COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIAN MIKUS, COMPLAINANT

v.

WHITMAN'S CHOCOLATES, RESPONDENT

DOCKET NO. E-35302

FINDINGS OF FACT

CONCLUSION OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT

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.	Complainants' Exhibit
J.E.	Joint Exhibit
S.F.	Stipulation of Facts
V.D.	Vasalluzzo Deposition
B.D.	Braden Deposition

1. The Complainant herein is Marian Mikus, (hereinafter either "Mikus" or "Complainant"). (S.F. 1)
2. The Respondent herein is Whitman's Chocolates, (hereinafter either "Whitman's" or "Respondent"). (S.F. 2)
3. Mikus began employment with Whitman's on January 13, 1981 as a candy packer in packing department #8 at Whitman's Philadelphia factory. (N.T. 13, 14; S.F. 8 as modified at N.T. 7, 8)
4. Whitman's Philadelphia facility runs a five day, Monday through Friday, operation with three shifts: Shift A - 8:00 a.m. - 4:00 p.m.; Shift B - 4:00 p.m. - midnight; and Shift C - Midnight - 8:00 a.m. (N.T. 25, 133, 134; J.E. 42 p.8, J.E. 43 p.8)
5. During her employment Mikus primarily worked Shift B. (N.T. 25)
6. As a candy packer, Mikus generally sat next to a conveyor belt and strategically placed a paper cup and candy into candy boxes which passed by at the rate of approximately 30 boxes per minute. (N.T. 24, 134, 136; J.E. 7)
7. Of approximately 325 employes assigned to packing department 8, approximately 83 worked the second shift. (N.T. 133, 134)
8. The majority of employes working in packing department 8 were assigned candy packing duties, however, some employes inspected, and others packed filled candy boxes into cartons. (N.T. 134)
9. During a shift, employes had three regularly scheduled breaks: A 30 minute lunch break, one 10 minute break before the lunch period, and one 10 minute break after lunch. (N.T. 137)
10. During break periods, the conveyor belts were shut down. (N.T. 187)
11. Perceiving there to be a developing problem with employes asking to be excused from a running belt to go to the bathroom, Whitman's developed a policy of requiring employes to bring in a doctor's note requesting relief for medical reasons. (N.T. 184, 224)
12. Employes requesting bathroom relief from the conveyor line only became a problem when many did it. (N.T. 139)
13. Whitman's "problem" regarding bathroom relief was generally on the A shift. (N.T. 181)
14. Whitman's had tried assigning a specific relief person to accommodate employe bathroom needs but a problem developed when the assigned relief person began relieving their friends only. (N.T. 225)
15. Employes working the conveyor belt who needed bathroom were relieved by either a supervisor or an assistant supervisor. (N.T. 40, 136)
16. Approximately 8-10 employes had long-term bathroom notes. (N.T. 138)
17. Throughout 1984, Mikus frequently missed work as she continually felt sick with symptoms of weakness, diarrhea, vomiting, and acute stomach pain. (N.T. 26, 27, 31; J.E. 23, 28)
18. In a letter dated October 24, 1984, Whitman's warned Mikus that her poor attendance record was noted and if it continued it could result in her discharge. (N.T. 31; J.E. 8)
19. On October 29, 1984 Mikus became ill at work and went home. (N .T. 32)
20. Mikus' family doctor referred Mikus to Dr. Braden, a gastrointestinal specialist. (N.T. 32)
21. Between October 31, 1984 and the end of the year, Mikus underwent a battery of tests which ultimately determined that her continuing problem was chronic sigmond diverticulitis; an infection or abscess in the colon area generally caused by the

proliferation of bacteria in plugged up pouches which occasionally form along the lining of the colon. (N.T. 33; B.D. 6, 7)

