COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DOROTHY DI PASQUALE, Complainant	DOCKET NO. E-46060
and	
THE ESTATE OF M. JANE HANSEN, Complainant	DOCKET NO. E-46062
v.	
JOHNSON MATTHEY, INC., Respondent	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DOROTHY DIPASQUALE AND JANE HANSEN, Complainants	:	DOCKET NOS. E-46060 and E-46062
v.	:	
JOHNSON MATTHEY INC., Respondent	:	

~~PROPOSED~~ STIPULATIONS OF FACT

The following facts are admitted by all the parties to the above-captioned case and no further proof thereof shall be required.

1) The Complainant herein is Dorothy DiPasquale, an adult female. Jane Hansen, an adult female, was also a Complainant; however, Ms. Hansen died on October 9, 1994, and an administrator was appointed in November 1994 to represent the interests of her estate.

2) The Respondent herein is Johnson Matthey Inc.

3) The Respondent, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth of Pennsylvania.

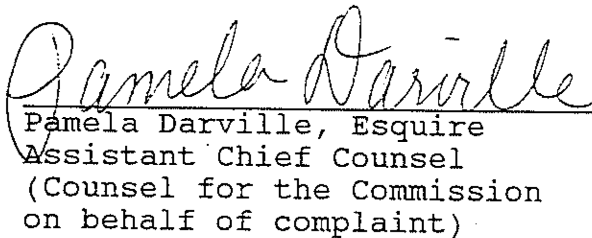
4) On or about November 23, 1988, Complainants DisPasquale and Hansen filed a notarized complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission Docket Numbers E-46060, E-46061, E-46062 and E-46063. A copy of the complaint is attached hereto as Appendix

"A" and will be included as a docket entry in this case at time of hearing. The complaint, as docketed at E-46061 and E-46063 is not included in this matter herein.

5) In correspondence dated September 26, 1991, Commission staff notified the Respondent that probable cause existed to credit the allegations of handicap/disability contained in the above-referenced complaint.

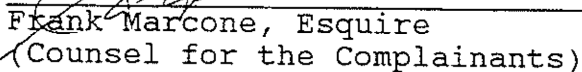
6) A meeting occurred on November 6, 1991, with Commission staff and the parties to settle this matter. No settlement was reached. The parties continued to attempt to settle this matter from March 1992 through June 1992, but were unsuccessful.

7) In correspondence dated September 9, 1994, Commission staff notified Respondent that a public hearing had been approved in this matter.



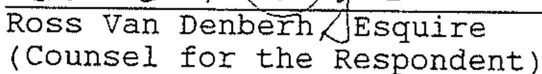
Pamela Darville, Esquire
Assistant Chief Counsel
(Counsel for the Commission
on behalf of complaint)

March 3, 1995
Date:



Frank Marcone, Esquire
(Counsel for the Complainants)

5/2/95
Date:



Ross Van Denberh, Esquire
(Counsel for the Respondent)

April 25, 1995
Date:

FINDINGS OF FACT *

1. Complainant Dorothy DiPasquale (hereinafter "DiPasquale") was hired by the Respondent, Johnson Matthey, Inc. (hereinafter "Johnson Matthey"), on May 18, 1978. (CE 27.)

2. Complainant Jane Hansen (hereinafter "Hansen") was hired by Johnson Matthey on April 4, 1977. (CE 28.)

3. Hansen died on October 9, 1994, and an administrator was appointed in November 1994 to represent the interests of Hansen's estate. (SF 1.)

4. Of Johnson Matthey's coast-to-coast national operation, three facilities are located in the Delaware Valley: the West Whiteland plant in West Chester; a facility in Malvern; and a facility in Devon Industrial Park. (NT 340-341, 1017.)

5. Union employees at Johnson Matthey facilities operate under a collective bargaining agreement. (NT 342; CE 3, 5; RE 6, 7 and 8.)

6. Nationally, Johnson Matthey employs approximately 2,500 employees. (NT 341.)

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

CE	Complainants' Exhibit
NT	Notes of Testimony
RE	Respondent's Exhibit
SF	Stipulations of Fact

7. In 1988, DiPasquale and Hansen worked in Johnson Matthey's West Whiteland Plant which employed approximately 280 employees, of which approximately 110 were in the collective bargaining unit. (NT 340-342.)

8. Each unionized job at Johnson Matthey has a job description and has a job classification: the higher the classification, the higher the pay scale. (NT 266; CE 24.)

9. From May 1978 to March 26, 1985, DiPasquale performed as a Janitor, Class 1, in Johnson Matthey's administration building. (NT 783-784.)

10. While at work on March 26, 1985, DiPasquale broke a metatarsal bone in her right foot, causing her to be off work from March 26, 1985 to November 1985. (NT 784, 790, 899.)

11. Over time, DiPasquale's foot injury aggravated both her knee and a prior back injury. (NT 569, 901, 945.)

12. DiPasquale also had to wear a metal ankle brace because her injured foot kept turning over. (NT 814, 945.)

13. To the present, DiPasquale still gets cortisone shots in her injured foot. (NT 943.)

14. In November 1985, DiPasquale returned to Johnson Matthey as a Janitor, Class 1. (NT 794, 899).

15. Dr. Traiman, the doctor who treated DiPasquale, had some affiliation with Johnson Matthey. (NT 1142.)

16. Dr. Traiman returned DiPasquale to regular duty November 4, 1986, without restrictions. (RE 10.)

17. After further problems which stemmed from the foot injury, on December 1, 1986, Dr. Traiman placed a complete work restriction on DiPasquale until December 22, 1986, when DiPasquale's condition was to be reevaluated. (RE 10.)

