COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IDA V. SIEBER, AND FREDA C. GEORGE, COMPLAINANTS

v.

FREEDOM FORGE CORPORATION OF AMERICA, RESPONDENT

DOCKET NO. E-8519

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RECOMMENDATION OF HEARING PANEL CHAIRPERSON

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STIPULATIONS OF FACT

The parties hereby stipulate and agree that the following stipulations are admitted for the purposes of the public hearing in the above-captioned matter and that no further proof thereof shall be required.

1. The Complainants herein are Ida V. Sieber and Freda C. George, individuals within the meaning of Section 5(a) of the Pennsylvania Human Relations Act (hereinafter referred to as "the Act")
2. Respondent herein is Freedom Forge Corporation, an employer within the meaning of Section 5(a) of the Act.
3. On or about September 13, 1974, the Complainants applied for production jobs with Respondent.
4. On or about March 5, 1975, the Complainants filed a Complaint with the Commission, a copy of which is attached hereto as Appendix A.
5. On or about March 4, 1976, the Complainants filed an Amended Complaint with the Commission, a copy of which is attached hereto as Appendix B.
6. On or about December 2, 1975, Complainant Sieber was given a General Aptitude Test Battery (hereinafter referred to as "the GATB") , administered by the Pennsylvania Bureau of Employment Security.
7. Complainant Sieber scored "high" in the areas of Repair Machine Shop, Internal Transportation and Stores, and “low” in all other areas.
8. On or about December 3, 1975, Complainant George was given the GATB test, administered by the Pennsylvania Bureau of Employment Security.
9. Complainant George scored "high" in the areas of Repair Machine Shop, Internal Transportation and Stores, "medium" in six areas, and "low" in four areas.
10. The GATB test results correspond to specific departments/shops at Respondent.
11. Attached hereto as Appendix C are two pages of GATB test results, which include Complainants' test results, as well as those of the five women hired by Respondent in December, 1975 and January, 1976.
12. The Complainants have never been hired by Respondent for production jobs.

G. Thompson Bell
Assistant General Counsel
Pennsylvania Human Relations Commission
Harrisburg Regional Office
3405 North Sixth Street
Harrisburg, PA 17110

Counsel for Complainants

Thomas L. Van Kirk
Wendelynne J. Newton
Buchanan Ingersoll
Professional Corporation
57th Floor, 600 Grant Street
Pittsburgh, PA 15219

Counsel for Respondent

FINDINGS OF FACT

The foregoing "Stipulation of Facts" is 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 these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
S.F. Stipulation of Facts
C. Complaint

1. As of 1974, both Sieber and George had approximately 30 years of production work experience. (N.T. 19-29, 103-111, 158-159)
2. Prior to applying for production positions with Standard, both Sieber and George had worked approximately 23 years with FMC Corporation.
3. On September 13, 1974, after learning that they would soon lose their jobs at FMC Corporation, Sieber and George separately applied for production work at Standard's Burnham plant. (C.E. 1, 3; N.T. 31, 119)
4. When Sieber applied for a production job with Standard on September 13, 1974, she was told by Samuel Steese, an employee of Standard responsible for distributing and receiving employment applications, that Standard did not hire women for production positions and that there were no bathroom facilities available for women. (N.T. 120, 121)
5. Between September 13, 1974, and January of 1975, Complainants were not contacted by Standard. (N.T. 33, 121)
6. In January of 1975, Complainants went together to Standard's plant to up-date their applications. (N.T. 33-38, 121-123)
7. When Complainants went to upgrade their applications in January of 1975, they were told by Steese that Standard in essence did not hire women for production work and that no bathroom facilities were available for women. (N.T. 37, 80, 95, 122)
8. Between January of 1975 and December of 1975, Standard did not contact Sieber or George with respect to their job applications. (N.T. 38, 124)
9. Between September 13, 1974, and December of 1975, Standard hired 59 persons for production work, all of them were men. (C.E. 9)
10. Between W.W. II and December of 1975, Standard did not hire any women for production jobs, despite the fact that approximately forty percent (40%) of the relevant labor pool was female. (C.E. 6, p. 6; C.E. 8)
11. Between W.W. II and December of 1975, Respondent hired hundreds of men for production work. (C.E. 6, EEO-1 Forms; C.E. 7)
12. During 1974 and 1975, Standard emphasized hiring men with families. (N.T. 169)
13. Prior to December of 1975, Standard used the non-validated Wonderlic test as an employment screening device. (N.T. 171, 260)
14. In December of 1975, Standard significantly altered its selection procedure by instituting the General Apptitude Test Battery (GATB), as a screening device. Additionally, Standard made a decision to hire women into production positions. (N.T. 217; C.E. 6)