22. By letter dated October 30, 1984 Mikus' daughter informed Whitman's of Mikus' status. (J.E. 15)
23. By letter dated November 6, 1984 Mikus' family doctor also attempted to inform Whitman's of Mikus' status. (J.E. 16)
24. In December 1984, Mikus' symptoms became severe as a colon obstruction had developed which resulted in surgery on January 2, 1985 intended to remove the affected section of Mikus' bowel. (B.D. 8, 9, 10)
25. Unexpected complications during surgery prohibited removal of the affected bowel area and instead, a temporary measure was implemented to allow a 3-6 month quieting of the then present problem: Mikus was given a diverting colostomy. (B.D. 10)
26. In May 1985, Mikus reported to Whitman's medical department and presented Dr. Braden's April 29, 1985 medical certificate which in effect informed Whitman's that Mikus had been given a temporary bag until follow-up surgery could correct her condition. (N.T. 36; J.E. 1)
27. Mikus was not permitted to return to work in May 1985 and was told at that time not to come back until she was completely cured. (N.T. 36)
28. On July 5, 1985 Mikus underwent a second surgery during which a section of her colon was removed. (N.T. 35; B.D. 15)
29. On September 3, 1985 Mikus had a third surgery to close the colostomy left in place in July in order to permit the colon section removal to heal. (B.D. 16)
30. At a regularly scheduled doctor's appointment on October 21, 1985 Dr. Braden gave Mikus a full release to return to work. (N.T. 38; B.D. 16, 18; J.E. 3)
31. Mikus, fearing she might need a bathroom relief excuse, asked Dr. Braden to also provide her with a certificate requesting bathroom relief when necessary. (N.T. 39; B.D. 19; J.E. 2)
32. Although in Dr. Braden's medical opinion Mikus was normal and did not need a bathroom relief note, Dr. Braden provided Mikus with a bathroom note. (B.D. 20)
33. Dr. Braden's bathroom note states in pertinent part: "To employer, Mrs. Marian Mikus is my patient and should be excused to use the bathroom when necessary." (J.E. 2)
34. In addition to Dr. Braden's two notes, Mikus also obtained a release from her surgeon, Dr. Annon. (N.T. 38; J.E. 4)
35. On October 22, 1985 Mikus called Whitman's and arranged an appointment with Whitman’s medical department on October 25, 1985. (N.T. 43; J.E. 24 B & C)
36. On October 25, 1985 Mikus went to Whitman's medical department and was first seen by Helen Hagen ("Hagen"), Whitman's company nurse. (N.T. 44)
37. Mikus testified that she next saw Dr. Vassalluzzo to whom she gave two of the three doctor's certificates she had been given on October 21, 1985. (N.T. 46)
38. Mikus indicated she did not give Dr. Vassalluzzo Dr. Braden's bathroom note until Dr. Vassalluzzo told her "Whitman's will have to terminate you because your illness can reoccur." (N.T. 46)
39. Both Hagen and Dr. Vassalluzzo testified that the only note Mikus gave them was Dr. Braden's bathroom note. (N.T. 192, 197, 221; V.D. 8, 9, 15)
40. Dr. Vassalluzzo called Whitman's Director of Human Resources, Edward Barr (“Barr”) to discuss Mikus' situation with him. (N.T. 49, 116; V.D. 10)

41. After Barr reviewed Dr. Braden's bathroom note and a brief discussion with Dr. Vassalluzzo, Barr decided Mikus would not be permitted to return to work. (N.T. 118, 153)
42. Barr's decision was based on an unwritten policy which dictated that employes who had been off work with a non-work related injury or illness would only be permitted to return to work if they could produce a restriction free doctor's certificate. (N.T. 118, 119, 128, 152, 154, 162; V.D. 10, 11, 26)
43. This restrictive policy affords the medical department no discretion. (N.T. 154; V.D. 27, 28)
44. At the time of Barr's decision not to permit Mikus to return to work, Barr made no inquiries regarding the circumstances surrounding Mikus' note; i.e.: anticipated length of time note needed; anticipate frequency of use; status of Mikus' condition; packing department 8 supervisory input; number of other packing department 8 employes currently possessing bathroom notes; production impact of bathroom use. (N.T. 118, 165-168)
45. Barr made no effort to accommodate Mikus. (N.T. 169)
46. Prior accommodations had been made for employes with bathroom notes. (N.T. 120)
47. Whitman's restrictive policy only applied to low seniority employes who had been off on a non-job related injury or illness. (N.T. 160-162)
48. Employes out on Workmen's Compensation with a job-related injury or illness who returned with restrictions on a doctor's certificate were accommodated. (N.T. 162)
49. Additionally, employes with at least 20 years seniority were also accommodated whenever they presented doctor's notes with restrictions. (N.T. 160-161)
50. Also, any time a working employe brought in a doctor's certificate with a bathroom relief request, that employe too would be accommodated. (N.T. 145, 160-162)
51. Pursuant to provisions of a collective bargaining agreement, October 25, 1985 was the last day Mikus would have been able to return to work before losing her seniority which had the effect of termination. (N.T. 113; J.E. 43)
52. Following Barr's October 28, 1985 review of Mikus' attendance records, Barr advised Mikus, by letter dated October 28, 1985 that her employment had been terminated. (S.F. 15; N.T. 115)
53. A typographical error in Barr's October 28, 1985 letter was corrected in an October 30, 1985 letter to Mikus. (S.F. 16; N.T. 116)
54. Following her termination, Mikus made reasonable efforts to find substitute employment. (N.T. 62)
55. In March 1986, Mikus secured substitute employment with the Deb Shop working in their clothing merchandise warehouse. (N.T. 63)
56. Since October 1985, Mikus has had no medical problems related to diverticulitis. (N.T. 68)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of this case.
2. The parties and the PHRC have fully complied with the procedural pre-requisites to a public hearing in this matter.
3. Respondent is an "employer" within the meaning of the PHRA.

