

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

STEPHEN L. SOFFER,
Complainant

v.

BROWN TRANSPORT CORPORATION,
Respondent

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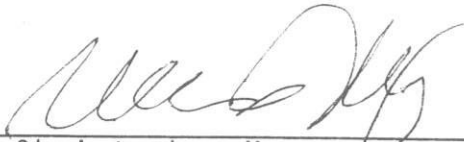
Docket No. E-30889-D

STIPULATIONS
FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
RECOMMENDATION OF HEARING EXAMINER
FINAL ORDER

7. On June 7, 1982, Complainant received a pay increase of fifty dollars (\$50) per week.
8. On April 11, 1983, Complainant received a pay increase of twenty-five dollars (\$25) per week.
9. On April 30, 1984, Complainant received a pay increase of thirty-five dollars (\$35) per week raising his salary to \$460 per week.
10. On June 29, 1984 Respondent discharged Complainant.
11. On September 25, 1984, Complainant made, signed and filed with the Pennsylvania Human Relations Commission a written verified complaint.
12. On or about December 20, 1984 Respondent submitted a statement of its position in response to the complaint in which it denied discriminating against Complainant on the basis of his religion.
13. The complaint was amended on December 31, 1984 and was served upon Respondent on or about January 30, 1985.
14. After investigation, the Pennsylvania Human Relations Commission determined that probable cause existed for crediting the allegations of the complaint and notified Respondent of this finding in correspondence dated April 8, 1986.

15. Conciliation efforts have failed.

16. The Pennsylvania Human Relations Commission approved this matter for public hearing. The parties were notified of this action by letter dated May 4, 1987 from Homer C. Floyd, Executive Director.



N. Christopher Menges
Attorney for Complainant



Walter O. Lambeth, Jr.
Attorney for Respondent

Dated 3-1-89

Dated 2/24/89



Patricia A. Miles
Attorney for Commission in Support of the Complaint

February 21, 1989
Dated

FINDINGS OF FACT*

1. In 1946, Claude Brown, (hereinafter "Brown") founded the motor carrier company that is now Brown Transport Corporation, (hereinafter "BTC"). (C.E. 3)
2. By 1984, BTC had grown from a small motor carrier company operating in Georgia, to an independently owned motor carrier operation servicing the contiguous 48 states. (C.E. 3)
3. In 1984, BTC had 69 full service truck terminals throughout the United States. (C.E. 3)
4. BTC's York Pennsylvania terminal generally operated Monday through Friday and not only received freight for delivery to but also picked up freight for shipment from companies in the York terminal service area which included the Lancaster, Harrisburg, Camp Hill, Mechanicsburg, Hanover, Gettysburg, and, of course, York areas. (N.T. 56, 223, 225, 233)
5. On April 9, 1981, BTC hired the Complainant, Stephen L. Soffer, (hereinafter "Soffer"), as the York terminal night operations supervisor. (N.T. 56, S.F. 3)

* The foregoing "Stipulations" are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows develops 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
S.F. Stipulations
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

6. BTC's York terminal operations were directly managed by a terminal manager and under the terminal manager's supervision were two operations supervisors: the day supervisor, Bob Heltebridle, (hereinafter "Heltebridle") and Soffer, the night supervisor. (N.T. 59, 60, 69, 164, 221, 283)

7. Both the daily start and finish of BTC's York operations fluctuated depending upon the quantity of freight in-bound and out-bound. (N.T. 58, 221, 223)

8. At the time of Soffer's hire, the York terminal manager was Michael Dansic. (N.T. 69, 159-160, 269)

9. Approximately May, 1982, Thomas Wilson, (hereinafter "Wilson") became York's terminal manager. (N.T. 69, 269)

10. In June 1983, BTC paychecks began to include Bible verses on the face of employee paychecks. (N.T. 72, C.E. 2, S.F. 6)

11. When the Bible verses first appeared on Soffer's checks, Soffer expressed his disapproval to Wilson and asked Wilson to take steps to have the verses removed from his paychecks. (N.T. 74, 90, 238, 280)

12. Wilson told Soffer he would look into the matter. (N.T. 74, 238)

13. Approximately 4 months later, Soffer checked with Wilson regarding the status of Soffer's prior request to have the Bible verses removed from his checks. (N.T. 74)

14. In effect, Wilson indicated to Soffer, "Be happy you have a job and are getting a paycheck." (N.T. 74, 239, 281). Wilson had checked into the matter with Wilson's supervisor, Don Pries, (hereinafter "Pries"), who simply confirmed that it was a senior management decision. (N.T. 280).

Pries also instructed Wilson to suggest to Soffer that he write to Brown expressing his displeasure. Wilson then conveyed this to Soffer. (N.T. 281)

15. The Bible verses continued to be printed on employee paychecks throughout the remainder of Soffer's employment with BTC. (N.T. 75, C.E. 2)

16. Beginning in January, 1984, BTC reestablished a company newsletter, (hereinafter "Brownie Sez"), which had previously been discontinued in July/August 1970. (N.T. 75, C.E. 3)

17. Being offended by the perceived religious content of certain articles in the "Brownie Sez" publication, Soffer approached Wilson complaining with respect to being offended by the religious aspects of some portions of the January, 1984 publication. (N.T. 78)

18. Wilson acknowledged the Complainant's complaint regarding "Brownie Sez." (N.T. 79)

19. Subsequently, the March, April, and May 1984 editions of "Brownie Sez" contained matters Soffer perceived as religious and was offended thereby. (N.T. 76)

20. Soffer's main contention with the sporadic religious connotations in the "Brownie Sez" and continual Bible verses being typed on his checks was that, in his opinion, religion should not be part of business affairs. (N.T. 211)

21. Soffer also would have been offended if the same perceived religious matters he found objectionable had discussed or highlighted aspects of his own religion. (N.T. 184, 210, 242, 246)

22. Soffer also formed an impression from the perceived nature of the verses and Brownie Sez materials that BTC wanted and perhaps required its employees to be Christians. (N.T. 212)

23. Being Jewish, Soffer reflectively questioned his job security and felt uneasy to a degree as he queried whether one needed to be a Christian to proceed into upper management within BTC. (N.T. 73, 237, 247)

24. At no time did either the verses on paychecks or articles in the Brownie Sez hinder Soffer's job performance. (N.T. 236, 237)

25. Approximately January/February 1984, Wilson was promoted to District Manager but remained at the York facility. (N.T. 69, 269, 288)

26. Wilson had the responsibility to hire his replacement as the York facility terminal manager. (N.T. 287). Wilson hired Paul Timmens, (hereinafter "Timmens"), as his replacement. (N.T. 161, 269, 287, 310)

