the Respondent discriminated against the Complainant in violation of Section 5 of the PHRA, the relief is described in the Order which follows.

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEVIN R. CAHILL, COMPLAINANT	:	
v.	:	DOCKET NO. E-26878
IZOD LIMITED CHILDRENS DIVISION OF GENERAL MILLS, INC., RESPONDENT	:	

RECOMMENDATION OF THE HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, it is the view of the Hearing Examiner that the Respondent discharged the Complainant because of the Complainant's non-job related handicap or disability, multiple sclerosis, in violation of §5 (a) of the Pennsylvania Human Relations Act. Accordingly, it is the Hearing Examiner's recommendation that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Final Order be adopted by the full Pennsylvania Human Relations Commission.

Carl H. Summerson
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

PENNSYLVANIA HUMAN RELATIONS COMMISSION

KEVIN R. CAHILL, COMPLAINANT	:	
v.	:	DOCKET NO. E-26878
IZOD LIMITED CHILDRENS DIVISION OF GENERAL MILLS, INC., RESPONDENT	:	

FINAL ORDER

AND NOW, this 4th day of August, 1987, following review of the entire record in this matter, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

1. That the Respondent cease and desist from discriminating on the basis of non-job related handicap or disability.
2. That the Respondent shall pay to the Complainant within 30 days of the effective date of this Order, the lump sum of $37,059.00, which amount represents backpay lost for the period between July 15, 1983, and September 1, 1984, plus interest of 6% per annum, calculated up to the month during which the Public Hearing of this matter was held.
3. That the Respondent shall pay additional interest of 6% per annum calculated from the effective date of this Order until payment is made.

4. That within 30 days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Ellen K. Barry, Esquire, in the PHRC Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Thomas L. McGill, Jr.
Thomas L. McGill, Jr.
Chairperson

ATTEST:

John P. Wisniewski
John P. Wisniewski
Secretary