4. Complainant is an “individual” within the meaning of the PHRA.
5. Complainant has established a prima facie case by proving that:
    a. She is handicapped within the meaning of the PHRA and applicable regulations;
    b. That she was otherwise qualified for the position of packer; and
    c. That on October 25, 1985 either she was not permitted to return to work or she was terminated.
6. The Respondent regarded Mikus as having a physical impairment which substantially limits one or more major life activities.
7. The Respondent failed to reasonably accommodate the Complainant's handicap/ disability.
8. It would not have been an undue hardship for the Respondent to accommodate the Complainant.
9. Had the Respondent not refused to permit the Complainant to return to work on October 25, 1985 the Complainant would not have been terminated on October 28, 1985.
10. Section 9 of the PHRA gives the PHRC broad discretion to order relief after a finding of discrimination.
11. The Complainant's May 3, 1989 rejection of the Respondent's unconditional offer of reinstatement stops the accrual of potential backpay liability and precludes reinstatement as a possible remedy.

OPINION

This case arises on a complaint filed by Marian Mikus, (hereinafter either "Mikus" or "Complainant") against Whitman's Chocolates (hereinafter either "'Whitman's" or "Respondent") with the Pennsylvania Human Relations Commission ("PHRC"') on or about December 12, 1985, at Docket No. E-35302. The Complainant alleged that the Respondent discriminated against her on the basis of her non-job related handicap/disability, acute sigmoid diverticulitis, and by regarding her as having a handicap/disability when the Respondent refused to permit the Complainant to return to work on October 25, 1985, and subsequently discharged her. The Complainant claims that the Respondent's actions are a 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 allegations 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 Philadelphia on June 6, 1989, before permanent Hearing Examiner Carl H. Summerson.

The case on behalf of Mikus was presented by Sharon Dietrich, Esquire and Alba E. Martinez, Esquire. Thomas H. Langenburg, Esquire, appeared on behalf of Whitman's. The PHRC interest in this matter was overseen by Michael Hardiman, Esquire, Assistant Chief Counsel, PHRC. The Respondent's post hearing brief was received on August 31, 1989 and the Complainant's brief was received on September 5, 1989. Subsequently, the Complainant submitted a reply brief which was received on September 29, 1989.

Before focusing on the substance of the allegations raised in this case, another legal matter raised by the Respondent must be addressed. During the Public hearing and in the Respondent's brief,

the Respondent argued that Federal labor laws preempts the Complainant's PHRC claim because a determination of whether the Respondent's actions were handicap-based discrimination would require an interpretation of a past practice under a collective-bargaining agreement. The Respondent cited the U. S. Supreme Court case of Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985) in support of its argument.

In Lueck, the U. S. Supreme Court considered whether a Wisconsin Tort remedy for bad-faith handling of an insurance claim could be applied to the handling of a claim for disability benefits that were authorized by a collective-bargaining agreement. The U. S. Supreme Court analyzed both the collective-bargaining agreement and the state's statutory tort remedy. The court found that the tort remedy they reviewed exists for breaches of duties which devolve from terms of collective-bargaining agreements. To view the scope of the terms of the agreement there must of necessity be consideration of the contract itself. Id at 216. Because there had to be consideration of the terms of the collective-bargaining agreement, the U. S. Supreme Court preempted the state tort remedy.

The provision of the Federal labor law alluded to by the Respondent's preemption argument is Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a). That Section provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

In the U.S. Supreme Court case of Lingle v. Norge Div. of Magic Chef, 108 S.Ct. 1877 (1988), the court generally reviewed the court's historical handling of the Section 301 preemption issue. The court's review included the following:

> "In Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957), we held that §301 not only provides federal court jurisdiction over controversies involving collective-bargaining agreements, but also "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements." Id., at 451.
>
> In Teamsters v. Lucas Flour Co., 369 U.S. 95, 49 LRRM 2717 (1962), we were confronted with a straightforward question of contract interpretation: whether a collective-bargaining agreement implicitly prohibited a strike that had been called by the union. The Washington Supreme Court had answered that question by applying state-law rules of contract interpretation. We rejected that approach, and held that §30l mandated resort to federal rules of law in order to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes.."

The factual scenario of the Lingle case has some similarity to the issues presented in the present case. In Lingle, a discharged employe filed a tort claim of retaliatory discharge alleging the

discharge was done because a worker's compensation claim had been filed. The employe in Lingle was covered by a collective-bargaining agreement. The court noted the necessary elements which had to be shown to establish a retaliatory discharge and noted that the required showings were purely factual questions which pertain to the conduct of both the employe and the employer. None of the elements required interpretation of any term of a collective-bargaining agreement. To defend against the claim, the employer had to show it had a non-retaliatory reason for the discharge. The court found this too to be a purely factual inquiry which did not turn on the meaning of any provision of a collective-bargaining agreement. In ruling against preemption the court stated:

> "the state-law remedy in this case is 'independent' of the collective-bargaining agreement in the sense of 'independent' that matters for §30l preemption purposes: resolution of the state law claim does not require construing the collective-bargaining agreement."