27. Soffer testified that he brought up the issue of the verses on paychecks and Brownie Sez articles with Timmens, (N.T. 239), but Timmens testified that he could not recall Soffer ever mentioning it. (N.T. 369). In a prior deposition, Soffer indicated he had not told Timmens about being offended by the checks or articles in Brownie Sez. (N.T. 250, 251, 252)

28. However, Timmens did "recall hearing something about it", but testified that he "in all honesty" could not recall from whom. (N.T. 369)

29. On June 29, 1984, Timmens abruptly terminated Soffer. (N.T. 62, 244, 294, 336, R.E. 6, S.F. 10). Soffer was instructed to get his personal possessions, take them, and do not come back on the property. (N.T. 244)

30. Soffer testified that at the time of his discharge Timmens advised him that he was being terminated because he was not able to complete his job functions. (N.T. 61, 187)

31. Timmens testified that he told Soffer he was being terminated because of inconsistent job performance and attitude. (N.T. 336)

32. During the week of March 19-23, 1984, Soffer was sent to Edison, New Jersey to train a new BTC night operations supervisor. (N.T. 100)

33. On May 1, 1984, Timmens submitted an evaluation of Soffer in which Timmens marked Soffer excellent in job proficiency, and good in employee and customer relations. (C.E. 12)

34. The remarks column of the May 1, 1984 evaluation states:

"Steve does an excellent job, is always here when he is needed (weekends), good work on phone, knows his responsibilities, and performs them. I feel he merits this raise." (C.E. 12)

35. In April 1984, Timmens had contemplated giving Soffer a \$25 per week raise, but raised it to \$35 per week after Soffer persuaded Timmens to raise it an additional \$10 per week. (N.T. 392, C.E. 12)

36. Soffer was never given less than an excellent rating regarding job proficiency his entire tenure with BTC. (C.E. 12)

37. In January 1984, Wilson's performance evaluation of Soffer outlined Soffer's strong areas in pertinent part:

"Operationally very adept. Has remarkable ability to co-ordinate and simplify complex operational duties ..."

Wilson outlined areas needing improvement by stating in pertinent part:

"Performance is inconsistent ... instances where it appears that little or no forethought was given ...needs to develop a more "diplomatic thought train" and stronger desire to work well and alongside others ..." (C.E. 12)

38. In December 1983, Wilson sent an internal memo to his supervisor, Gary Morrison; Wilson stated in pertinent part:

"... Numerous instances of either acting or vocalizing before thinking have been contributing factors in stunting the career growth of this otherwise skillful individual. Operationally speaking, Steve has an almost wizard level of intelligence of the mechanics of industry. I have witnessed first hand his completion of technically complex logistical problems which would stump many a transportation professional. Yet in many instances this level of proficiency was overshadowed by Steve's inability to relate and get along with other people in his work environment. I have witnessed a change for the positive in his attitude and he more readily allows the quality of his work to announce his ability. He has shown a lesser hunger for constant demonstration of recognition and realizes the importance of consistency and follow through. Steve's promotional potential is almost totally dependent upon a continued level of personal growth such as he has shown this year." (N.T. 279, R.E. 3)

39. In April 1983, Soffer received a \$25 per week merit increase. (N.T. 91, C.E. 12, S.F. 8)

40. On May 1, 1982 Soffer was given a \$50 per week raise. (C.E. 12, S.F. 7)

41. Soffer's complaint alleged other religious-based disparate treatment in the conditions of his employment generally as follows:

- (a) BTC omitted newsletter recognition of Soffer's attainment of three years of employment;

- (b) Soffer's supervisor opened his mail;
- (c) Soffer was not afforded an opportunity to drive BTC equipment to make pickups and deliveries;
- (d) Soffer was responsible to handle the night operation alone;
- (e) Soffer was given difficulty regarding taking time off;
- (f) Soffer had to pull bills; and
- (g) Soffer was asked to arrive at work 1 to 2 hours early so the day supervisor could perform pickup and delivery duties.

42. Soffer's testimony directly concedes that in April 1984 his name was not intentionally omitted in the recognition section of Brownie Sez. Like Soffer, BTC employees with an April anniversary date were recognized in the May issue. (N.T. 189, 194, C.E. 3)

43. The mail opened by the terminal manager, which Soffer contended was an act of discrimination, was BTC business mail over which the terminal manager had the ultimate responsibility and had every right to open. (N.T. 70, 229-230, 281-282)

44. Heltebridle, the day supervisor, was initially assigned driving duties as an interim measure after a driver had quit, and remained driving on occasion due to significant increases in business. (N.T. 70, 82, 161, 228, 232, 298)

45. Heltebridle drove for both BTC and an independent owner operator who had extra equipment. (N.T. 283-285)

46. When Heltebridle drove for the independent owner operator he did so after his shift ended. (N.T. 283, 286, 370)

47. When Heltebridle drove a BTC vehicle, Soffer would be required to come in early to share the additional duties this arrangement generated. (N.T. 70, 87, 162, 164, 228)

48. Soffer's testimony hesitantly acknowledged that both BTC's failure to assign him driving duties and BTC's assignment of additional duties was not because of Soffer's religion. (N.T. 191-192)

49. Regarding Soffer taking time off, Soffer was told when he was hired there would be no problem with Soffer taking off on religious holidays. (N.T. 160)

50. Throughout his employment at BTC, Soffer was given paid days off for Jewish holidays without affecting his taking off all other holidays. (N.T. 160, 244)

51. On the morning Timmens began as terminal manager, Soffer casually approached Timmens and told Timmens that he takes off Jewish holidays. (N.T. 240, 312). Timmens responded by telling Soffer that he would look into it. (N.T. 313)

52. Neither Wilson's nor Timmens' testimony regarding BTC's rationale for Soffer's dismissal was wholly credible.

53. Soffer testified that he would not want to return to BTC under any circumstances. (N.T. 192)

54. Following Soffer's discharge, Soffer immediately made reasonable attempts to find employment. (N.T. 104-133, C.E. 9, 10)

CONCLUSIONS OF LAW

1. Stephen L. Soffer is an individual within the meaning of the PHRA.
2. Brown Transport Corporation is an employer within the meaning of the PHRA.
3. The PHRC has jurisdiction over the parties and the subject matter of this case.
4. The parties have fully complied with the procedural prerequisites to a Public Hearing.
5. The provisions of the PHRA must be construed liberally for the accomplishment of the purpose of the PHRA.
6. Liberally construed, Soffer's complaint alleged retaliation as well as a religion-based discharge.
7. Bible verses on company paychecks and religious references and content in a company newsletter were objectionable to Soffer thereby constituting a discriminatory condition of employment.
8. Soffer's other allegations that his conditions of employment were adversely affected because of his religion, Jewish, were without merit.
9. BTC's right to practice religious activity are subject to reasonable governmental regulation because the PHRC has an overriding compelling state interest in assuring a workplace free from religious influences which might become objectionable to an employee who holds contrary beliefs.