18. DiPasquale's condition caused her to be out for three additional weeks beginning February 19, 1987, and on March 9, 1987, Dr. Traiman released DiPasquale to work on March 16, 1987 with a five-pound lifting restriction. (RE 10.)

19. In July 1987, Dr. Traiman raised DiPasquale's lifting restriction to 12 to 15 pounds, which lifting restriction was listed as permanent on January 8, 1988. (RE 10.)

20. When DiPasquale returned to work in November 1985, she remained a Janitor, Class 1, at the West Whiteland facility for approximately one year, at which time DiPasquale bid on a Class 12 position in Johnson Matthey's investment room, also at the West Whiteland facility. (NT 784, 799, 879, 906, 909.)

21. Eventually, Johnson Matthey abolished the West Whiteland investment room operation, and DiPasquale transferred into the gauze department. (NT 802.)

22. On August 16, 1986, DiPasquale bumped into the West Whiteland facility rolling department as a Class 7 Roller's Helper. (NT 696, 804, 833, 908, 910.)

23. The Roller's Helper position then changed and the title for DiPasquale's position became Operator B, Class 10. (NT 121, 343, 345, 808, 910.)

24. DiPasquale remained an Operator B until January 8, 1988, when DiPasquale received a layoff notice effective January 15, 1988. (NT 39-41; CE 1.)

25. Before the layoff, DiPasquale had been performing the Operator B job satisfactorily, without complaints. (NT 129, 132, 236, 1097, 1206.)

26. Melt and Roll Operators who were assisted by DiPasquale attested to the fine job DiPasquale had done, and that her lifting restriction did not impair her ability to do the Operator B job. (NT 367, 580, 595, 634, 719, 733.)

27. Hansen also performed as a Helper, Class 7/Operator B, Class 10, until she too was notified of being laid off on January 8, 1988, effective January 15, 1988. (NT 343; CE 2.)

28. Hansen too had lifting restrictions which began when back pain and leg spasms caused Hansen to see Dr. Traiman in October 1986. (RE 12.)

29. On or about November 1986, Hansen's back problem caused Dr. Traiman to impose a five-pound lifting restriction and no standing for more than four hours at a time. (RE 12.)

30. Over time, Hansen's lifting restriction increased until shortly before her layoff Hansen had a 15-pound lifting restriction. (NT 768, 779.)

31. Like DiPasquale, Hansen too had been performing her duties as an Operator B satisfactorily, without complaints. (NT 129, 132, 236, 1097, 1206.)

32. Melt and Roll Operators attested that Hansen performed her job while operating under lifting restrictions. (NT 598, 632, 687, 719, 733.)

33. DiPasquale's and Hansen's layoffs resulted from a decision to eliminate all Operator B positions in the Melt and Roll department. (NT 36, 133.)

34. In May 1987, Robert Johnson (hereinafter "Johnson") became the West Whiteland operations manager. (NT 1032.)

35. Johnson's review of daily, monthly, and annual production reports revealed a pattern of production deterioration related to profitability. (NT 1033-1034.)

36. Johnson Matthey hired an outside industrial engineering consultant to conduct a production study. (NT 1034.)

37. The study identified the Melt and Roll operation as having low productivity and recommended the elimination of Operator B positions. (NT 1036-1037; RE 5.)

38. In August 1987, Johnson partially implemented the study's recommendation and added a second Melt and Roll operator onto the second shift where there previously had been only one. (NT 1038, 1064.)

39. The increased production realized by that change led to Johnson's decision in December 1987 to eliminate Operator B positions. (NT 1039, 1044, 1068.)

40. At the time of this decision, Johnson was unaware of either DiPasquale's or Hansen's lifting restrictions. (NT 129, 1077.)

41. On January 8, 1988, the three Operator B positions in the Melt and Roll department were eliminated. (NT 133, 134, 344, 1069.)

42. Johnson's plan was to create one additional Melt and Roll Operator, Class 16 position on the day shift, in addition to the experimental position created in August 1987. (NT 346.)

43. The second Melt and Roll Operator position was posted for bids on April 20, 1988. (NT 346; CE 19.)

44. Paragraph 6.5.3 of the Collective Bargaining Agreement provides laid off employees with bumping rights. (CE 3.)

45. A laid off employee may bump employees junior in seniority in the same or lower job classifications. (NT 270, 1019; CE 3.)

46. At the West Whiteland plant, there were only two job classifications lower than the highest job classifications ever held by either DiPasquale or Hansen: Janitor, Class 1, and Laborer, Class 3. (NT 42, 1019.)

47. Hansen attempted to bump into the Janitor position, but Walter Perkins, Johnson Matthey's then Human Resources Manager (hereinafter "Perkins"), advised Hansen that her lifting restriction prevented her from bumping into the Janitor position. (NT 32, 42, 46, 52, 68-69, 71-73, 144, 1207-1208; RE 1.)

48. Laid-off employees have three working days from a notice of layoff to notify the Human Resources Department of their intent to exercise their bumping rights. (NT 297-298; CE 3.)

49. Laid-off employees with seniority then have ten days to bump a junior employee. (NT 270; CE 3.)

50. On January 13, 1988, DiPasquale was injured when she slipped on ice. (NT 815, 819, 912.)

51. Initially, on January 13, 1988, DiPasquale received a three-day "no work" restriction from Dr. John Foster. (RE 10.)

52. Subsequently, Dr. Daniel Zimet issued DiPasquale a "Not to return to work until 2-11-88" restriction following her fall. (RE 10.)

53. Although DiPasquale attempted to exercise her bumping rights, DiPasquale's injury made her unavailable to work until February 11, 1988. (NT 42; RE 10.)