15. The GATB is a battery of 12 tests each correlated to correspond to a department at Standard. (N.T.218)
16. Applicants who took the GATB were given a score of high, medium or low on .each test. (N.T. 218)
17. Applicants who receive a "high" score in a particular test are given a reference check and then a personal interview when a vacancy becomes available in the corresponding department. (N.T. 281, 289)
18. Both Sieber and George took the GATB in December of 1975. (S.F. 8, 10)
19. Both Sieber and George scored “high” in the areas of stores, internal transportation and repair machine shop. (S.F. 8, 10)
20. After Sieber and George took Standard's GATB in December of 1975, Standard hired 17 persons into stores, internal transportation and repair machine department. (C.E. 10)
21. Neither Sieber nor George were hired for any of these positions. (S.F. 13)
22. With Sieber and George, Standard deviated from its normal procedure in that Standard did not perform reference checks on Sieber and George when vacancies occurred in the stores, internal transportation and repair machine departments subsequent to December of 1975. (N.T. 264)
23. Had Sieber and George been hired on September 16, 1974, for the first available position after submitting their applications, they would have been laid off on or about August 6, 1982. (R.E. 6)
24. If Standard had hired Sieber and George between September 16, 1974, and August 6, 1982, Sieber and George would have earned from Standard at least $112,506.84. (C.E. 11; R.E. 6)
25. Between September 16, 1974, and August 6, 1982, Sieber had deductible earnings of $57,487.91 earned at employment she obtained in lieu of not being hired by Standard.
26. Sieber would have been able to hold the position as Registrar of Birth and Death Records for Mifflin County even if she had been hired by Standard. (N.T. 161)
27. From September 16, 1974, until August 6, 1982, George earned a total of $29,164.06. (N.T. 48-49; C.E. 2)
28. From September 16, 1974, until August 6, 1982, George did not leave or refuse any positions which afforded identical promotional opportunities, compensation, job responsibilities, working conditions, and status as production work with Standard. (N.T. 40-46, 98-99)
29. From September 16, 1974, to August 6, 1982, George used reasonable care and diligence in seeking employment. (N.T. 40-46, 98-99)

CONCLUSIONS OF LAW

1. Complainants are individuals within the meanings of Sections 4 and 5 of the PHRA.
2. Respondent is an employer within the meaning of Sections 4 and 5 of the PHRA.
3. The parties and the Commission have met all procedural pre-requisites to a public hearing in this case.
4. The Commission has jurisdiction over the parties and subject matter of this case.
5. The doctrine of laches consists of two parts: inexcusable delay and prejudice resulting.
6. The party asserting a laches claim must demonstrate prejudice with such clarity as to leave no room for controversy.

7. Hearsay evidence supported by other evidence may be admitted into administrative proceedings.
8. Complainants have presented a case of unlawful sex discrimination with respect to Respondent's failure to hire them for production positions by direct evidence.
9. Complainants have established prima facie case of unlawful sex discrimination with respect to Respondent's failure to hire them by introducing statistical evidence which showed a gross disparity.
10. Complainant's have established a prima facie case of unlawful sex discrimination with respect to Respondent's failure to hire them by showing that:

    a. They are members of a protected class;
    b. They applied for a position for which they were qualified;
    c. They were rejected for the position; and
    d. Respondent continued to see other applicants for the job.

11. Respondent has failed to rebut Complainants' prima facie case by clearly articulating a legitimate, non-discriminatory reason for failing to hire the Complainants.
12. After a prima facie case has been established, a Respondent has the burden to demonstrate that the Complainant was not the best qualified.
13. A Respondent's subsequent measures to correct discriminatory practices do not affect the liability for a prior violation.
14. After a finding of discrimination, the Commission is empowered by Section 9 of the Act to award appropriate relief including reinstatement and lost wages.
15. When a Complainant has shown an economic loss, back-pay should be awarded absent special circumstances.
16. A back-pay award will not be reduced by earnings from a part- time job which a Complainant would have maintained even if hired by a Respondent.
17. Unemployment benefits received are not to be deducted from a back-pay award.
18. Complainant George used reasonable care and diligence in seeking comparable work following Standard's refusal to hire her.

OPINION

I. HISTORY OF THE CASE

This matter arises on a complaint filed by Ms. Ida V. Sieber and Ms. Freda C. George, ("Complainants") against Titanium Metals Corporation of America, Standard Steel Division. The complaint, filed on March 5, 1975, alleged that the Respondent refused to hire the Complainants for production worker positions because of their sex, female, in violation of Section 5(a) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq., (hereinafter the "PHRA"). On March 4, 1976, the Complainants filed an amendment to their complaint which alleged that the Respondent also violated Sections 5(a) and Section 5(d) of the PHRA by additionally refusing to hire the Complainants because of their ages, Ida Sieber -- 49, and Freda George -- 50, and by retaliating against the Complainants because they had previously filed their complaint.

At the pre-hearing conference, held on September 16, 1985, the parties also agreed to an additional amendment of the complaint which changed the name of the Respondent from Titanium Metals Corporation of America to Freedom Forge Corporation, a wholly owned subsidiary of Titanium Metals Corporation. (In this opinion, Freedom Forge Corporation shall be referred to as either the "Respondent" or "Standard ") .

This case was investigated and a determination was made that probable cause existed to credit the allegations. Thereafter, the Commission endeavored to eliminate the practices complained of by conference, conciliation, and persuasion. These efforts were unsuccessful. Accordingly, a public hearing was approved.

The public hearing was held on April 9 and 10, 1986, before Commissioners Rita Clark, Hearing Panel Chairperson; Doris M. Leader; and Raquel Otero de Yiengst. G. Thompson Bell, Assistant General Counsel, and Matthew McCullough, Esquire, a legal intern, presented the case on behalf of the Complainants, and Thomas L. Vankirk, Esquire, and Wendelynne J. Newton, appeared on behalf of the Respondent.