10. It was insufficient that BTC made only minimal efforts to accommodate Soffer's religious-based objections to Bible verses on his paychecks and religious matters being published in the company newsletter.

11. Employers have an obligation to make reasonable attempts to accommodate an employee's objection to religious materials the employee finds offensive.

12. At the Public Hearing, BTC responded to Soffer's allegations by offering legitimate non-discriminatory reasons for Soffer's dismissal.

13. Weighing the totality of the evidence in this case, BTC's rationale for Soffer's dismissal is not worthy of credence.

14. BTC terminated Soffer because of his religion, Jewish, and because he complained about the Bible verses on his checks and religious matters in the company newsletter.

15. The PHRC has wide discretion in fashioning remedies where unlawful discrimination have been shown.

OPINION

This case arises on a complaint filed by Stephen L. Soffer (hereinafter "Soffer") against Brown Transport Corporation (hereinafter "BTC") on or about September 25, 1984, at Docket Number E-30889-D. The complaint was subsequently amended on or about December 31, 1984. Soffer alleged that BTC discriminated against him by dismissing him because of his religion, Jewish. The complaint also alleged disparate treatment regarding conditions of employment because of Soffer's religion. Soffer's complaint claimed that both BTC's dismissal of him and being subjected to disparate working conditions violated Sections 5(a) of the Pennsylvania Human Relations Act, Act of October 25, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter the "PHRA").

PHRC staff conducted an investigation and found probable cause to credit the allegations of the discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on March 2 and 3, 1989 in York, PA, before Carl H. Summerson, Hearing Examiner.

The case on behalf of Soffer was presented by N. Christopher Merges, Esquire. Walter O. Lambeth, Jr., Esquire appeared on behalf of BTC, and the PHRC interest in this matter was overseen by Patricia A. Miles, Esquire, Assistant Chief Counsel, PHRC. Post-hearing briefs were simultaneously submitted by the parties during the first full week of June, 1989.

During the Public Hearing, a question arose regarding whether Soffer had alleged a claim of retaliatory discharge. Mr. Menges, Soffer's private attorney, submitted a Motion to Amend paragraph 4 of the complaint. As originally submitted, paragraph 4 of Soffer's amended complaint states: "The allegations in paragraph 3 hereof constitute(s) an unlawful discriminatory practice or unlawful practice and is in violation of: [PHRA] Section 5 Subsection(s) (a)." Soffer's proposed amendment simply sought to add (d) as another subsection alleged to have been violated besides Subsection 5(a).

Simply amending to add the letter "d" under paragraph 4 of Soffer's amended complaint was deemed an unnecessary action insomuch as the substance of the allegations under paragraph 3 of the complaint are sufficient to stand or fall on their own regarding the question of whether a retaliation allegation had been raised. See ie. Curry v. U. S. Postal Service, 36 FEP 1312, 1320 (S.D. Ohio 1984). Here we are guided by the mandate of Section 12(a) of the PHRA which states: "The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof . . ."

Section 12(a) of the PHRA is consistent with a long-standing principle well recognized by federal courts: In civil rights actions, pleadings are to be liberally construed. See, Windsor v. Bethesda General Hosp., 10 EPD ¶10,407 (8th Cir. 1975) citing, Cody v. Union Electric, No. 75-1093 (8th Cir., July 17, 1975), slip op. at 3; Cruz v. Cardwell, 486 F.2d 550, 551-52 (8th Cir. 1973); Escalera v. New York City Housing

Authority, 425 F.2d 853, 857 (2d Cir.), cert. denied, 400 U.S. 853 (1970; Holmes v. New York City Housing Authority, 398 F.2d 262, 265 (2d Cir. 1968); Barnes v. Merritt, 376 F.2d 8, 11 (5th Cir. 1967). See also, Galvan v. Bexar, 40 FEP 710 (5th Cir. 1986).

Paragraph 3 of Soffer's complaint states in pertinent part:

"The Complainant alleges that on . . . June 29, 1984 the Respondent . . . dismissed him . . . On at least one occasion the Complainant expressed to the Respondent his being offended by the religious propaganda he was subjected to, and Tom Wilson, a superior employee of Respondent told the Complainant, "be glad you get a paycheck" and, further, told the Complainant not to ever discuss the matter ever again."

Section 5(d) of the PHRC states in pertinent part:

"It shall be an unlawful discriminatory practice . . . [f]or any . . . employer . . . to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act ..."

In my opinion, reviewing Soffer's allegations liberally, Soffer sufficiently put BTC on notice Soffer was asserting a retaliatory reaction by BTC in the form of Soffer's dismissal because of Soffer's prior complaint that he was being subjected to "religious propaganda." The PHRC refuses to exalt form over substance and eschews rigid construction of the PHRA's procedural mandates when strict insistence upon technical compliance would defeat the fundamental purpose of the PHRA, ie, ensuring that employment discrimination is redressed. See eg, McCarthy v. Cortland County Cap., 24 FEP 809 (N.D.N.Y. 1980).

Before turning to the questions which surround Soffer's discharge, we shall review the issues which relate to both the alleged disparate treatment in Soffer's conditions of employment and Soffer's allegation that during his employment at BTC, he was harassed because of his religion, Judaism. First, we note that Soffer emphatically indicated that under no circumstances would he want to return to BTC. Soffer's posture on this point does not wholly moot the allegations of disparate treatment and harassment. If BTC would be found to have engaged in either disparate treatment or harassment, a cease and desist order would still be a viable remedial measure despite the fact that such a measure would never directly benefit Soffer.

Soffer's amended complaint generally contends that he was treated differently because his name was omitted in the April issue of Brownie Sez; his mail was opened; he was denied an opportunity to drive; he had to handle the night operation alone; BTC gave him trouble about taking time off; he had to pull bills; and he had to come to work early so the day supervisor could drive.

Remarkably, Soffer specifically conceded BTC's motive behind much of what occurred with regard to Soffer's conditions of employment was in no way related to religious discrimination. Instead, Soffer acknowledged that in 1983 and 1984, an upswing in BTC's business caused additional responsibilities to be heaped on Soffer. Even if Soffer intended to seriously contend his working conditions were made more difficult because of his religion, Soffer's effort would be hindered by his testimony that he

had no knowledge of the extent of the quantity and exact types of duties performed by the day supervisor-the only individual with whom Soffer could reasonably compare himself.

Regarding the allegations unrelated to perceived additional duties, Soffer's name was not omitted from Brownie Sez. Like other BTC employees with April anniversary dates, his name properly appeared in the recognition section in the May issue. Soffer's complaint that mail was opened is misplaced because the evidence revealed that Soffer's supervisor, the one who did open mail designated for Soffer, was specifically authorized to open the mail at BTC.