54. In any event, DiPasquale too was informed that she would not be permitted to exercise bumping rights because of her lifting restrictions. (NT 47, 68-69, 71-73, 144, 1207, 1208.)

55. Following their layoffs, both Hansen and DiPasquale collected twenty-six weeks of unemployment compensation benefits. (NT 26, 87, 769-770, 845.)

56. On January 18, 1988, DiPasquale and Hansen filed Grievance M-88-2 which contested their not being allowed bumping rights and, in the alternative, that rather than going on unemployment, they should be placed on worker's compensation. (NT 339, 375; CE 23.)

57. In June 1988, DiPasquale's Grievance M-88-2 was settled, and in July 1988 Hansen's was settled, with the results that both were placed on worker's compensation, retroactive to the time of their layoffs. (NT 513-514, 845.)

58. In effect, Paragraph 7.2.3. of the CBA provides that laid-off employees have an automatic bid on all posted jobs, and that the senior employee will be awarded an opening provided the employee has the abilities and qualifications for the opening. (NT 57, 76, 80, 87, 306, 585, 1183; CE 5.)

59. A successful bidder is given a period of time to see if they are able to do a job. (NT 92, 100, 107; CE 5.)

60. Employees on worker's compensation have no bidding rights. (NT 273.)

61. Between DiPasquale's and Hansen's layoffs and the time they were retroactively placed on worker's compensation, the following jobs came open for which employees junior in seniority to both DiPasquale and Hansen filled the openings:

	Job Title	Date Filled
A.	General Inspector	2/1/88
B.	CNC Set-Up Operator	4/11/88
C.	Bench & Machine Operator	4/18/88
D.	Bench & Machine Operator	4/25/88
E.	Bench & Machine Operator	5/2/88
F.	Draw & Form Operator	5/2/88
G.	Fabrication Operator	5/2/88

	Job Title	Date Filled
H.	Prod. Fab. Erector	5/9/88
I.	Laborer	5/9/88
J.	Draw & Form Operator	5/9/88
K.	Melt & Roll Operator	5/9/88
L.	Draw & Form Operators (2)	6/13/88
M.	CNC Set-Up Operator	6/20/88

(CE 13.)

62. Additionally, the following two additional openings occurred for which only Hansen had seniority over the employee who filled the opening:

	Job Title	Date Filled
A.	Draw & Form Operator	4/25/88
B.	Precious Metal Craftsman	5/2/88

(CE 13.)

63. The General Inspector, Class 16 job which was filled on February 1, 1988 was offered to Hansen, but she declined because it was a second shift job. (NT 56, 59, 76; CE 4.)

64. Perkins testified that, but for their lifting restrictions, both DiPasquale and Hansen were otherwise qualified for these openings with the exception of the CNC Set-Up Operator positions where a machine shop background was considered necessary. (NT 349-350.)

65. Perkins unilaterally decided DiPasquale's and Hansen's lifting restrictions would prevent them from doing any of the available jobs. (NT 1189.)

66. Perkins had concluded that as long as DiPasquale and Hansen had lifting restrictions Perkins would not allow them to work, no matter what. (NT 82, 89, 105, 107, 180, 243, 247.)

67. Perkins testified that it was merely a guess that employees in departments with openings were required to lift over ten pounds. (NT 83, 85, 86.)

68. In the Draw & Form department, Perkins indicated that perhaps twice a year either DiPasquale or Hansen may have required assistance lifting something, had they been given positions in that area. (NT 85.)

69. Some work in the Bench & Machine Operator, Class 16 positions was small lathe work at a bench, under magnification. (NT 75.)

70. Perkins was of the opinion that an accommodation was unreasonable if the accommodation had to be full-time. (NT 196-197, 216.)

71. Johnson Matthey frequently accommodated temporary restrictions. (NT 67, 84, 118, 137-139, 141-142, 166-167, 185, 217, 222-226, 227, 235-236, 239, 243-244, 274, 308; CE 14, 15, 16, 17.)

72. Also, if an employee was in a job already, and needed an accommodation, one was made. (NT 256.)

73. Perkins testified that it was not at all difficult to create a job. (NT 355.)

74. Within departments, there are many jobs in each job description and some facets of a job description require more lifting than others. (NT 241-242.)

75. Within a department, individual job assignments are made by production supervisors. (NT 242.)

76. Perkins testified that to keep injuries down, he recommended that employees ask for help when handling heavy materials. (NT 84, 89.)

77. DiPasquale and Hansen were the only two Johnson Matthey employees considered to have permanent disabilities. (NT 120.)

78. Perkins indicated that no accommodations would be made for those with permanent disabilities. (NT 118-119.)

79. Perkins never attempted to negotiate with either DiPasquale or Hansen regarding the possibility of accommodations. (NT 1027.)

80. Neither DiPasquale nor Hansen were afforded an opportunity to attempt to do jobs which came open following their layoffs. (NT 92, 100, 107, 1178, 1198.)

81. On July 15, 1988, Perkins notified DiPasquale of a Laborer, Class 3 opening and that she was expected to report to work on July 25, 1988 with documentation of her ability to perform all facets of the job. (NT 154, 822; CE 18.)

82. When DiPasquale went in on July 25, 1988, Perkins did not permit DiPasquale to work since she still had a 20-pound lifting restriction. (NT 157, 829.)

83. DiPasquale was not afforded a trial period. (NT 159.)

84. Perkins told DiPasquale that she would need a 30-pound lifting restriction. (NT 159.)

85. Perkins did not know, but only guessed, in what ways a 20-pound lifting restriction would have hindered DiPasquale's performance in the Laborer's position. (NT 161, 185.)

86. On July 20, 1988, DiPasquale and Hansen filed grievance number M-88-12, which, in effect, claimed that they had been denied their bidding rights. (CE 25.)