In the case of Miller v. AT&T Network Systems, 46 EPD ¶38029, (9th Cir. 1988), the U. S. Court of Appeals for the 9th Circuit specifically and persuasively discussed the preemption issue in the context of discrimination cases. The Miller court stated:

> Although its scope is substantial, section 301 does not preempt every suit concerning employment. If a court can uphold state rights without interpreting the terms of a CBA, allowing suit based on the state rights does not undermine the purpose of section 301 preemption: guaranteeing uniform interpretation of terms in collective bargaining agreements. Therefore, "nonnegotiable state-law rights...independent of any right established by contract" are not preempted...Allis Chalmers, 471 U.S. at 213. A contrary rule would permit unions and employers to exempt themselves from state labor standards. Congress never intended "to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." ...see, e.g. Paige v. Henry J. Kaiser Co., 826 F.2d 857, 863 (9th Cir. 1987) (holding that a wrongful discharge claim based on violation of a state public policy is not preempted, because it is a non-negotiable independent state-law right).

Here we find that the provisions of the PHRC are non-negotiable. First, the PHRC is based on a declared Commonwealth policy "to foster the employment of all individuals in accordance with their fullest capacities regardless of their...handicap or disability...and to safeguard their right to obtain and hold such employment without such discrimination..." PHRA, Section 2. Also, the Pa. Commonwealth Court in Freeport Area School District v. PHRC, 335 A.2d 873 at 877 (1974), modified and aff'd 359 A.2d 724 (1976), indicated:

> "[t]he law is that a collective bargaining provision fixing the obligation of employers inconsistent with the statutory rights of employes will not preclude the latter from pursuing those rights." The allegations raised in the present case do not require consideration of the terms of a collective-bargaining agreement. Instead, we find that our assessment of the Complainant's PHRC claim can be done and rights guaranteed by the PHRA enforced without any need to rely on particular terms, explicit or implied, in the collective-bargaining agreement. Fundamentally, resolution of the question of whether

> the Respondent could have reasonably accommodated the Complainant does not depend on any standards set forth in the collective-bargaining agreement but instead on statutory regulatory, and case precedent standards. Accordingly, the PHRA and applicable regulations articulate an independent standard that is not inextricably intertwined with any need to interpret the collective-bargaining agreement.

For these reasons, the Respondent's preemption argument is rejected.

Turning then to the resolution of the Complainant's specific allegation, we begin by clearly outlining the nature of her complaint. Mikus' complaint charges that she was verbally notified that she was terminated on October 25, 1985. Further, Mikus contends that she was terminated because Whitman's regarded her as having a handicap/disability. Clearly, the general question for resolution here is whether the Respondent's October 25, 1985 actions violate the PHRA.

> Section 5(a) of the Act 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 Act'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 Commission 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 handicapped person applies for, is engaged in, or has been engaged in. Uninsurability or increased cost of insurance under a group or 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 definitions have been upheld as a valid exercise of the Commission'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).

Both the Complainant's and Respondent's briefs accurately note that the Complainant bears the initial burden of proof in this disparate treatment, handicap/disability employment discrimination case. This initial burden is to establish a prima facie case. Allegheny Housing Rehabilitation Corporation v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987) (hereinafter “PHRC”), National Railroad Passenger Corp. v. PHRC, 70 Pa. Cmwlth. Ct. 62,452 A.2d 301 (1982).

The Respondent~ brief primarily argues that the Complainant failed to meet her burden to show a prima facie case and, except for a very short discussion regarding an issue of accommodation,

does not address the respective burdens of the parties if there is a determination that the Complainant's evidence does establish a prima facie case. Although the Respondent's brief mentions that the burden then shifts, only the Complainant's brief discusses exactly what burden falls on whom once a prima facie showing has been made.

As noted by the Complainant's brief, generally in handicap cases once a prima facie showing is made, the burden which normally shifts to the Respondent is to simply articulate a legitimate, non-discriminatory reason for its actions. AHRC Supra. However, if a Respondent asserts the defense of job relatedness, the Respondent bears the burden of proving that the handicap is job related. SEPTA v. PHRC, PA Cmwlth Ct. , , A.2d (No. 2871, C.D. 1987, filed February 28, 1989), (hereinafter "SEPTA"); citing Pennsylvania State Police v. PHRC, 72 Pa. Cmwlth Ct. 520, 457 A.2d 584 (1983). The ultimate burden of persuasion remains with the Complainant. SEPTA Supra, citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); and AHRC Supra.