II. ANALYSIS

A. LACHES

At the outset of the public hearing, the Respondent renewed its Motion which had been previously denied to have this case dismissed on the basis of laches. The Respondent argued that the lengthy delay in this case was not attributable in any way to the Respondent. Additionally, the Respondent's counsel suggested there were witnesses that were no longer with the Respondent and who "did not elect to become involved and go through the massive paper work and refresh their recollection".

The Commonwealth Court of Pennsylvania has indicated that the defense of laches may not even be applicable to an administrative proceeding such as a public hearing before the Pennsylvania Human Relations Commission, Department of Transportation v. PHRC, 480 A.2d 342, 348 (Pa. Cmwlth. 1984), reversed on other grounds A.2d (1986). However, since the issue has not been finally resolved, the merits of the Respondent's laches claim have been evaluated.

Fundamentally, more than the mere passage of time must be shown to raise a successful defense based on laches. Department of Transportation v. PHRC, supra at 348; EEOC v. Westinghouse Electric Corp., 18 EPD ¶8929, 592 F.2d 484 (8th Cir. 1979). The standard concept of laches has two parts: inexcusable delay in instituting a suit and prejudice resulting to a Respondent from such delay, Anaconda Company v. Metric Tool & Dye Company, 485 F.Supp. 410 (D.C. Pa. 1980). The party asserting the laches claim must demonstrate prejudice resulting from the time lapse. Whether prejudice has been shown is a factual question determined by examining the circumstances of each case, Leedom v. Thomas, 473 Pa. 193,373 A.2d 1329 (1977).

In the present case it is readily apparent to all that there was a delay. The question is, however, are both factors present? Was the Respondent so prejudiced as to be unable to prepare an adequate defense? In EEOC v. Westinghouse Electric Corp., 18 EPD ¶8929, 592 F.2d 484 (8th

Cir. 1979), the Circuit Court indicated that a Respondent must establish "with such clarity as to leave no room for controversy" that its ability to establish a defense has been substantially impaired.

Without resolving the question of whether the extended delay in this case was inexcusable we need only review the content of the Respondent1s argument and the testimony of Respondent's sole witness to determine that the Respondent failed to establish prejudice. First, the Respondent's counsel asserted that potential witnesses were no longer employees of the Respondent and did not want to get involved. Apparently, the Respondent chose not to take advantage of the process of subpoenaes and their enforcement provided for in 16 Pa. Code §§42.103 and 42.104. No evidence was presented regarding even the Respondent's slightest effort to obtain witnesses for the public hearing. The Respondent cannot argue witness unavailability prejudice without a showing of some unsuccessful reasonable effort extended.

Second, on cross examination, Respondent's sole witness, Mr. Heimbach, clearly indicated that to his knowledge no documents were lost or destroyed in connection with either information regarding the Complainants or information needed by the Respondent for preparation of its case.

Lastly, Respondent's counsel attempted to infer prejudice from the fact that Mr. David Herst, a retired director of industrial relations, was now living in Georgia. Mr. Herst was Respondent's representative with whom Mr. Smedley, a PHRC investigator, testified to having had numerous discussions early in the investigation of this case. Mr. Heimbach testified on cross examination that he knew of no reason why Mr. Herst could not come from Georgia to testify.

Accordingly, Respondent's failure to submit any evidence of prejudice appropriately results in the denial of the Respondent's Motion to Dismiss this case based on the doctrine of laches.

B. BACKGROUND

On September 13, 1974, Ida Sieber, (hereinafter "Sieber"), and Freda George, (hereinafter "George"), filled out and submitted applications for production positions at Standard's Burnham Pennsylvania plant. At the time of their applications for employment with Standard, both Sieber and George were employees of FMC Corporation, and had been production workers at FMC for almost 23 years.

In the late Summer of 1974, Sieber and George were notified that .their department at FMC would be phased out. Once advised of the likelihood of the eventual loss of their jobs at FMC, Sieber and George applied at Standard.

The submission of George's application was uneventful. However, Sieber's testimony regarding her experience indicated that after Sieber completed her application, Mr. Samuel Steese looked at it and told her, “[w]e don't hire women on production. Here we don't have any women on production. We don't have facilities for them, bathroom facilities for them." Sieber still gave Steese her application and left Standard's employment office.

Neither Sieber nor George heard anything from Standard, so together in January of 1975, they went back to Standard's employment office to update their job applications. Sieber testified that she once again spoke to Steese. On this occasion, Sieber indicated that she asked when she and George could expect to be called. Sieber testified further that Steese again told her that Standard did not have bathroom facilities for women. George's testimony paralleled Sieber's.

The next contact, either direct on indirect, Seiber and George had with Standard was approximately 11 months later in December of 1975. Neither Sieber nor George was ever contacted directly by Standard for an interview or to further process their applications in any way.