87. An arbitrator denied their grievance by finding that since DiPasquale and Hansen had been retroactively put on worker's compensation, their bidding rights were lost. (RE 2.)

88. DiPasquale and Hansen remained on worker's compensation until Johnson Matthey created jobs for them in May 1992. (NT 96-97.)

89. The Union and Johnson Matthey cooperated in creating Hand Finisher positions for DiPasquale and Hansen, and Union officials testified that the Union wanted to help both DiPasquale and Hansen. (NT 354, 396.)

90. After a short time, DiPasquale was disqualified as a Hand Finisher and she bumped into a Bench & Machine Operator position. (NT 872, 875, 1157.)

91. DiPasquale has remained in the Bench & Machine Operator position through the public hearing.

92. During the period she was on worker's compensation, Johnson Matthey paid Dipasquale $56,449.81 in benefits. (NT 981.)

93. During the period she was on worker's compensation, Johnson Matthey paid Hansen $62,557.48 in benefits. (NT 981.)

94. At the time of their layoffs, DiPasquale and Hansen were earning $11.10 per hour. (NT 834.)

95. When returned to work, effective June 1, 1992, DiPasquale's and Hansen's pay rates were $13.93 per hour. (CE 27, 28.)

96. No evidence was presented that either DiPasquale or Hansen ever attempted to find alternative employment from the moment there was an agreement resolving their grievance number M-88-2, which placed them on worker's compensation retroactive to January 15, 1988. (NT 777, 925.)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of these consolidated cases.

2. The parties have fully complied with the procedural prerequisites to a public hearing in these cases.

3. DiPasquale and Hansen are individuals within the meaning of the Pennsylvania Human Relations Act ("PHRA").

4. Johnson Matthey is an employer within the meaning of the PHRA.

5. Victims of one or more alleged acts may maintain an action regarding acts occurring before the 180 day limitation period, so long as at least one of the alleged acts occurred within the filing period.

6. To establish a *prima facie* case that DiPasquale's and Hansen's layoffs were discriminatory, DiPasquale and Hansen must prove:

(a) that they have handicaps/disabilities;

(b) that they met applicable job qualifications;

(c) that, despite their qualifications, they were laid off;

(d) that either individuals without lifting restrictions were retained, or others with lifting restrictions were assigned jobs they had performed; and

(e) that evidence is produced from which a reasonable conclusion can be made that Johnson Matthey intended to discriminate.

7. Both DiPasquale and Hansen established that they have handicaps/ disabilities within the meaning of the PHRA.

8. DiPasquale and Hansen could not establish the fourth element of the requisite *prima facie* showing regarding their layoffs.

9. Hansen has established a *prima facie* showing that she was denied bumping rights by establishing:

(a) that she has a handicap/disability;

(b) that she expressed her intention to exercise her bumping rights;

(c) that she was otherwise qualified for a position for which she had a right to bump into; and

(d) that she was denied the opportunity to bump.

10. Johnson Matthey failed to establish that Hansen's lifting and standing restrictions were job-related.

11. DiPasquale was unavailable to exercise bumping rights.

12. DiPasquale and Hansen have established *prima facie* cases with regard to their automatic bidding rights being denied by establishing:

(a) that they had handicaps/disabilities;

(b) that they bid on open positions;

(c) that they were otherwise qualified for open positions; and

(d) that they were denied positions.

13. Johnson Matthey failed to establish that either DiPasquale's or Hansen's restrictions were job-related.

14. Prevailing Complainants are entitled to lost wages, plus six percent interest.

OPINION

These consolidated cases arise on complaints filed on or about November 23, 1988, by Dorothy DiPasquale (hereinafter "DiPasquale") and M. Jane Hansen (hereinafter "Hansen") against Johnson Matthey, Inc. (hereinafter "Johnson Matthey"), with the Pennsylvania Human Relations Commission (hereinafter "PHRC"), at Docket Numbers E-46060 and E-46062.

The consolidated complaints alleged sex-based and disability-based discrimination in that DiPasquale and Hansen alleged they were laid off on January 15, 1988, and subsequently refused recall rights. These allegations allege violations of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, PL 744, as amended, 43 PS §951, *et seq.* (hereinafter "PHRA").

PHRC staff investigated the allegations and at the investigation's conclusion informed Johnson Matthey that probable cause existed to credit DiPasquale's and Hansen's disability-based allegations. Thereafter, the PHRC attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that it had approved a public hearing.

The public hearing was held on May 2, 3 and 4, 1995, and on June 6, 1995, in West Chester, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The PHRC's interest in the complaint was overseen by PHRC staff attorney Pamela Darville. Ross Van Denbergh, Esquire, appeared on behalf of Johnson Matthey, and Frank J. Marcone, Esquire, appeared on behalf of DiPasquale

and Hansen. The parties were afforded an opportunity to submit briefs. Johnson Matthey's post-hearing brief was received on September 7, 1995. The PHRC regional office's post-hearing brief was received on October 20, 1995, and DiPasquale and Hansen's post-hearing brief was received on October 25, 1995. Johnson Matthey subsequently submitted a reply brief which was received on December 15, 1995.

Shortly after the opening of the public hearing, Johnson Matthey moved to strike any alleged action which occurred prior to May 22, 1988, which date Johnson Matthey asserted is one hundred eighty days prior to the date the complaint was filed. At the time the motion was made, the parties were instructed that the ruling on the motion would be made at the conclusion of the case.