Both parties' briefs list four factors which they submit are the proper elements of a prima facie case in this matter. Several of the elements listed by the parties are identical and are in fact elements which will be used here. They include.

1. That the Complainant was handicapped/disabled within the meaning of the PHRA;
2. That the Complainant was otherwise qualified for the job in questions;

At this point the parties' briefs diverge regarding the remaining elements. Because of the precise nature of the allegation raised and the defense submitted, the Complainant can establish the remainder of the requisite prima facie showing by establishing:

3. That on October 25, 1985, either the Complainant was not permitted to return to work, or the Complainant was terminated.

The Respondent's list adds the requirement that the Complainant show that the Respondent replaced the Complainant with someone with equal or lesser qualifications. As the Commonwealth Court recognized in SEPTA, Supra, "[i]t is well established that the Complainant can prove a prima facie case without demonstrating that the Respondent continued to seek other qualified applicants." Although the factual scenario in SEPTA dealt with a refusal to hire, the principle articulated can easily be applied here so as not to specifically require a showing of exactly who was placed into the Complainant's position following either her not being permitted to return to work or her termination.

The Respondent's brief almost completely relies on the argument that the Complainant cannot meet the first element of the requisite prima facie showing. The Respondent contends that the Complainant's condition was not permanent, and therefore, cannot be a handicap. The Respondent would have the PHRC rule that the Complainant's condition was merely temporary, and as such would not qualify as a handicap under the PHRA.

Although 16 Pa. Code §44.4(i) categorizes handicaps three ways, we shall only focus on Section 4(i)(c), which defines a handicapped person as a person who "is regarded as having [a physical

or mental impairment which substantially limits one or more major life activities.]" Even the Complainant's complaint specifically refers to the "regarded as" provision when describing the nature of the alleged handicap which existed on October 25, 1985.

The Respondent's brief correctly argues that on October 25, 1985, the Complainant had no current disability. However, when the Respondent' brief discusses the "regarded as" provision, the Respondent's brief appears to sidestep the real issue in this case. The Respondent's focus shifts from the October 25, 1985 action to October 28, 1985 when the Respondent alleges Whitman's director of human resources decided to terminate Mikus. The October 28, 1985 action is said to have been required pursuant to a provision in the current collective-bargaining agreement.

The appropriate application of the "regarded as" provision is to the uncontested actions which occurred on October 25, 1985. During the public hearing, controversy abounded regarding the number of doctor's certificates Mikus presented to Whitman's medical department. The Respondent urges a finding that only one certificate was presented, while the Complainant seeks a finding that three notes were presented. While it is apparent Mikus did give the Respondent's medical department more than one certificate, this case can be resolved by an analysis of what occurred surrounding the one note the Respondent concedes Mikus did submit.

There is no question that Mikus presented herself for work on October 25, 1985 and that the Respondent knew that Mikus' doctor's note indicated, "to employer, Mrs. Marian Mikus is my patient and should be excused to use the bathroom when necessary."

Critically, there is also no disagreement regarding why the Complainant was not permitted to return to work on October 25, 1985. Quite simply stated, the Respondent clearly refused to permit Mikus to return to work because she had not been given a full release from her doctor. The Respondent's medical record for Mikus on October 25, 1985 stated:

> "Since this problem was caused and exacerbated by stress and because she was kept out of work for prolonged period to avoid stress, I feel that by bringing this person back to work under stressful conditions may cause her further harm and problems. Therefore, she was advised not to work under these conditions. Also she has a note stating that she is to be permitted to use the bathroom when necessary. With colitis and/or diverticulitis and exacerbation of diarrhea, this could mean leaving the line every five to ten minutes. Is this feasible?"

Barr, the Respondent's director of human resources also testified, in effect, that it was his decision not to permit Mikus to return to work, and that his decision was based solely on the fact that Mikus did not have a full medical release.

Accordingly, the Respondent's refusal to allow Mikus to return to work was for a medical reason. This action, in itself, constitutes a per se impairment of a major life activity, i.e. employment. Pennsylvania State Police v. PHRC, 72 Pa. Cmwlth Ct. 520, 457 A.2d 584, 589 n. 12 (1983). Through its actions, Whitman's regarded Mikus as having an impairment which limited a major life activity. Therefore, Mikus meets the first required showing of her prima facie case.

It should be noted that this element of a prima facie case can be established by the "regarded as" method even when a physical condition may not actually constitute a handicap. See Civil Service Commission of City of Pittsburgh v. PHRC, Pa. Cmwlth Ct. , 556 A.2d 933 (1989) The key of course is that the Respondent's refusal itself for a perceived medical reason qualifies the Complainant as handicapped. Accordingly, the Respondent's entire argument regarding a temporary versus permanent condition is wholly rejected.