Perhaps the least understood allegation of disparate treatment was Soffer's allegation that he was given a rough time about taking time off. On the contrary, the evidence revealed that while employed at BTC, Soffer was given extra time off for Jewish holidays over and above the regularly scheduled holidays given to all employees. Rather than being given a hard time, BTC more than reasonably accommodated Soffer's request for time off for religious holidays.

Clearly, before Soffer was terminated, he carried additional duties, however, as he himself concedes, any additional responsibilities given to Soffer were not added because of an unlawful religious-based motivation. Considering the record as a whole, excluding the harassment allegation, remaining separate alleged religious-based disparate condition of employment cannot be supported. Accordingly, we find Soffer's enumerated disparate conditions of employment allegations to be wholly without merit.

Turning to Soffer's harassment allegation, the picture is not quite so clear. Soffer's contention is that certain BTC practices, perceived by Soffer as religious, were spilling over into business aspects of BTC thereby causing Soffer to be offended. Bible verses typed on company paychecks and references to religion in BTC's newsletter are the two specific circumstances Soffer contends amount to religious discrimination.

Section 5(a) of the PHRA makes it an unlawful discriminatory practice, "[f]or any employer because of the ... religious creed ... of any individual to ... discriminate against such individual with respect to ... conditions or privileges of employment ..." We interpret this section as generally imposing a duty upon an employer to maintain an atmosphere free from religious harassment. At the same time we acknowledge that an interpretation of the facially neutral PHRA provisions regarding religion should recognize that such provisions are equally intended to preserve religious diversity from forced conformity. This is especially true in a case such as this, where an employer itself participates in a practice which either directly or even indirectly tends to disseminate religious views to that employer's employees.

When preservation of an employee's freedom of conscience is weighed against an employer's Pennsylvania and United States constitutional right to free exercise of religion it can be readily seen that this matter enters into an area of tender sensibilities. Although not directly raised at Public Hearing by BTC, we shall briefly review the freedom to exercise

religion issue posed by BTC's actions of printing Bible verses on company paychecks and making a variety of religious references in the company newsletter, Brownie Sez.

A three step analysis is followed to ascertain whether BTC's actions merit full constitutional protection. First, a determination must be made whether the PHRA actually imposes a burden on BTC's free exercise of religion. State of Minn. v. Sports & Health Club, 37 FEP 1463, 1469 (Minn. Supreme Ct. 1985), citing, U.S. v. Lee, 455 U.S. 252 (1982). Second, if a burden is found to exist, it must be determined whether the burden is justified by a compelling government interest. See, Bob Jones University v. U. S., 461 U.S. 574 (1983). Third, there must be a determination whether the PHRA prohibition is the least restrictive means to achieve the Commonwealth's goals. See, Thomas v. Review Board of Indiana Employment Security, 450 U.S. 707 (1981). Accordingly, an individual's right to practice religious activity, in certain circumstances, may be subject to reasonable governmental regulation when the government has an overriding compelling interest. See, Cantwell v. Connecticut, 310 U.S. 296 (1940).

In order to make a determination regarding the first step just outlined, we must evaluate Soffer's reaction to BTC's challenged practices. Soffer's testimony regarding his reactions can be categorized into two distinct considerations. The first was that Soffer simply had a belief that religion and business should not mix. Soffer indicated that even if the religious matters in question had either discussed, cited, or advanced

Jewish doctrine, he would still have been offended. Standing alone, such a position takes on more of a temporal and political character inconsistent with what might constitute a religious belief. However, the second aspect of Soffer's reaction does fall within a religious boundary, thereby deserving the protections of the PHRA.

Soffer described his feelings of uneasiness and developing insecurity regarding promotability at BTC. Soffer observed that by highlighting Christian ideals BTC was saying that to get ahead at BTC one must be a "Christian." Personal profiles of both BTC's owner and president referred to their Christian commitments, leaving Soffer with a perceived implied understanding that BTC wanted its employees to be Christians. Such concerns are cognizable under the PHRA. Accordingly, the PHRA's protections could well impose a burden on BTC's free exercise of religion.

The first step satisfied, we move to the second stage which questions whether the potential burden is justified by a compelling government interest. Summarily, we find an overriding compelling state interest in prohibiting discrimination in employment. In our society, the government has a responsibility to insure that all citizens have equal opportunity without having to overcome artificial barriers which can attend diverse beliefs and which can inappropriately influence employment decisions which more appropriately should be made upon due consideration of one's competence to perform a job. Additionally, BTC's business is clearly a for profit secular endeavor. Entrance into the economic arena normally carries with it the prospect of subjecting the business to prescribed

legislative standards, designed not only for prospective and existing employees, but also for the benefit of the citizens of the Commonwealth as a whole in an effort to eliminate discrimination. Accordingly, we move to the third step of our inquiry.

Regarding whether the PHRA prohibition in question is the least restrictive means to achieve the Commonwealth's goals, we first note that the PHRA does outline certain exemptions when discussing discriminatory practices based on religion. See PHRA Section 4(b). Also, the PHRA only requires that employers make reasonable accommodations in circumstance such as those presented here. We would not seek to enjoin BTC's practices totally. Instead, our concern here would have been primarily with an accommodation of Soffer's concerns. Secondary to this primary concern, the PHRC also considers the imposition of affirmative measures to insure other BTC employees are provided with a full opportunity to express concerns they may have without fear of any retaliatory action.

Here, Soffer has indicated he does not wish to return to BTC. Accordingly, future specific accommodation measures are unnecessary for him. However, BTC must accept its obligation in its Pennsylvania facilities to maintain an atmosphere free from direct or implied religious pressures such as those expressed by Soffer. BTC should help its Pennsylvania employees to feel BTC is committed to making its employment decisions on the basis of an employee's competence and not the nature of his or her religious beliefs. Equal opportunity in employment also means an employee must be free to express objection to religious content of business

practices. Further, once an objection has been raised, an employer must take reasonable measures to accommodate the religious-based objections of an employee.

The circumstances of this case are somewhat similar to the 5th Circuit case of Young v. Southwestern Savings and Loan Association, 9 EPD ¶19995 (5th Cir. 1975). In Young, an employee was required to attend staff meetings which were opened with a brief religious talk and a prayer. The court in Young found that it would be unlawful discrimination on account of religious beliefs to require attendance at such meetings unless the employer could show that efforts to accommodate the needs of employees who found the devotional aspect of staff meetings objectionable would create an undue hardship.