Section 9(h) of the PHRA states in pertinent part that "[a]ny complaint. . . must be. . . filed within one hundred eighty days after the alleged act of discrimination. . ." Here, the complaints were filed on or about November 23, 1988, with alleged disability-based discrimination beginning as early as January 8, 1988, when DiPasquale and Hansen received notices that they would be laid off effective January 15, 1988. The complaints also allege refusals to recall until on or about July 15, 1988. A PHRC regulation found at 16 Pa. Code §42.14(a) states:

> (a) The complaint shall be filed within 180 days from the occurrence of the alleged unlawful discriminatory practice, but the computation of the 180 days does not include a period of time which is excludable as a result of waiver, estoppel or equitable tolling. If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of the practice will be deemed to be any date

subsequent to the occurrence of the practice up to and including the date upon which the unlawful discriminatory practice shall have ceased.

Clearly, the PHRC follows federal precedent which interprets Title VII and recognizes the concept of a continuing violation. See Allen v. US Steel Corp., 27 FEP 1293 (5th Cir. 1982). In the present cases, DiPasquale and Hansen have alleged an initial layoff and denials of a series of job openings with regard to recall from their layoffs.

Such allegations do not merely allege the present effects of a past discriminatory act. Instead, the alleged layoff and each separate subsequent denial of an opening amount to allegations of events which challenge an ongoing systematic policy. DiPasquale and Hansen allege a present violation each time they challenge a failure to recall them for an open position.

Under the continuing violation theory, a victim of one or more alleged acts may maintain an action regarding actions occurring before the limitations period, so long as at least one of the alleged acts occurred within the one hundred eighty day filing period. See Jewett v. ITT Corp., 25 FEP 1593 (3rd Cir. 1981). Here, the evidence reveals that at least two job openings were filled after May 22, 1988 by employees junior in seniority to both DiPasquale and Hansen: a Draw & Form Operator position filled on June 13, 1988, and a CNC Set-Up Operator position filled on June 20, 1988.

Furthermore, the challenged systematic discrimination continued into the period of time which was within one hundred eighty days of the filing of the complaints. Such a challenge is actionable under the continuing violation theory,

even if some or all of the events evidencing the challenged system's inception occurred prior to the limitation period. See William v. Owens-Illinois, Inc., 27 FEP 1273 (9th Cir. 1982). Accordingly, Johnson Matthey's motion to strike is denied.

A review of the statutory framework governing DiPasquale's and Hansen's disability-based claims begins with the basic tenet of Section 5 of the PHRA. Section 5(a) 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 refuse to hire or employ. . . 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 rendered. . .

(43 PS 955(a).)

Sections 4(p) and 4(p)(1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states:

> 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 . . .

Section 4(p)(1) states:

> The term "handicap or disability," with respect to a person, means:
>
> (1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
>
> (2) a record of having such an impairment; or
>
> (3) being regarded as having such an impairment. . .

(43 PS 954(p) and (p)(1).)

These PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which 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 physiological 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 an 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:

(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 employee 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 employee 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 employee or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

(16 Pa. Code §44.4.)

These regulatory definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. Pennsylvania State Police v. PHRC, 72 Pa. Cmwlth. Ct. 520, 457 A.2d 584 (1983); and, see Pennsylvania State Police v. PHRC, 85 Pa. Cmwlth. Ct. 621, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986), with appeal limited to propriety of remedy.

The normal burden of proof applicable to a disability case was set forth by Pennsylvania's Commonwealth Court in National Railroad Passenger Corporation

(AMTRAK) v. PHRC, 70 Cmwlth. Ct. 62, 452 A.2d 301 (1982). In AMTRAK, the court indicated that a complainant bears the initial burden of establishing a *prima facie* case by proving that "he is handicapped, that he applied for a position for which he was otherwise qualified, that his application was rejected because of his handicap, and that [the employer] continued to seek qualified applicants." *Id.* at 303, citing, Philadelphia Electric Co. v. PHRC, ___ Pa. Cmwlth. Ct. ___, 448 A.2d 701 (1982). The court then declared that once a *prima facie* case has been established, "the burden shifts to [the employer] to establish that the Complainant's handicap is job related and, thus, presents a valid basis for the denial of employment." *Id.* at 303.

Before the court in Amtrak articulated this general proof-burden pattern, the court recognized the fundamental idea that the factors necessary to establish a fair employment action will vary under different factual settings. *Id.* at 303, citing General Electric Corp. v. PHRC, 469 Pa. 292, 365 A.2d 649 (1976). In these consolidated cases this is particularly true given the fact that the factual setting surrounding DiPasquale's and Hansen's layoffs and the events which followed are significantly different.

With respect to Johnson Matthey's elimination of DiPasquale's and Hansen's "Operator B" positions, Johnson Matthey asserts that the Operator B positions were eliminated for reasons unrelated to either DiPasquale's or Hansen's lifting restrictions. Such a disclaimer by Johnson Matthey makes the allocation of the burden of proof more appropriately that burden first articulated by the United States

Supreme Court in McDonnell Douglas Corp. v. Green, 411 US 792 (1973), and as clarified by the Pennsylvania Supreme Court in Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987). In this three-part analysis, the complainant must first establish a *prima facie* case of discrimination. If the complainant establishes a *prima facie* case, the burden of production then shifts to the respondent to "simply. . . produce evidence of a legitimate, non-discriminatory reason for. . . [its action]." If the respondent meets this production burden, in order to prevail, a complainant must demonstrate by a preponderance of the evidence that the complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 US 248, 256 (1981). Thus, for the layoff portion of the allegations, although DiPasquale and Hansen claim the layoffs were because of their disabilities, the proof burden stays with DiPasquale and Hansen, and only a burden of production shifts to Johnson Matthey.