Regarding the remaining two elements of the Complainant's prima facie showing, she easily meets her burden. Mikus had worked the position in question between January 1981 and October 1984. Clearly, she was qualified to perform the job of packer. Equally clear is the remaining requisite prima facie element. On October 25, 1985, Whitman's refused to permit Mikus to return to her packer position.

Accordingly, Mikus has established a prima facie case. Since Whitman's attempted to defend its actions by suggesting Mikus' condition was job-related, the burden of proof shifts to Whitman's. Once again, we begin our analysis of what occurred on October 25, 1985, by viewing the factual setting in a light most favorable to the Respondent. This is not a standard to follow in future cases but will be used here simply because the case can readily be resolved without the need to decide precisely how many notes were given to Whitman's medical department, where they went, and who knew exactly what.

Instead, taking Respondent's witnesses' version of the events of October 25, 1985 at face value, the Complainant still ultimately prevails in here ultimate burden of persuasion. In effect, the Respondent argues that following Mikus' doctor's note would require too great an accommodation.

In reality, Whitman's took absolutely no measures to even ascertain the degree of accommodation needed by Mikus. Instead, the Respondent simply applied an inflexible policy which strictly disallowed the return of any employe who had been off with a non-work related injury when that employe produced a doctor's certificate which noted any restrictions.

Astoundingly, the evidence in this case revealed that, in certain circumstances, Whitman's did take measures to accommodate medical restrictions, exactly like the one Whitman's perceived Mikus had. However, Whitman’s apparently only felt accommodation was necessary when Whitman's had a financial stake in their ability to accommodate. For example, when an employe had been off on a work related injury or illness, Whitman's was able to accommodate a returning employe. Also, when a working employe brought in a restriction, Whitman's again found a way to accommodate medical needs similar to the need requested by Mikus.

> Under the PHRC Regulations:
>
> Handicapped or disabled persons shall not be denied the opportunity to use, enjoy, or benefit from employment and public accommodations subject to the coverage of the act, where the basis for such denial is the need to make reasonable accommodations, unless the making of reasonable accommodations would impose an undue hardship.

16 Pa. Code §44.5(b)

> An employer shall make reasonable accommodations by modifying a job, including but not limited to modification of duties, scheduling, amount or nature of training, assistance provided, and the like, provided that such modification shall not impose an undue hardship.

16 Pa. Code §44.14(a).

Once again, if we give the Respondent the benefit and look only at the fact pattern which finds the Respondent with only one note which, in effect, asks Whitman's to permit Mikus to use the bathroom when necessary, Whitman's had an obligation to consider accommodating that request. As the regulations state, an employer is obligated to afford a reasonable accommodation unless developing an accommodation would cause an undue hardship.

Whitman's made a halfhearted attempt to suggest that allowing Mikus to periodically use the bathroom when needed would create an undue hardship. While it is true that the nature of Mikus' position required someone at her production line station at all times, the evidence adduced at the public hearing made it abundantly clear that Whitman's accommodated others with minimal effort. Several options were clearly open to Whitman's. It was already Whitman's practice to temporarily relieve production line workers when necessary with supervisory employes. Second, a 20 year employe testified that Whitman's had, in the past, actually assigned a relief floater to relieve line employes, however, that person was found to have relieved only their friends. Certainly, closer supervision could abate such a minor problem. Additionally, Mikus could have been assigned as the relief floater.

Finally, Barr, Whitman's director of human resources, agreed that no effort was made to consider the extent of Mikus' perceived need to use the bathroom. Barr agreed that Whitman's can, without problem, accommodate a 4 to 6 week bathroom need. Additionally, Barr indicated that production is not disrupted when only 1 or 2 need relief. As Barr testified, there is a problem only "when many do it."

On cross examination Barr indicated that it was even possible "that at the time he denied Mikus' return to work that there may have been no other employes with bathroom notes on Mikus' shift. Barr simply did not attempt to find out. Instead, absolutely no effort was made to determine how Mikus might be able to return. Barr simply applied a rigid standard which left no room for any considerations of an accommodation. By doing so, Whitman's failed to meet their obligation to seek a reasonable accommodation.

Accordingly, Mikus has successfully met her ultimate burden of persuasion that on October 25, 1985, Whitman's discriminatorily refused to permit her to return to work. The true effect of the October 25, 1985, act of discrimination was actually felt several days later when Whitman's terminated Mikus. Whitman's contends that Mikus was discharged not because of her physical status but pursuant to the terms of a collective bargaining agreement. The agreement provided that employes with less than 5 years seniority could only be on medical leave for up to one year. At the end of one year, Whitman's was permitted to terminate an employe.