Here Soffer distinctly expressed his objection to two practices with religious overtones and his objections went unheeded. During the Public Hearing, BTC made little to no effort to address either the issue of accommodation or whether an undue hardship might result if any accommodation was suggested. Conversely, Soffer expressed that he would have been satisfied if BTC had simply expurgated his copy of Brownie Sez in such a way as to delete religious references. The same simple deletion from his paycheck of Bible verses would have served to eliminate Soffer's personal objections.

The fact that Soffer's job performance was not affected by the religious practices he found offensive did not obviate BTC's obligation to attempt to accommodate Soffer's objections. Like the Complainant in Young

who was said to have been able to simply "close her ears" to matters objectionable to her, Soffer could have simply ignored the Bible verses on his checks and religious articles in the Brownie Sez. However, employers simply have the obligation to attempt to accommodate an employee's objection to religious materials which offend them unless an employer can show an undue hardship would render an accommodation unreasonable.

Considering BTC's failure to respond to Soffer's objections, some affirmative relief is appropriate to insure that other BTC employees are free to object to religious matters imposed on them by BTC which they find objectionable, without fear of retaliation of any sort.

We now turn our attention to Soffer's contention that his discharge was because of his religion and in retaliation for complaining that he was offended by the religious verses on his paychecks and religious articles in the Brownie Sez.

Normally, in disparate treatment cases, the pattern of analysis follows a common avenue. First a Complainant makes a prima facie showing. Once established, a respondent is afforded an opportunity to articulate a legitimate, non-discriminatory reason for its action. If the Respondent meets this production burden, in order to prevail, a Complainant must demonstrate that the entire body of evidence produced demonstrates by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

However, we are not going to dwell on the prima facie requirement. Because this matter was fully tried on the merits, it is appropriate to move to the ultimate issue of whether Soffer has met his ultimate burden of persuasion that his discharge was discriminatory within the meaning of the PHRA. See U.S. Postal Service Board of Governors v. Aikens, 31 FEP 609 (U.S. Supreme Court 1983) ("Aikens").

In this case, BTC responded to Soffer's allegations by offering evidence of the reason for Soffer's dismissal. Aikens indicates that once a Respondent does this, the McDonnell-Burdine presumption arising from a prima facie showing drops from the case, and the factual inquiry proceeds to a new level of specificity. Aikens further states that the prima facie case method established in McDonnell Douglas was never intended to be rigid, mechanized, or ritualistic. Rather it is merely a sensible orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. Aikens, citing Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

"Where the [Respondent] has done everything that would be required of [it] if the [Complainant] had properly made out a prima facie case, whether the [Complainant] really did so is no longer relevant. The [trier of fact] has before it all the evidence it needs to decide whether 'the [Respondent] intentionally discriminated against the [Complainant].'" Aikens at 611. In short, we simply must decide which party's explanation of BTC's motivation to believe.

BTC's proffered rationale for Soffer's discharge was primarily articulated through BTC's only two witnesses, Soffer's direct terminal manager supervisors: Wilson and Timmens. Wilson directly supervised Soffer for the approximate period of May 1982 through January 1984. Timmens replaced Wilson and supervised Soffer until Soffer's discharge on June 29, 1984.

Wilson's testimony was given with artful articulation as Wilson outlined what he described as four ongoing problem areas with Soffer. Wilson testified that in his opinion, Soffer had a sarcastic attitude towards his job and in his relationships with his peers. Soffer's attitude was described as breaking the chain of a team partnership.

Wilson further suggested Soffer had a general resistance or rejection of authority. Soffer is said to have continually questioned authority throughout BTC's system. Wilson indicated that, in his opinion, Soffer harbored resentment because Wilson had been made the terminal manager instead of Soffer. Wilson stated that Soffer never had a volunteer spirit. Wilson contended that Soffer always had to be required to do things. Wilson described Soffer's mannerisms as throwing hands up in disgust, throwing his head back, sighing deeply, shuffling papers, and stating "If I have to I'll do it." The portrait Wilson's testimony painted was quite unflattering.

A third problem area Wilson outlined dealt with Soffer's phone mannerisms. Wilson said Soffer was cold and indifferent at best. Soffer was described as never smiling, displaying a sense of haste or urgency. Soffer was said to be curt, short, and conveying no congeniality.

The fourth area Wilson reviewed was a circumstance of alleged collusion between Soffer and BTC's dock foreman. The York facility dock foreman would be credited for the amounts of freight actually moved. Wilson contended that on two occasions Soffer had credited the dock foreman with either freight not moved or freight moved unnecessarily.

Wilson suggested he reprimanded Soffer for these problems and that on average it was necessary to have heart-to-heart discussions with Soffer every six weeks. Interestingly, Wilson submitted that once counselled, Soffer's performance would be ideal/exemplary for a time. However, in effect, Wilson's overall description of Soffer's performance was that it vacillated greatly.

Yearly, Wilson gave Soffer performance evaluations and at the conclusion of Wilson's duties as terminal manager, Wilson prepared a separate evaluation for Soffer. In December 1983, Wilson had also directed a memorandum to Wilson's boss generally regarding Soffer's performance for the year 1983. That memorandum stated:

"1983 has been a "Quieter" year for the mouse that roars. Temperance and a realization that sharp and sharpshooter are two different things were "Jaws" two assigned developmental goals for 1983. Steve has long been afflicted with a severe case of hoof and mouth disease of the non-anthrax type! Numerous instances of either acting or vocalizing before thinking have been contributing factors in stunting the career growth of this otherwise skillful individual. Operationally speaking, Steve has

an almost wizard level of intelligence of the mechanics of industry. I have witnessed firsthand his completion of technically complex logistical problems which would stump many a transportation professional. Yet in many instances this level of proficiency was overshadowed by Steve's inability to relate and get along with other people in his work environment. I have witnessed a change for the positive in his attitude and he more readily allows the quality of his work to announce his ability. He has shown a lesser hunger for constant demonstration of recognition and realizes the importance of consistency and follow through. Steve's promotional potential is almost totally dependent upon a continued level of personal growth such as he has shown this year."

Two additional factors were mentioned by Wilson apparently to be submitted as contributing factors leading up to Soffer's termination. In May, 1984, Wilson testified that Soffer had rudely told a BTC customer that BTC could not provide a certain service. Extraordinary arrangements had been made with a customer for a weekend expedited delivery. Wilson indicated that Soffer later told the customer it could not be done. Wilson says Soffer was put on notice that such actions would not be tolerated. Finally, Wilson suggested Timmens had reported that Soffer had been arbitrarily bringing in the billing clerk unnecessarily.

Wilson's account of the events occurring immediately prior to Soffer's termination suggest that Timmens called Wilson indicating Soffer

was "out of control." Wilson indicates Timmens told him Soffer continued to defy Timmens' authority and that Soffer perpetually challenged Timmens' decisions. Wilson indicated that he contacted Morrison, his supervisor, and a mutual decision was made by Wilson, Timmens, and Morrison to terminate Soffer.