Between September of 1974 and December of 1975, Standard hired 59 persons for production work. All 59 persons hired were men. In fact, until after December of 1975, Standard had not hired a woman in a production position since World War II, despite the fact that approximately 40% of the area labor pool was female. Between World War II and December of 1975, Standard had hired hundreds of employees. Very little evidence was submitted regarding Standard's selection procedure prior to December of 1975. The only pre-December, 1975 screening device mentioned at hearing was the non-validated Wonderlic test. Neither Sieber nor George were ever administered the Wonderlic test. Sieber and George were both contacted approximately in December of 1975 by the Bureau of Employment Security to take a General Aptitude Test Battery,(GATB).

In December of 1975, Standard began using the GATB as a screening device.

The post-December 1975, GATB was administered for Standard by the unemployment office. Standard reviewed all active applications to determine which applicants met the minimum qualifications for their production position. Those applicants who met the minimum qualifications were notified to come to the unemployment office to take the GATB.

Sieber and George both took the GATB. The GATB is a 2½ hour battery of 12 tests designed to measure nine different aptitudes. Prior to Standard's use of the GATB, Respondent representative and a representative of the testing division of the Bureau of Employment Security correlated the GATB with the various departments at Standard. The 12 scores on the GATB fell into three categories: high, medium or low.

Standard's initial approach was to consider only correlated area scores of high as qualification for a particular department. If an applicant scored high on only one of the 12 possible scores, Standard considered that applicant as qualified for the shop or department at Standard to which the score related. Then, when a vacancy became available in a corresponding department, the applicants with high scores were further processed. Specifically, Standard performed a reference check and then gave high scoring applicants a personal interview.

Sieber and George scored high in the same three areas on their GATB: stores, internal transportation, and repair machine shop. Following Sieber and George's testing, Standard hired 17 persons into these three departments. Neither Sieber nor George was one of the 17 hired. Additionally, with Sieber and George, Standard did not follow their prescribed procedure

because Standard neither performed referenced checks on Sieber and George nor gave either of them a personal interview.

C. SEX DISCRIMINATION LIABILITY

There are at least three ways that a Complainant can prove that a Respondent's actions constitute unlawful employment discrimination: (1) by direct evidence relevant to and sufficiently probative of the issue, Cline v. Roadway Express, Inc., 689 F.2d 481, 30 EPD ¶33,042 (4th Cir. 1982); (2) by general statistics alone, Hazelwood School District of U.S., 433 U.S. 299, 15 FEP 1 (1977); Lynn v. Regents, University of California, 656 F.2d 1337, 28 FEP 410 (9th Cir. 1981), cert. denied, 29 FEP 1560 (1982); and (3) by the now familiar four-prong prima facie test first established by the U.S. Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973).

In this case, there is evidence of all three of the listed methods of proof that the Respondent's decision not to hire the Complainants was more likely than not based on sex, a discriminatory criterion illegal under the PHRA, see Furnco Construction Corp. v. Waters, 438 U.S. 567, 17 FEP 1062 (1978). Of the three listed methods of proof, the Federal case law suggests that only methods two and three raise an inference of discrimination. See Furnco Construction Corp., 438 U.S. at 577. The direct evidence method of proof uses ordinary principles of proof without resort to any special judicially created presumptions or inferences related to the evidence. Cline v. Roadway Express, Inc., 689 F.2d 481, 30 EPD ¶33,042 (4th Cir. 1982), citing Lovelace v. Sherwin-Williams Co., 29 EPD ¶32,833 (4th Cir. 1982).

1. Direct Evidence of Sex Discrimination

Under this method of proof, a Complainant may introduce evidence that a Respondent announced or admitted, or otherwise unmistakably indicated that an unlawful discriminatory criterion was used, see Spagnuola v. Whirlpool Corp., 641 F.2d 1109, 25 EPD ¶31,596 (4th Cir. 1981). In this case, Samuel Steese, a Standard employee working in Standard's employment office, told Sieber on two occasions and George on one occasion, that Standard did not hire women into production positions and that Standard did not have adequate bathroom facilities for women.

This evidence was unrebutted, however, the Respondent did raise a hearsay objection to Sieber and George's testimony regarding what Steese said. The evidence was provisionally admitted, and upon consideration of all the evidence submitted in this case, it is clear that the statements attributable to Steese are corroborated by other admissible evidence. Hearsay evidence supported by other evidence may be admitted into proceedings before administrative agencies, Board of Public Education of School District of Pittsburgh v. Pyle, 390 A.2d 904, 37 Pa.Cmwlth. 386 (1978).

In this case, Mr. Smedley testified that Mr. Herst made similar statements to him, and statistically, the Respondent's record for hiring women into production jobs was abysmal. such evidence corroborates the Complainant's testimony regarding what Steese told Sieber. In the alternative, Steese's statements can be considered as an exception to the hearsay rule **in** that such statements are clearly admissions against interest.

This case also contains additional testimony which we find constitutes direct evidence of unlawful sex discrimination. First Mr. Smedley testified that Mr. Herst told him that during 1975 and 1976, Standard emphasized hiring "heads of households" meaning, “men with families". Finally, when Sieber and George submitted employment applications in September of 1974, they were not given the Wonderlic Intelligence Test which Standard administered to job applicants at that time.