On the other hand, with respect to DiPasquale's and Hansen's claims that they were not "recalled" because of their disabilities, Johnson Matthey, in effect, admits basing its employment decisions on DiPasquale's and Hansen's lifting restrictions. Johnson Matthey's acknowledgement that it took DiPasquale's and Hansen's lifting restrictions into consideration after the Operator B positions were eliminated makes this aspect of DiPasquale's and Hansen's allegations significantly different with

regard to the allocation of the burdens of proof. With the alleged refusals to recall, the proof burdens will be dictated by the proof formula established in AMTRAK, supra.

Going back to the elimination of the Operator B positions and DiPasquale's and Hansen's layoffs effective January 15, 1988, we first assess whether either DiPasquale or Hansen or both of them can establish the requisite *prima facie* case. Under the factual setting present in these cases, to establish a *prima facie* case that their layoffs were discriminatory, DiPasquale and Hansen must prove that:

1. they are handicapped/disabled;
2. they met applicable job qualifications;
3. despite these qualifications they were laid off; and
4. either individuals without lifting restrictions were retained, or others without lifting restrictions were assigned the duties which had been performed by either DiPasquale or Hansen.

Additionally, since the layoffs were necessitated by the elimination of Operator B positions, either DiPasquale or Hansen, as part of their *prima facie* case, must also produce "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate." See, Holly v. Sanyo Manufacturing Inc., 38 FEP 1317 at 1320-1321 (8th Cir. 1985), citing LaGrant v. Gulf & Western Manufacturing Co., Inc., 36 FEP 465 (6th Cir. 1984).

DiPasquale and Hansen's post-hearing brief asserts that Johnson Matthey does not challenge the issue of whether either DiPasquale or Hansen was "disabled"

under the meaning of the PHRA. A review of Johnson Matthey's brief reveals there is no direct challenge to the assumption that either DiPasquale's or Hansen's lifting restrictions result from a disability. On page 10 of Johnson Matthey's brief, the closest Johnson Matthey came to questioning whether DiPasquale is a disabled individual was to put the word "disability" in quotations when referring to the source of DiPasquale's lifting restrictions. No other argument on the issue was made.

In 1985, DiPasquale broke a metatarsal bone in her right foot. This injury initially kept DiPasquale out of work from March 26, 1985 to November 1985. When DiPasquale returned to work her right foot kept turning over, requiring DiPasquale to wear a metal ankle brace. Also, pressure from favoring the injured foot exacerbated a back injury which DiPasquale had suffered in 1984.

From the 1985 metatarsal break to 1988 and beyond, DiPasquale remained under physician-imposed lifting restrictions. Such an extended residual impairment either on its own amounts to a disability under the PHRA, or amounts to a disability because Johnson Matthey regarded DiPasquale's lifting restrictions as a disability.

In the case of City of Pittsburgh, Dept. of Personnel and Civil Service Commission v. PHRC, 157 Pa. Cmwlth. Ct. 564, 630 A.2d 919 (1993), one can be regarded as disabled if a real or perceived physical impairment makes an individual unable to obtain a series of jobs. Here, DiPasquale's lifting restrictions excluded her from consideration for an entire series of jobs, not just a single job. Accordingly, DiPasquale has established that she was disabled within the meaning of the PHRA.

In October 1986, Hansen received medical attention for back pain and spasms

in her legs. Radiographic study revealed degenerative disc disease. Initially, a physician placed Hansen on a five-pound lifting restriction, plus a standing restriction of no more than four hours at a time. The lifting restriction gradually increased over time until it became lifting up to 15 pounds shortly before the layoff on January 15, 1988.

Like DiPasquale, Hansen too was regarded as having a physical impairment which excluded her from a wide array of jobs. Accordingly, either because Hansen's condition was an extended impairment or because Johnson Matthey regarded Hansen's condition as a disability, Hansen also was disabled under the meaning of the PHRA.

Regarding the second and third elements, there is no dispute that either DiPasquale or Hansen was qualified to perform as an Operator B and that, despite their qualifications, they were laid off. However, there is a dispute regarding the fourth element of the *prima facie* requirement.

Johnson Matthey asserts that the Operator B jobs were eliminated with one minor exception, in the case of an Operator B who was approximately five weeks away from qualification for Social Security disability benefits. Johnson Matthey submits that this employee was not laid off immediately but was kept only long enough to enable him to qualify for benefits. Otherwise, Johnson Matthey asserted that Operator B positions were eliminated.

DiPasquale and Hansen presented the testimony of several Melt and Roll operators in an effort to make several general points. First, after DiPasquale and Hansen were laid off, Johnson Matthey temporarily assigned numerous personnel

from other departments to perform the functions DiPasquale and Hansen had done before their layoffs. Many of these temporary transfers came into the Melt and Roll Department without experience and had to be trained. Also, the position of Operator B was a Class 10 job, while those temporarily transferred held higher classifications. Further, two of the three Operator B, Class 10 positions ultimately became Melt and Roll Operators, Class 16.

One significant problem with this evidence is the fact that DiPasquale's and Hansen's own witnesses testified that at least two of those temporary transfers, Thomas Coupe and an employee named Lee, also had lifting restrictions. To meet the fourth element of their *prime facie* showing, DiPasquale and Hansen had to show that those assigned to their duties were without lifting restrictions.

Assuming *arguendo* that a *prima facie* showing could be made, Johnson Matthey clearly articulated a legitimate, non-discriminatory reason for DiPasquale's and Hansen's layoffs. In May 1987, Robert Johnson (hereinafter "Johnson") became Johnson Matthey's West Whiteland Plant's operations manager. Upon Johnson's review of daily, monthly and annual production reports, a general pattern of profitability deterioration related to production was noted. Johnson Matthey then hired an outside consultant to analyze the reasons for the productivity decline. A study was made and in the study, the Melt and Roll Department was identified as having the lowest productivity. Armed with this information, Johnson focused on the Melt and Roll Department.