When Timmens testified, he relayed that occasionally he had a problem with Soffer. Timmens' testimony regarding Soffer's problems began by stressing that Soffer's "problems stemmed from his basic attitude." For example, Timmens related that Soffer disregarded his instructions regarding when to allow the billing clerk to come in. Additionally, Timmens implied that Soffer also disregarded systemwide instructions regarding freight loading patterns resulting in a reprimand directed at Timmens.

Another problem area suggested by Timmens was Soffer's handling of customers. Specifically, Timmens related that Soffer's handling of a prospective customer resulted in the loss of that account. Along the same line, Timmens submitted that BTC salesmen complained to Timmens that Soffer had problems dealing with BTC customers which made it difficult to generate new business and maintain current business.

Timmens testified that on perhaps three occasions he sat with Soffer indicating that Soffer had to change. Timmens related that in April 1984 both he and Wilson met with Soffer and reviewed inconsistencies in Soffer's performance. Since April was Soffer's anniversary date, a pay increase was contemplated. However, Timmens indicated Soffer's raise was postponed pending Soffer displaying improvement. Timmens further indicated

the pay raise was then given "maybe 30 days outside of what may be more or would normally be considered on time."

Timmens then testified that after the end of April, Soffer's performance again fluctuated. Timmens related that in June, 1984 Soffer received a phone call from Timmens' wife. After Timmens' wife had asked where Timmens was, Timmens insinuated that Soffer told her that Timmens' and Wilson "had left for the evening with a couple of women and were going to commence to start drinking with them." Timmens also insinuated Soffer had told the same thing to Gary Morrison, BTC's regional vice president.

Timmens' related that in late June, 1984, he called Wilson indicating that "he did not feel as though [he] could adequately manage [Soffer] anymore." During that telephone conversation, Timmens submits that a decision was made to terminate Soffer.

The evidentiary content of the testimony of Wilson and Timmens clearly amounts to a sufficient articulation of legitimate non-discriminatory reasons for Soffer's discharge. Accordingly, it then becomes Soffer's burden to prove by a preponderance of evidence that these reasons are pretexts. It must be emphasized that Soffer retains the burden of persuasion on the ultimate issue of whether there was a discriminatory motive behind his termination. Soffer can succeed in this either directly by persuasion that a discriminatory reason more likely motivated BTC or indirectly by showing that BTC's proffered explanation is unworthy of credence. Winn v. Trans World Airlines, Inc., 75 Pa. Commonwealth Ct. 366, 462 A.2d 301 (1983), aff.d 506 Pa. 138 (1984); Texas Dept. of Community

Affairs v. Burdine, 450 U.S. 248, 256 (1981). Here, individual witness credibility and the totality of the evidence reveal that BTC's articulated explanations of Soffer's termination are unworthy of belief.

We are ever mindful that in discrimination cases it is rare for a Respondent to have made positive statements or to have performed patent acts of discrimination. Therefore, many cases must be resolved by findings of discrimination based upon inferences and circumstantial evidence. Harmony Fire Co. v. PHRC, 34 Pa. Superior Ct. 595, 459 A.2d 439 (1983); and Harrisburg School District v. PHRC, 77 Pa. Commonwealth Ct. 594, 466 Pa. 760 (1983). Here, considered both collectively and individually, each of BTC's articulated reasons are uncovered as pretextual.

Several major discrepancies expose much of Wilson's and Timmens' testimony as unworthy of credence. The most cogent pieces of evidence in this case were Soffer's performance evaluations. Consistently, Soffer was given the highest possible rating for his job performance. Remarkably, in April, 1984, only two months before his termination, Soffer's performance ratings remained consistent with all his prior ratings. In addition to categorical ratings on the April 1984 evaluation, Timmens included several descriptive remarks which stated,

"Steve does an excellent job, is always here when he is needed (weekends). Good work on phone, knows his responsibilities and performs them. I feel he merits this raise."

Both Wilson and Timmens Public Hearing testimony suggested Soffer was a significant problem employee whose pending raise had to be held back

until he manifested positive changes. In several persuasive ways, Soffer's April, 1984 performance evaluation is very solid evidence that neither Wilson's nor Timmens' Public Hearing version of Soffer's performance is believable. Soffer testified that he had been originally slated for a \$25 per week raise until he spoke with Timmens who was persuaded by Soffer to increase the raise to \$35 per week. Soffer's April, 1984 evaluation had listed an amount which was crossed out and \$35 per week substituted; thereby substantially corroborating Soffer's version of the April, 1984 circumstances. Additionally, Wilson and Timmens said Soffer's raise was held up for approximately 30 days, as it was unusual to not get a raise until the end of an anniversary month. Looking at Soffer's 1982 evaluation one sees that the effective date of Soffer's 1982 raise was May 1, 1982: No different from the 1984 experience.

Specifically regarding Soffer's contacts with BTC customers, it is particularly noteworthy that Timmens commented "good work on phone." The billing clerk who worked on Soffer's shift testified that she had never known Soffer to show any adverse concerns to BTC customers. For the most part, only the billing clerk and Soffer were in the terminal. Because of the nature of his work, Timmens was seldom around. Also, the billing clerk related that she had never heard even a hint of a complaint from anyone regarding Soffer.

The billing clerk's testimony on another area is also quite telling. Like Soffer's testimony, she indicated that although she worked part-time, she had a specific starting time each day of the Monday through

Friday operation. Timmens suggested Soffer was told that there had to be a certain number of freight bills before the billing clerk should be brought in. This too was not credible. At one point Timmens testified that on a night when there was only a small number of bills, he asked the billing clerk if she had been called in and she said yes. Clearly, when the billing clerk was called it would have been on those infrequent occasions to be told not to come in because the workload was light. Otherwise, she came in daily at a regularly scheduled time.

Both Wilson and Timmens generally testified that Soffer questioned authority. This assertion too is not credible. First, systemwide, Timmens suggested Soffer contradicted loading patterns. However, the evidence clearly shows that in reality Soffer had been commended by the then district vice president, Don Pries, for his efforts regarding loading patterns. This note of appreciation came to Soffer in May, 1982. Regarding Soffer's general reactions to authority, once again, each and every time Soffer was evaluated, he was marked in the good category regarding "Employee Relations."

In January, 1984, when Wilson was promoted from terminal manager, he did a separate evaluation of Soffer in which he did mention that Soffer needs to develop a stronger desire to work well and alongside others, however, in a category designated "Dependability" Soffer was given an excellent rating.

Another factor leaning heavily against the credibility of Wilson's and Timmens' testimony is the simple idea that if Soffer

fluctuated greatly between being either a good or bad supervisor, why then, in late March, 1984, was Soffer selected to train a new night operations supervisor in Edison, New Jersey. Soffer's selection to train a new supervisor is clearly inconsistent with Wilson's and Timmens' negative portrait painted of Soffer.