As a whole, such direct evidence clearly supports a strong inference of sex discrimination. Where as here there is direct evidence that a challenged action is based on discriminatory considerations, there is substantial and persuasive federal authority for the proposition that a Respondent must prove by a preponderance of the evidence that it would have made the same decision without regard to the discriminatory factor. See Renner v. Montour School District, Docket No. E-28299 (PHRC, July 2, 1986), citing, Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1982); Ramirez v. Sloss, 615 F.2d 163 (5th Cir. 1980); Crawford v. Western Electric Company, Inc., 614 F.2d 1300 (5th Giro 1980); and see Mt. Healthy School District v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977). The direct evidence removes the need for the McDonnell-Douglas analysis, the purpose of which is to isolate the factor underlying the challenged action. Also, where there is direct evidence of an employer’s intent, there is no need for independent proof of pretext. Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir.), cert. denied 454 U.S. 860 (1981); Loeb v. Textron, 600 F.2d 1003 (1st Giro 1979).

In this case, however, the pattern of proof was broken because the Respondent offered literally no rationale for its failure to hire either Sieber or George between September 13, 1974, and December of 1975, a period of approximately 15 months. Respondent counsel did state that Standard had received approximately 2,000 applications during this time period. However, such information was never submitted as evidence through a witness or by documentary evidence. The closest Respondent counsel came to introducing such information was a question posed to Sieber regarding whether it would surprise her to know that Standard had between 1,000 and 2,000 applications. Basically, the question contained facts not in evidence. As such this information could not be considered.

2. Statistical Proof

A Complainant may establish a prima facie showing of unlawful discrimination without using the McDonnell Douglas formula. Lynn v. Regents, University of California, 656 F.2d 1337, 28 FEP 410 (9th Cir. 1981), cert. denied, 29 FEP 1560 (1982). In McDonnell Douglas, 411 U.S. at 805, the U.S. Supreme Court has indicated that general statistical data is helpful in individual employment discrimination cases.

In Hazlewood School District v. U.S., 433 U.S. 299, 15 FEP 1 (1977) the U.S. Supreme Court provided more clarity to this issue by stating "[w]here gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination", citing Teamsters v. U.S., 431 U.S. 324 , 14 FEP 1520 (1977); see also, EEOC v. Cook Paint & Varnish Co., 24 FEP 51 (W.D.Mo. 1980).

The statistical evidence in this record strikingly shows a pattern of discrimination by Standard against women. From World War II until December of 1975 no women were hired into Standard's substantial production workforce. This period includes September of 1974 through December of 1975, the 15 month period in which the Complainants were not considered by Standard for production positions.

The gross statistical discrepancy in this case quite easily establishes a prima facie showing of sex discrimination.

3. McDonnell Douglas Prima Facie Case

McDonnell Douglas v. Green, 411 U.S. 792 (1973) set forth the specific elements of a prima facie case of employment discrimination. Under its often repeated test adopted by the Pennsylvania Human Relations Commission, the Complainants must show:

1. That they belong to a protected group;
2. That they applied for positions for which they were qualified;
3. That despite their qualifications, they were rejected for the positions; and
4. That the Respondent continued to seek other applicants for the positions.

The PHRC has consistently held that the burden of establishing a prima facie case is not onerous. Here, Sieber and George quite easily satisfy the four-prong prima facie test. Sieber and George are females who applied for production positions with Standard, first on September 13, 1974, and again in January of 1975.

Respondent argues the Complainants failed to establish that they were qualified for open production positions. However, the evidence reveals that the Complainants were clearly qualified for production positions. Both Sieber and George had approximately 23 years of production experience with FMC Corporation. At the time Sieber and George applied, the Respondent was unquestionably hiring other transfers from the FMC Corporation. Additionally, and more specifically revealing are the Respondent's own procedures. When the Respondent began to use the GATB, the Respondent contacted the Office of Employment Security to advise which applicants they wanted to test. Heimbach testified that Standard first reviewed applications to determine who should be tested. Sieber and George were both selected to be tested, thus indicating the Respondent considered them at least minimally qualified for production positions. Finally, Heimbach also indicated that some production jobs were totally unskilled jobs. Accordingly, the Complainants were qualified. Equally clear is the fact that neither Sieber nor George were hired, yet Standard continued to seek and hire other applicants. Accordingly, all four-prongs of the Complainants' prima facie case have been established.

REBUTTABLE PRESUMPTION

The Complainants' prima facie case identifies sex discrimination as the likely reason for the denial of the production position opportunity. See White v. City of San Diego, 605 F.2d 455, 20 FEP 1649 (9th Cir. 1979). A properly established prima facie case allows an inference of illegal

discrimination, creating a legally mandatory, rebuttable presumption against the Respondent, see Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 25 FEP 113 (1981); Casillas v. U.S. Navy, 735 F.2d 338, 34 FEP 1493 (9th Cir. 1984).

In this case, the Complainants' prima facie cases create the presumption that in September of 1974 and in January of 1975, the Respondent's refusal to hire the Complainants was more likely than not because of their sex, female. Accordingly, the time frame for determining initial liability on the sex discrimination allegations would be September of 1974 and January of 1975.