Clearly, had Whitman's not discriminatorily denied Mikus. attempt to return to work on October 25, 1985, Mikus' medical leave of absence would not have exceeded one year on October 28, 1985. Here, Mikus remained on medical leave beyond the permitted year limit solely because of Whitman's earlier act of discrimination. Therefore, Whitman's cannot legitimize the October 28, 1985 termination because it is inextricably tied to the October 25, 1985 act of discrimination. Having determined then that Whitman's failure to reasonably accommodate Mikus' handicap ultimately caused her discharge, we must consider appropriate relief.

Section 9 of the PHRA provides that hiring, with or without backpay, may be ordered after a finding of discrimination. The function of backpay relief is to put the victim of discrimination in the position she would have attained absent the discrimination. Albermarle Paper Company v. Moody, 422 U.S. 405, 418-423 (1975); PHRC v. Transit Casualty Insurance Company, 478 Pa. 430, 387 A.2d 58 (1978). Further, the Pa. Supreme Court has declared that the PHRC has broad discretion when fashioning an award. Murphy v. PHRC, 506 Pa. 549, 486 A.2d 388 (1985).

Regarding the backpay issue, Whitman's argues that in Mid to late February 1989 it made Mikus an unconditional offer of reinstatement which Mikus refused. Whitman's further argues that Mikus' refusal operates both to cut off the accumulation of backpay liability beyond February 1989, and to remove reinstatement as an appropriate remedy.

Whitman's brief cites Ford Motor Company v. EEOC, 29 FEP 121, 458 U.S. 219, 102 S. Ct. 3057 (1982 rev'g 645 F.2d 183 (4th Cir. 1981), a U.S**.** Supreme Court case which addressed the proper effect of a complainant refusing an offer of reinstatement. In Ford Motor Co., several women had been denied employment for discriminatory reasons. After the women filed Title VII actions, and after the women had accepted alternate employment, Ford offered the women the positions it had previously refused them. Both women rejected the offer because it did not include a promise of retroactive seniority. The offer also did not include backpay, however, this factor was not at issue during the trial. The Supreme Court ruled that a Complainant forfeits the right to backpay if the Complainant refuses a job "substantially equivalent" to the job for which there had been a discriminatory denial. In not requiring retroactive seniority to be part of an offer, the Supreme Court looked towards Title VII's goals and noted that to require an employer to also offer retroactive seniority would not serve Title VII goals. Instead, the goal of ending discrimination could be defeated because employers would be less likely to make offers of employment if they had to also offer retroactive seniority. The ultimate goal of making a Complainant whole can be served as well when an offer is accepted because a Complainant may still recover backpay, retroactive seniority, and other compensation by continuing the Title VII action. The rule the court articulated was "...absent special circumstances, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." Id. at 3070.

The Respondent also cited Grandonato v. Sybron Corp., 42 FEP 219 (19th Cir. 1986); in support of its argument that Mikus' refusal of Whitman's job offer also precludes reinstatement.

In this case, a letter dated March 14, 1989, was sent from Whitman's attorney to Mikus' attorney. This letter confirmed there had been discussions about an open offer of unconditional reinstatement. The letter noted that there was an opening for what appears to be the same position that Mikus had held. Also, the Complainant was to be given full retroactive seniority.

In a subsequent letter dated March 27, 1989, the Complainant's private attorney sought clarification of the impact a reinstatement would have on Mikus' pension benefits. A same day response from Whitman's attorney indicated that the pension benefit question and backpay issues would be resolved through litigation. In a letter dated May 3, 1989, Mikus' private attorney conveyed to Whitman's that Mikus was rejecting Whitman's reinstatement offer.

Under the circumstances presented here, Mikus was not even confronted with the seniority question posed in the Ford Motor Co. case. Had Mikus accepted Whitman's offer of reinstatement, she would have substantially minimized her damages. Her failure to accept Whitman's offer was not done for any apparent special circumstances and therefore Mikus both forfeits her right to backpay after May 3, 1989, and bars reinstatement as a remedy.

Since backpay is still appropriate between October 28, 1985 and May 3, 1989, we are mindful of the fundamental principle that a backpay award should be reduced by interim wages earned by the Complainant. See PHRC v. Transit Casualty Insurance Co., Supra. The joint exhibits of the parties outline the general rates of pay and shift differentials the Complainant would have received between October 28, 1985 through May 3, 1989 had she remained on the second shift: These amounts are as follows:

Wages

$8.21 per hour from October 28, 1985 to March 31, 1987
$8.56 per hour from April 1, 1989 to March 31, 1988
$8.96 per hour from April 1, 1988 to May 3, 1989

Shift Differentials
$.10 additional per hour from October 28,1985 through March 31, 1986
$.15 additional per hour from April 1, 1986 through May 3, 1989

During the Public Hearing, evidence revealed that the Complainant normally worked 37½ hours per week. Thus, calculating the Complainant's lost wages which include shift differential calculations, the Complainant would have earned:

$3,116.25	October 28, 1985 - December 31, 1985 10 weeks @ 37½ hours per week - 375 hours @ $8.31 per hour
$4,051.13	January 1, 1986 - March 31, 1986 13 weeks @ 37½ hours per week - 487.5 hours @ $8.31 per hour
$12,226.50	April 1, 1986 -December 31, 1986 39 weeks @ 37½ hours per week - 1462.5 hours @ $8.36 per hour

$4,075.50	January 1, 1987 - March 31, 1987 13 weeks @ 37½ hours per week - 487.5 hours @ $8.36 per hour
$12,738.38	April 1, 1987 - December 31, 1987 39 weeks @ 37½ hours per week - 1462.5 hours @ $8.71 per hour
$4,246.13	January 1, 1988 - March 31, 1988 13 weeks @ 37½ hours per week - 487.5 hours @ $8.71 per hour
$13,323.38	March 31, 1988 - December 31, 1988 39 weeks @ 37½ hours per week - 1462.5 hours @ $9.11 per hour
$6,149.25	January 1, 1989 -May 3, 1989 18 weeks @ 37½ hours per week - 675 hours @ $9.11 per hour
$59,926.52	Total

Had Mikus not been discriminatori1y terminated, she would have also earned overtime and production bonuses. Joint exhibit #51 reflects the wages for two comparable Whitman employes for the period 1986 through 1988. A proper basis for calculating the lost overtime and production bonuses need not be mathematically precise but must simply be a "reasonab1e means to determine the amount [the Complainant] would probably have earned..." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Cmw1th. 1975), aff'd 387 A.2d 58 (1978).

After reviewing the differences between Mikus' lost straight wages and those amounts actually earned by the comparable employes which also reflect overtime and bonuses, it has been generally determined that Mikus also lost approximately $100.00 per month for the 54 month period of November, 1985 through April 1989. Thus, we would include $5,400.00 as additional pay lost for the applicable period for a total pay loss of $65,326.52.

As previously noted, we must now reduce this amount by any interim earnings. Before making this reduction we also note that Mikus made reasonable attempts to find comparable employment following her termination from Whitman's. When Mikus did find alternate employment, she earned a total of $26,973.79 for the period between her termination and May 3, 1989. Accordingly, the total backpay award to which Mikus is entitled is $38,352.73. This amount is also subject to 6% interest per annum. Goetz v. Norristown Area School District, 16. Pa. Cmwlth. Ct. 389, 329 A.2d 579. (1975)

Finally, the Complainant's brief touches on the issue of pension benefits. Since reinstatement has been deemed lost as a remedy, it would also appear that any pension benefit rights have also been lost.

Finally, a cease and desist order is appropriate. Accordingly, relief is ordered as specified in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIAN MIKUS, COMPLAINANT

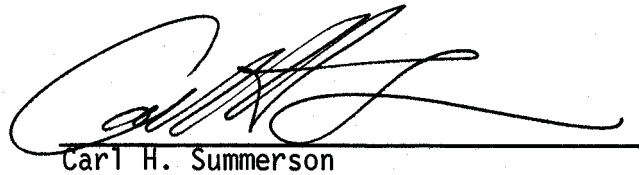
v.

WHITMAN'S CHOCOLATES, RESPONDENT

DOCKET NO. E-35302

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Respondent discriminatorily refused to permit the Complainant to return to work on October 25, 1985 because the Respondent regarded the Complainant as having a handicap, which refusal ultimately caused the Complainant's termination on October 28, 1985. Accordingly, the Complainant has proven discrimination in violation of §5(a) of the Pennsylvania Human Relations Act. It is. therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law and Opinion be Approved and Adopted by the full Pennsylvania Human Relations Commission. If so approved and Adopted the Permanent Hearing Examiner recommends issuance of the Attached Final Order.



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

MARIAN MIKUS, COMPLAINANT
v.
WHITMAN'S CHOCOLATES, RESPONDENT

DOCKET NO. E-35302

FINAL ORDER

AND NOW, this 2nd day of November, 1989, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That Whitman's shall cease and desist from its failure to consider reasonable accommodations of the handicap/disabilities of its employes.
2. That Whitman's shall pay Mikus, within 30 days of the effective date of this order, the lump sum of $38,352.73, which amount represents Mikus' lost wages and benefits between her termination and May 3, 1989, less Mikus' interim earnings.
3. That Whitman's shall in addition, pay Mikus interest of six percent per annum on the amount specified in paragraph 2 above, calculated yearly from October 1985, until such time as payment is made.
4. That within 30 days of the effective date of this Order, Whitman's shall report on the manner of compliance with the terms of this Order by letter addressed to Michael Hardiman, Esquire, at the PHRC's Philadelphia Regional Office.

Pennsylvania Human Relations Commission

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

ATTEST:

Gregory J. Celia, Jr.
Assistant Secretary