At the Public Hearing, one of Soffer's witnesses was Derek Rich Koller, a salesman with BTC for 6-7 months in 1984. Koller described Soffer's demeanor as all business and conveyed that he never had any customer problems which in any way involved Soffer. Koller testified that he had never complained to Timmens regarding Soffer. Timmens later testified that in effect Koller had complained. BTC had two salesmen and Timmens had also expressed that the other salesman was the one who primarily complained about Soffer.

This raises a particular point generally applicable to several issues raised by both Wilson and Timmens. Instead of calling witnesses with direct information on a subject, BTC relied wholly on information related by either Wilson or Timmens which had allegedly been passed onto them. In Harris v. Richards Mfg. Co., 25 FEP 720 (W.D. Tenn. 1981), a U.S. District Justice's finding that Respondent witnesses were less than credible was based in part on the fact that in Harris, the Respondent did not produce the allegedly complaining parties to testify regarding reported displeasure with a Complainant. BTC's litigation posture has stark similarities to the shortcomings noted in Harris. Timmens testified that a BTC salesman complained but failed to call that salesman. Wilson and

Timmens indicated there were complaints from BTC customers; again not one complaining customer representative was called by BTC to relate specific displeasure with Soffer personally. Timmens testified that he was reprimanded because Soffer had disregarded freight loading patterns, but neither an internal memo reflecting such a reprimand nor supportive testimony by the source of the alleged reprimand was produced at the Public Hearing. Similarly, Timmens' insinuations that Soffer told his wife and Morrison a tale that Timmens and Wilson went drinking with several women went uncorroborated by either Timmens' wife or Morrison.

The credibility of Wilson's and Timmens' testimonial version of Soffer's performance having already been severely weakened by Soffer's performance evaluations, BTC's failure to produce corroborative witnesses on the matters outlined above serves to further weaken the credibility of Wilson's and Timmens' testimony.

Specifically, on the issue of retaliation, Respondent's Exhibit #3, previously reproduced in this opinion, is quite telling in several respects. First, we note that Wilson displayed masterful articulation skills. However, in the beginning of Respondent Exhibit #3, Wilson's expressive skills appear to have been set aside for a jumbled assortment of seemingly meaningless phrases. Careful analysis of the phrases used reveals a telling disclosure. Wilson's memorandum to Morrison was drafted in December, 1983. Soffer first complained to Wilson in June, 1983 and approximately October, 1983 again approached Wilson regarding the status of his prior complaint. Wilson's memorandum calls Soffer "The mouse that

roars", "Jaws", and suggests Soffer has a "severe case of hoof and mouth disease." Wilson's memo also described Soffer as having vocalized without thinking and by doing so Soffer's career growth has been stunted. Then, the memo's damaging effect is further revealed by its change in focus and return to normal language. The change occurs when Wilson says "Operationally speaking . . ." Obviously, the information conveyed to Morrison before this phrase relates to matters outside Soffer's operational performance. A strong inference is created here that Wilson began his memo by ridiculing Soffer for having complained about Bible verses on his checks and by further recognizing that by complaining Soffer adversely affected his career potential at BTC. Wilson's descriptive choices clearly depict someone that Wilson considered as having a big mouth about something. A reasonable inference here is that Wilson was referring to Soffer's religious-based complaints.

In my opinion, the career stunting Wilson referred to in December, 1983 mushroomed into a June, 1984 career termination after Soffer again raised religious concerns regarding articles in BTC's "Brownie Sez" beginning in January, 1984. Timmens' testimony dramatically illustrates the stark contradiction between his Public Hearing version of events leading up to Soffer's termination and what most likely occurred. When asked on direct examination about incidents occurring between the end of April, 1984 and the June 29, 1984 termination, Timmens mentioned only Soffer allegedly telling his wife and Morrison that he was out with a couple of women. On cross examination, Timmens could not point to a single

precipitating event which ultimately resulted in Soffer's discharge. Instead, Timmens indicated the decision had not been sudden. Timmens says he relied on past events occurring in February and March. Timmens also stated that Soffer's alleged conversation with his wife was not a big factor in Soffer's discharge. The bottom line with Timmens was the simple idea of inconsistent job performance.

This testimony stands in direct conflict with Soffer being sent to train a new supervisor and an excellent job performance rating coupled with a \$35 per week raise only two months previous. Once again, the \$35 began as \$25, but was increased to \$35 after Soffer successfully argued for more.

The circumstances of Soffer's actual termination also pose interesting questions. Timmens abruptly discharged Soffer telling him to get his personal possessions, to leave the premises, and not to come back on the property. The original documentation of the discharge simply designates "dismissed" without further explanation. Documented explanations only began to be forthcoming after Soffer had obtained the services of an attorney who began communicating with BTC.

Considering the evidence as a whole and the credibility of witnesses, it is my opinion that Soffer was an employee who did an excellent job. When instructed regarding any minor discrepancy, Soffer took professional corrective action and comported his behavior and performance completely within acceptable standards. He did, however, complain about a high level management policy which he found offensive and

which related to religiously related conditions he perceived were being imposed upon him. His complaints became intolerable to someone, thereby, resulting in his eventual termination. Accordingly, finding BTC liable for Soffer's termination, we turn to the issue of an appropriate remedy.

Because Soffer adamantly expressed that there were no circumstances under which he would return to BTC, we need not address the issue of reinstatement. Instead, the individual remedial emphasis here will be on back pay liability issues.

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 he 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 must consider regarding making Soffer 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).

Clearly, Soffer's termination date is the appropriate commencement point from which to calculate any financial loss. Here,

Soffer's testimony also provides us with the specific ending date of July 1988. Soffer testified that at that time compensation from his new job substantially exceeded the compensation he would have been making at BTC had he not been terminated.

When Soffer left BTC he was paid \$460 per week. On an employee's anniversary date raises were considered and normally given. In Soffer's case his anniversary date was in April and historically he received raises of \$50 per week in 1982, \$25 per week in 1983, and \$35 per week in 1984. Averaging Soffer's previous raises, he was given an average yearly raise of approximately \$37 per week. Using this average figure, had Soffer remained at BTC, Soffer would have earned at least the following amounts during the period from June 29, 1984, up to July 1988.

June 29, 1984 - April 30, 1985		
43½ weeks at \$460 per week	-	\$ 20,010.00
May 1, 1985 - April 30, 1986		
52 weeks at \$497 per week	-	\$ 25,844.00
May 1, 1986 - April 30, 1987		
52 weeks at \$534 per week	-	\$ 27,768.00
May 1, 1987 - April 30, 1988		
52 weeks at \$571 per week	-	\$ 29,692.00
May 1, 1988 - July 1, 1988		
8½ weeks at \$608 per week	-	<u>\$ 5,168.00</u>
		\$108,482.00

Fundamentally, a back pay award should be reduced by either a Complainant's actual earnings or amounts which could have been earned by exercising reasonable diligence. The record in this case contains an abundance of evidence which securely supports the premise that Soffer made continual diligent efforts to secure alternative employment.