In federal cases, once a prima facie case has been shown and the presumption of discrimination created, the burden shifts to the Respondent to articulate some legitimate, non-discriminatory reason for the failure to hire, see Texas Department of Community Affairs v. Burdine, at 257. The factual setting of Dillon v. Coles, 746 F.2d 998, 36 FEP 159 (3rd Cir. 1984), illustrates a Respondent which failed to meet this burden, similar to Standard's failure in the present case. As with Standard, the Respondent in Dillon failed to produce evidence of a Complainant's relative lack of qualifications. Having failed to introduce evidence to raise a genuine issue of fact about the Complainant's credentials, the Respondent in Dillon did not meet its burden of production under Burdine.

Dillon is consistent with the Pa. Supreme court case of General Electric Corp. v. PHRC, 365 A.2d 649 (1976). In General Electric, the court emphasized that effective enforcement of the PHRA seems best promoted by casting the burden on a Respondent to demonstrate that the female claiming discrimination was not the best qualified.

In the present case, the record is devoid of any rationale for the Respondent's actions between September of 1974 and December of 1975. Instead, Standard relies on subsequent measures and an argument that Sieber and George's December of 1975 GATB scores qualified the Complainants for only a small number of jobs. However, Sieber and George's qualifications should have been compared with the 59 men hired during the period between September of 1974 and December of 1975. As previously noted, the time frame for determining liability is September of 1974 and January of 1975.

Standard's new program beginning in December of 1975 may well be seen as a subsequent measure to correct a prior pattern violation, however, such a measure does not affect the liability for the original violation. See EEOC v. Cook Paint & Varnish Co., 24 FEP 51 (W.D.Mo. 1980), in which a Respondent's defense based on after the fact events totally fails to articulate a legitimate, non-discriminatory reason for its actions.

Since Standard offered no explanation for its decision to reject Sieber and George, it remained silent in the fact of the presumption created by Sieber and George's prima facie case. Thus, Sieber and George's . prima facie showing is sufficient to meet their ultimate burden of proving unlawful discrimination. Nanty v. Barrons Co., 27 EPD ¶32,224 (9th Cir. 1981), citing Burdine and McDonnell Douglas.

Having reached this conclusion, it is unnecessary to fully consider why Sieber and George were not hired after December of 1975. Sieber and George have demonstrated that it is more likely

than not that but for their sex, they would have been hired prior to December of 1975, and never would have been involved in Standard's GATB program.

D. REMEDY

Section 9 of the Act provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice...the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent 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 hiring...upgrading...with or without back pay...as, in the judgment of the Commission... will effectuate the purposes of the Act...

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice, See Albemarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa.S.Ct. 1973).

The first aspect we now consider regarding making Sieber and George whole is the issue of the extent of financial losses suffered. When Complainants prove an economic loss, back pay should be awarded absent special circumstances, See Walker v. Ford Motor Co. Inc., 684 F.2d 1355, 29 FEP 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the Complainants] would probably have earned..." PHRC V. Transit Casualty Insurance Co., 340 A.2d 624 (Pa.Cmwlth. 1975), aff'd 387 A.2d 58
(1978).

In this case, there are several specific considerations which must be reviewed prior to calculating lost earning. First, when should the lost wages period begin and end? The evidence reveals that the commencement period should be September 16, 1974, the date Standard first hired a production worker following the Complainant's application. The termination of the period of lost wages shall be August 6, 1982. We agree with Complainant's argument that if they would have been hired in September of 1974, layoffs at Standard would not have affected them until this date. Accordingly, lost wages will be calculated between the period September 16, 1974, until August 6, 1982.

Next, it is a fundamental principle of law that a back-pay award should be reduced by actual earnings, See PHRC v. Transit Casualty Insurance Co., supra. However, in Sieber's case, she had part-time employment as Registrar of County Birth and Death Records, which could have been held along with a job with Standard. We shall not deduct these earnings because the evidence clearly shows that Sieber would have been able to maintain the registrar position even with the job at issue at Standard, See Buck v. Board of Education, 10 EPD ¶10, 363 (E.D.N.Y. 1975).

With these considerations in mind, the evidence indicates that at a minimum, as production workers at Standard, Complainants would have earned at least the following amounts during the period from September 16, 1974, through August 6, 1982:

Time Period	Amount
9/16/74-11/1/74	$ 846.00 (3.525/hr x 40 hrs/wk x 6 wks)
11/2/74-11/1/75	$ 8,788.00 ($4.225/hr x 40 hrs/wk x 52 wks)
11/2/75-1/1/76	$ 1,733.00 (4.815/hr x 40 hrs/wk x 9 wks)
1976	$10,395.00
1977	$11,154.00
1978	$13,078.84 ($9,456. hypothetically earned during 1st three quarters + $763.84 hypothetically earned during 10/1/78-10/22/78 + $2,859 actually earned by comparable employee during 10/23/78-12/31/78)
1979	$18,660.00 (Amount actually earned by comparable employee
1980	$14,943. (Amount actually earned by comparable employee)
1981	$20,920.00 (Amount actually earned by comparable employee)
1/1/81-8/6/82	$11,989.00 (Amount actually earned by comparable employee)
TOTAL	$112,506.84

During this period Sieber earned the following deductible earnings:

9/16/74-12/31/74	$ 1,810.23 (Sieber's total earning for 1974, $6,275.47 ÷ 52 wks x 15 (the number of weeks in the period))
1975	$ 589.45
1976	$ 250.00 (approximately)
1977	$ 7,985.00
1978	$ 5,802.94
1979	$ 9,798.87
1980	$10,977.95
1981	$12,310.75
1/1/82-8/6/82	$ 7,962.72 (Sieber's total deductible earnings during 1982, $13,650.82 ÷ 12 mos x 8 (months in the period))
TOTAL	$57,487.91

George earned the following:

9/16/74-12/31/74	$ 1,810.23 (Estimated figure which is the same as Sieber's earnings for this period, based on the fact that George had same job as Sieber)
1975	$ 144.00 ($1.80 (minimum wage) x 40 hrs per wk x 2 wks)
1976	$ 3,320.00
1977	$ 2,900.52

1978	$ 6,192.74
1979	$ 4,172.00
1980	$ 4,562.53
1981	$ 4,022.78
1/1/81-8/6/82	$ 2,039.26 George's total earnings for 1982 $3,495.89 ÷ 12 mos x 8 (months in the period))
TOTAL	$29,164.06

In the Respondent's brief, the calculations used deduct unemployment compensation. However, the decision not to deduct unemployment compensation is within our discretion, see Jackson v. Wakulla Springs & Lodge, 33 FEP 1301 (N.D.Fla. 1983). Additionally, we agree with the Third, Fourth, Ninth, and Eleventh Circuits which have adopted a rule that there should be no deduction for unemployment benefits. Craig v. Y & Y Snacks, Inc., 33 FEP 187 (3rd Cir. 1983); see also Williamsburg Community School District v. PHRC, No. 2590 C.D. 1985, slip op. at 5 and 6 (Pa. Cmwlth. July 28, 1986).

Standard also argues that George's award should be reduced because she failed to mitigate her damages. Standard asserts that George had sporadic employment and frequently voluntarily terminated job opportunities without good cause.

A Respondent bears the burden of proving facts to enable a determination of an appropriate deduction, see Kaplan v. IATSE, 525 F.2d 1354, 11 FEP 872 (9th Cir. 1975). In order to meet this burden, Standard must show that: 1) there were substantially equivalent positions which were available; and 2) that George failed to use reasonable care and diligence in seeking such positions. Rasimas v. Michigan Department of Mental Health, 32 EPD ¶33,758, p. 30,649 (6th Cir. 1983), citing, Sias v. City Demonstration Agency, 588 F.2d 692, 696 (9th Cir. 1978); and EEOC v. Saudia, 639 F.2d 600, 627 (10th Cir. 1980). "Substantially equivalent employment" means a position that affords "virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status." Rasimas at p. 30, 649, citing, EEOC v. Ford Motor Co., 102 S.Ct. 3057, 3065 (1982).

Not only has Standard failed to show that George did not exercise reasonable diligence to locate substantially equivalent employment, the record is clear that George made extraordinary efforts to find work after she left FMC. She had eight (8) jobs between 1975 and 1982. In one instance (Gordon Wire), George left because the company went out of business; in another instance (Green Gables), she left to begin a better job; in three instances (Empire Kosher, Fisher Electronics, and Selinsgrove Center), she left for compelling health reasons; in yet another instance (snack bar in Harrisburg), she left because of an unreasonably long and costly commute; in another instance (Lutheran Homes Hospital in Montana), she left for important personal reasons; and in yet another instance (Arrow Shirt), she left because she was unable to perform the required duties.

All of these reasons are valid and in no way show a lack of reasonable diligence. Moreover, the Respondent has not shown that any of these jobs was substantially equivalent to the production

job at Standard. They appear to have different promotional opportunities, compensation, job responsibilities, and working conditions.

Accordingly, Sieber is entitled to a lump sum back-pay award of $55,018.93, and George is entitled to a lump sum back-pay award of $83,342.78, plus 6% simple interest per annum, calculated from August of 1982 until the date that such awards are paid.

We next turn to the affirmative remedy of hiring. Presently, Standard has numerous employees in a layoff status. Sieber and George should be given retroactive seniority and placed on Standard's seniority list in a preferred position as if they had been hired in September of 1974, and offered the next available production positions in either the Repair Machine Shop or Internal Transportation, or Stores, in order of such retroactive seniority as if Sieber and George had been laid off in August of 1982.

Lastly, a cease and desist order is appropriate.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IDA V. SIEBER, AND FREDA C. GEORGE, COMPLAINANTS

v.

FREEDOM FORGE CORPORATION OF AMERICA, RESPONDENT

DOCKET NO. E-8519

RECOMMENDATION OF HEARING PANEL COMMISSIONERS

Upon consideration of the entire record in this matter, including the complaints, stipulations, exhibits, notes of testimony, and briefs filed on behalf of the parties, we hereby adopt the attached as our proposed Findings of Fact, Conclusions of Law, Opinion, and Final Order, and recommend that same be finally adopted and issued by the PA Human Relations Commission.

Doris M. Leader — 29 September 1986

Doris M. Leader, Hearing Commissioner — Date

Raquel Otero de Yiengst — 29 September 1986

Raquel Otero de Yiengst, Hearing Commissioner — Date

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IDA V. SIEBER, AND FREDA C. GEORGE, COMPLAINANTS

v.