One study recommendation was the elimination of the Operator B positions. In the summer of 1987, Johnson partially implemented the recommendation by

putting a second Melt and Roll Operator on the second shift. This action resulted in realized benefits, and in December 1987 - January 1988, Johnson made the decision to eliminate all Operator B positions and go with all Melt and Roll Operators. This action reduced man-hours because the day shift went from three Melt and Roll Operators and three Operator Bs to four Melt and Roll Operators. Additionally, temporary personnel were utilized on an as-needed basis. This change also resulted in an increased billing.

Finally, Johnson testified, without contradiction, that at the time he made the decision to eliminate the Operator B positions, he was unaware of either DiPasquale or Hansen's restrictions.

Neither DiPasquale nor Hansen produced evidence that Johnson Matthey's articulated nondiscriminatory reasons for their layoffs were a pretext for discrimination. Accordingly, the alleged disability-based layoffs have not been proven.

We thus turn to the events which occurred following DiPasquale's and Hansen's layoffs. Initially, pursuant to paragraph 6.5.3 of the Collective Bargaining Agreement (hereinafter "CBA"), laid-off employees are afforded bumping rights. Under paragraph 6.5.3 of the CBA a laid-off employee may bump the most junior employee on any shirt in either the same or a lower job class, provided the laid-off employee has the ability and physical fitness to perform the new job in ten working days.

Paragraph 6.7 of the CBA indicates that from the time an employee is notified of a layoff, that employee must provide written notification to the Human Resource

department within three working days. Failure to do so waives the employee's right to bump.

Regarding Hansen, she specifically indicated a desire to bump a junior employee from a position with a designated job class lower than Hansen's job class at the time of her layoff. However, when she made her intention known, Johnson Matthey's Human Resources manager Warren Perkins (hereinafter "Perkins") specifically conveyed to Hansen that her lifting restriction prevented her from bumping into the lower position.

Under Amtrak, *supra*, to establish a *prima facie* case, Hansen must prove:

1. that she is handicapped/disabled;
2. that she expressed her intention to exercise her bumping rights;
3. that she was otherwise qualified for the Janitor's position; and
4. that she was denied the opportunity to bump into the lower job classification.

Previously, we have discussed why Hansen's particular medical condition constitutes a handicap/disability within the meaning of the PHRA. The same analysis applies here. Accordingly, the first element of Hansen's *prima facie* case is established.

With respect to the second and fourth elements of the *prima facie* case, there is no dispute. Hansen expressed her intention to exercise her bumping rights, and she was clearly denied the opportunity to do so. The question here is the meaning we need to give to the phrase "otherwise qualified."

First, clearly, Perkins testified that, with one exception, without their weight lifting restrictions, both DiPasquale and Hansen were otherwise qualified for job openings at Johnson Matthey. (NT 349-350.) The exception to which Perkins referred was the position of CNC Set-Up Operator, which Perkins suggested required a machine shop background to be qualified.

However, in the context of disability discrimination claims, the phrase "otherwise qualified" entails something more than a simple showing that a disability was the basis for the denial of an opportunity. Within the phrase "otherwise qualified" we find the idea that the individual is able to perform the essential functions of a position. Sometimes individuals can do so without an accommodation being necessary, and there are other instances where there is a need for reasonable accommodations to enable an individual to perform the essential functions of a job.

The question here is just how much of a showing must Hansen make to overcome her requisite *prima facie* case? We do have evidence that DiPasquale had previously performed in a Janitor position while under a greater lifting restriction than was Hansen's at the time of Hansen's layoff. We also know that Hansen had satisfactorily performed her job as a Helper and Operator B from the time her lifting and standing restrictions were first imposed to the time of her layoff.

Such evidence satisfies the requirement that Hansen establish that she was "otherwise qualified" either with or without reasonable accommodations. See AT&T v. Royston, 2 AD 1564 (Colorado Ct. of Appeals 1989). Hansen is only required to provide evidence sufficient to make at least a facial showing that reasonable

accommodation is possible. Arneson v. Heckler, 1 AD 1497 (8th Cir. 1989), citing Gardner v. Morris, 1 AD 673 (8th Cir. 1985).

Having established a *prima facie* case of being denied the right to bump into a Janitor position, the burden of proof shifts to Johnson Matthey to establish that Hansen's disability is job related. Previously, 16 Pa. Code §44.4 was cited in its entirety. That section lists three basic instances in which a disability can be found to be job related.

Johnson Matthey's main focus appears to be on the issue of whether Hansen's disability substantially interfered with her ability to perform the essential functions of the Janitor's position. On this point, Johnson Matthey appears to urge a finding that it is an essential function of the Janitor's job to be able to lift at a 30-pound level.

The problem here is that the record does not support a finding that lifting at that level is an essential function of the job. On the contrary, the evidence reveals that DiPasquale had successfully performed the duties of a Janitor with a lifting restriction greater than Hansen's. What is likely is that informal accommodations were readily available to nearly anyone at Johnson Matthey who had a heavy task to accomplish. In fact, Perkins admitted that it was his policy that employees help each other lift heavy items to avoid injuries.

Johnson Matthey has simply not proven that Hansen's lifting restriction could not be reasonable accommodated, and that such accommodations could not enable Hansen to perform all the essential functions of the Janitor's position.

What is most clear regarding the circumstances surrounding the denial of Hansen's bumping rights us the fact that Perkins simply made Hansen's lifting restriction a complete bar to any consideration of her bumping anyone. Perkins made no effort to discuss or negotiate what accommodations, if any, Hansen might need. Perkins never considered the possibility of accommodations, which the evidence shows were frequently made for those with "temporary" conditions. Instead, Perkins merely declared that since Hansen's disability was "permanent," no accommodation would be reasonable. Such an inflexible posture violates the PHRA.