For 22 weeks after leaving BTC, Soffer received approximately \$250 per week unemployment compensation benefits. In Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983), the circuit court articulates well reasoned rationale for not deducting unemployment compensation. In order not to dilute the PHRA's purpose of ending discrimination in the workplace and because unemployment compensation most closely resembles a collateral benefit which is ordinarily not deducted from a Complainant's recovery, we decline to deduct the 22 weeks of compensation Soffer received. In this case, we adopt the stated rationale in Craig as persuasive arguments.

In December 1984, Soffer began substitute employment with Sanborne's Motor Express. Soffer remained with Sanborne until October 1986, at which time Soffer began a new job with Jack Trier Moving and Storage Co., where Soffer remained until April 1987. In April 1987, Soffer again switched employers and went with AAA Trucking as a salesperson. In July 1988, Soffer changed jobs again and moved to Holmes Transport where he concedes he was paid more than he would have made had he remained with BTC.

On direct examination Soffer indicated that at Sanborne's he was initially paid \$9.00 per hour and averaged \$400 per week, gross. However,

on cross-examination, Soffer agreed that he did work considerable overtime and that 50 hours per week was probably accurate. At 50 hours per week, the average gross wages would be \$495 per week. In June 1985, Soffer was put on a salary basis and received \$500 per week.

In October 1986, when Soffer went to Jack Trier's his salary remained at \$500 per week. The same was true when Soffer transferred jobs and began working at AAA Trucking. From April 1987 through June 1988 Soffer's salary remained \$500 per week. In June 1988, Soffer's salary was increased to \$540 per week.

When Soffer began with AAA Trucking he was also afforded a company car. This factor becomes important when consideration is given to Soffer's request that his damages include a mileage calculation because when he left BTC he accepted comparable employment which was, roundtrip, approximately 56 miles per day, greater distance to get to and from his substitute employment. Weekly, this amounts to approximately 280 additional miles driven by Soffer between December 1984 and April 1987.

Most courts which have addressed the issue of whether mileage differentials are an appropriate remedial measure have permitted such expenditures. See i.e. Williams v. Board of Education, 5 FEP 814 (M.D.NC. 1973), aff'd 10 FEP 585 (4th Cir. 1974); Mitchell et.al. v. West Feliciana Parish School Board, 507 F.2d 662 (5th Cir. 1975); American Manufacturing Co., 66 LRRM 1122 (1967). We agree that such differential commuting expenses are appropriate.

On this point, Soffer originally suggested that his expenses should be calculated at 25¢ per mile. On cross-examination, Soffer specifically conceded that his expenses were not that much. State employees are presently reimbursed at the rate of 22.5¢ per mile and we deem this a reasonable figure with which to calculate Soffer's commuting expenses. Accordingly, following his termination, Soffer incurred commuting expenses between December 1984 and April 1987: Approximately 120 weeks - 280 miles per week - 22.5¢ per mile or \$7,560.00, total additional commuting expense. This amount serves to reduce the amount of actual earnings Soffer earned following his termination.

Soffer's earnings included:

(a) Sanborne's Motor Express:

\$495 per week between December 1984 - June 1985;
approximately 6 months or 26 weeks \$12,870.00

(b) Sanborne's Motor Express; Jack Trier Moving
& Storage Co.; and AAA Trucking:

\$500 per week between June 1985 - June 1987;
approximately 2 years or 104 weeks \$52,000.00

(c) AAA Trucking:

\$540 per week between June 1987 - July 1988;
approximately 13 months or 56 weeks \$30,240.00

Total interim earnings \$95,110.00

Less commuting expenses \$87,550.00

Accordingly, Soffer's lost wages for the applicable period after his termination amount to \$20,932.00. Added to this figure are several additional expenses incurred by Soffer as a result of his termination. First, Soffer claims certain incidental expenses associated with seeking alternative employment. Incidental expenses have been included in damages calculations. See i.e. Singleton v. Vance County Board of Education, 8 FEP 205 (EDNC 1973); and Williams v. Board of Education, Supra.

The incidental expenses which will be allowed in this matter include:

(a) Mileage seeking alternative employment:	
2,125 miles at 22.5¢ per mile	\$478.13
(b) Phone bills regarding Soffer's search for employment	\$114.02
(c) Trade publication subscription	\$110.07
(d) Sending inquiries/resumes to prospective employers	<u>\$216.78</u>
Total	\$919.00

Soffer also claims the cost of maintaining medical insurance and life insurance which had been benefits received at BTC. Also, Soffer submitted he incurred medical and dental expenses that would have been covered had he not been terminated. These expenses are also appropriate when computing damages and include:

(a) Blue Cross/Blue Shield Premiums	\$ 512.72
(b) Life Insurance Premiums	\$ 419.58
(c) Medical/Dental Bills	<u>\$ 197.00</u>
Total	\$1,129.30

Soffer also asks for reimbursement of his legal fees associated with his Unemployment Compensation Hearing. Such expenditures are not recoverable as damages in a PHRA action. Accordingly, Soffer incurred a total financial loss of \$22,980.30 as a result of his discriminatory discharge.

Following is an order which both reflects these damages and addresses affirmative measures designed to influence the Respondent's practices regarding religious materials being incorporated into BTC's business.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

STEPHEN L. SOFFER,
Complainant

v.

BROWN TRANSPORT CORPORATION,
Respondent

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:
:
:
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Docket No. E-30889-D

RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes and recommends a finding that the Respondent did unlawfully discriminate against the Complainant by discharging him because of his religion and in retaliation for the Complainant having opposed a practice he believed violated the PHRA. The Respondent's adverse action was in violation of Sections 5 (a) and (d) of the Pennsylvania Human Relations Act. Accordingly, it is recommended that the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission.



Carl H. Summerson
Hearing Examiner

4. That BTC shall pay to Soffer within 30 days of the effective date of this Order, the lump sum of \$22,980.30, which amount represents back pay lost for the period June 29, 1984 up to July 1988, costs associated with seeking alternative employment, additional commuting costs, and medical and dental costs incurred.

5. That BTC shall pay interest of 6% per annum, calculated from June 29, 1984 until payment is made.

6. That within 30 days of the effective date of this Order, BTC shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Patricia Miles, Esquire, in the PHRC Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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

ATTEST:

Raquel Otero de Yiengst
Raquel Otero De Yiengst, Secretary