FREEDOM FORGE CORPORATION OF AMERICA, RESPONDENT

DOCKET NO. E-8519

COMMISSION'S DECISION AND FINAL ORDER

AND NOW, this 7th day of October, 1986, following a review of the entire record in this case, the PA Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of a majority of the Hearing Commissioners, and therefore

ORDERS

1. That Respondent cease and desist from discriminating in any manner against any present or potential employee on the basis of that person's sex;
2. That Respondent place Complainants Sieber and George on Respondent's seniority list in a preferred position as if they had been hired in September of 1974;
3. That Respondent offer Complainants the next available production positions in the Repair Machine Shop, or in Internal Transportation, or in Stores, consistent with the retroactive seniority given in item #2 above, as if Sieber and George had been laid off on August 6, 1982;
4. That Respondent shall pay to Complainant Sieber, a lump sum of $55,018.93, representing the amount equal to the difference between what she actually earned since Standard's refusal to hire her and what she would have earned if she had been hired on September 16, 1974. Additionally, 6% annual interest shall be paid on the lump sum award from August 6, 1982, until such date as payment is made. This amount shall be paid by check, payable to Ida V. Sieber, within 30 days of the effective date of this Order;
5. That Respondent shall pay to Complainant George, a lump sum of $83,342.78, representing the amount equal to the difference between what she actually earned since Standard's refusal to hire her and what she would have earned if she had been hired on September 16, 1974. Additionally, 6% annual interest shall be paid on the lump sum award from August 6, 1982, until such date as payment is made. This amount shall be paid by check, payable to Freda C. George, within 30 days of the effective date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Joseph X. Yaffe, Chairperson

ATTEST:

BY: Elizabeth M. Scott, Secretary

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

IDA V. SIEBER, AND FREDA C. GEORGE, COMPLAINANTS

v.

FREEDOM FORGE CORPORATION OF AMERICA, RESPONDENT

DOCKET NO. E-8519

RECOMMENDATION OF HEARING PANEL CHAIRPERSON

Upon consideration of the entire record in this matter, including the complaints, stipulations, exhibits, notes of testimony, and briefs filed on behalf of the parties, the Hearing Panel Chairperson hereby adopts the attached as her Opinion, concurring in part and dissenting in part, and recommends that the same be adopted by a majority of the PA Human Relations Commission.

Rita Clark

Rita Clark, Hearing Panel Chairperson

Sept. 29, 1986

Date

OPINION CONCURRING IN PART AND DISSENTING IN PART

Liability in this case is clear and I agree with the majority regarding their rational for establishing that the Respondent's refusal to hire Sieber and George was intentional sex discrimination. However, I do not agree that Complainant George should be given a full back-pay award.

The power to award back pay is discretionary. PHRC V. Alto Reste Park, 453 pa. 124, 306 A.2d 881 (1973). Indeed, Section 9(f) of the PHRA specifically provides for the exercise of discretion by stating in pertinent part: [the PHRC is authorized to] ". ..take such affirmative action...as, in the judgment of the Commission will effectuate the purposes of this act..." Emphasis added.

Precedent has been set to use our discretion regarding reduction of a back-pay award. In both Ore v. Albert Einstein Medical Center, Docket No. E-19935 (PHRC, February 9, 1984), and Thompson and Malcolm v. M & M Imports, Inc., Docket Nos. E-20653 and E-20864 (PHRC, April of 1986), we cut Complainants lost wage claim in half. In Ore we did not believe the Complainant exercised a full faith attempt to mitigate her damages. Similarly, in M & M Imports, a Complainant's award was cut because of diminished efforts to seek alternate comparable employment.

George's work history after being rejected by Standard is as follows:

1. December 1975 -- March 1976: Gordon Wire Company - George left because the Company closed.
2. August 1976 -- December 1976: Green Gables Motor Inn - this was a part-time job from which Complainant left to obtain a full-time job.
3. December 1976 -- March 1977: Empire Kosher - George left because she was working in cold water all day.
4. March 1977 -- August 1977: Snack Bar at State Building in Harrisburg - George left because of lengthy commute from Lewistown.
5. Two week period: Arrow Shirt Company - George left because she disliked running a sewing machine.
6. Very short time: Fisher Corporation - George left because she was experiencing irritation from working with fiberglass.
7. February 1978 -- March 1979: Selinsgrove Center - George left following a back injury.
8. August 1979 -- March 1980: Lutheran Homes Hospital, Montana - George left this job for personal reasons: a pending marriage fell through.
9. July 1980 -- present: Holiday Inn

In my opinion, George voluntarily left several of these positions including Empire Kosher, the State Building Snack Bar, Arrow Shirt, Fisher Corporation, and the Lutheran Home. This raises a question regarding whether George exercised reasonable diligence in seeking and keeping employment at which she could have earned more money following Standard's refusal to hire her.

Similar to the approach taken in Ore and M & M Imports, I would reduce George's award at least to an amount equal to our award to Sieber because George could have earned much more had she exercised reasonable diligence. Accordingly, I would award George $55,018.93. An improperly dismissed employee may not remain idle and recover lost wages from the date of discharge. The employee must make a reasonable effort to find other suitable employment. See O'Neal v. Gresham, 519 F.2d 803, 805 (4th Cir. 1975).