Turning to the denial of DiPasquale's bumping rights, the circumstances are significantly different. Only days after being notified of her layoff, DiPasquale fell on the ice, causing an injury which made her unable to work until February 11, 1988. At that point, DiPasquale's CBA rights to bump were effectively over. As argued by Johnson Matthey, DiPasquale was unavailable to exercise her bumping rights.

This brings us to the CBA bidding rights of DiPasquale and Hansen during the period between their layoffs and the point at which agreements were reached to place them on worker's compensation retroactive to their layoff dates.

As far as their *prima facie* showings, both DiPasquale and Hansen have to establish:

1. that they were handicapped/disabled;
2. that they bid on open positions;
3. that they were otherwise qualified for the open positions; and
4. that they were denied the positions.

Once again, the issue of DiPasquale's and Hansen's status as individuals with handicaps/disabilities has been discussed and a conclusion made that they are both disabled within the meaning and intent of the PHRA. Also, there is no question that DiPasquale and Hansen had automatic bids on numerous openings and that they were denied those positions. The remaining *prima facie* issue is whether they were "otherwise qualified."

As before, we begin with the general premise that Perkins offered testimony that without their lifting restrictions, both DiPasquale and Hansen were otherwise qualified for openings with the exception of CNC Set-Up Operator positions. We also note that Perkins generally testified that when someone had a "temporary" disability, an employee was generally allowed to do a lesser part of a job, and further that this was done for a lot of employees. (NT 118.) Perkins's testimony also indicated that within each general job description there are many jobs, some of which require more lifting than others. (NT 241-242.) Job assignments within the different departments is the function of department supervisors. (NT 242.) Perkins further indicated that it was not at all difficult to create jobs. (NT 355.)

These considerations are added to the fact that in May 1992, two jobs were easily created for DiPasquale and Hansen which, in effect, fully accommodated their disabilities. Finally, when disqualified from the job specifically created for her, DiPasquale was able to bump into another department and continually perform the required duties of that job successfully despite the continuation of lifting restrictions.

These factors, added to the fact that both DiPasquale and Hansen had continually performed their Helper/Operator B duties satisfactorily, sufficiently satisfy

the *prima facie* requirement that DiPasquale and Hansen were "otherwise qualified." The evidence clearly demonstrates that DiPasquale and Hansen make at least a facial showing that reasonable accommodations were possible. See Arneson, *supra.*

Accordingly, the burden of proof shifts to Johnson Matthey to establish that DiPasquale's and Hansen's disabilities were job related. On this point, Johnson Matthey relied heavily on statements contained within various job descriptions regarding the degree of exertion and lifting each job might require. Perkins suggested that each job description required lifting abilities beyond the limits of both DiPasquale's and Hansen's lifting restrictions.

In Hall v. US Postal Service, 1 AD 1368 (6th Cir. 1988), the court was looking at a similar question. In Hall, the court recognized that the determination of whether certain physical qualifications are essential functions of a job requires a highly fact-specific inquiry, and that "[s]uch a determination should be based upon more than statements in a job description." *Id.* at 1372.

In the cases of whether DiPasquale's and Hansen's disabilities could have been accommodated in any of the openings which occurred after their layoffs, Johnson Matthey's evidence falls short of meeting their burden of proof.

On the contrary, the evidence taken as a whole reflects Perkins's actions in denying DiPasquale and Hansen positions was fairly uninformed. More than once, Perkins indicated he was making uninformed guesses at the actual lifting requirements of various jobs. Perkins certainly was neither careful nor open-minded as he considered DiPasquale's and Hansen's situations. Without the benefit of either discussion or negotiation with DiPasquale and Hansen, Perkins simply applied an

unreasonable standard which totally excluded anyone with a "permanent" disability from consideration for any accommodation. (NT 118-119.) As Perkins saw it, it would automatically be an unreasonable accommodation if the accommodation had to be a full-time accommodation. (NT 196-197.) Neither DiPasquale nor Hansen were ever afforded an opportunity to attempt to qualify for any job. They were simply excluded, solely because of their lifting restrictions.

Therefore, both DiPasquale and Hansen have proven their denial of job openings after their layoff amounts to disability-based discrimination.

We thus turn our attention to an appropriate remedy. On this general issue, the record presents relatively scant evidence on what DiPasquale's and Hansen's wages may have been had discrimination not denied them numerous opportunities for employment. Because of this factor, several fundamental principles are of paramount importance.

Basically, once discrimination has been found, Section 9 of the PHRA empowers the PHRC to award relief, including lost wages, and a cease and desist order. Interest on back pay awards may also be ordered. Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975).

Pennsylvania courts have consistently allowed the PHRC broad discretion in fashioning a remedy. PHRC v. Alto Reste Park, 453 Pa. 124, 306 A.2d 881 (1973). Indeed, Section 9 specifically provides for the exercise of discretion by stating in pertinent part: "[the PHRC is authorized to]. . . take such affirmative action. . . as, in the judgment of the Commission, will effectuate the purposes of this act. . ." (Emphasis added.)

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

The first aspect we now consider regarding making DiPasquale and Hansen 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. Ct. 1975), aff'd. 387 A.2d 58 (1978).

Here, little mathematical precision is possible. When DiPasquale and Hansen were laid off, their wages as Class 10 Operator Bs was $11.10 per hour. When they were brought back into Class 10 jobs effective June 1, 1992, they were each making $13.93 per hour. Using these figures and the discretion afforded the PHRC in fashioning a remedy, the following calculations are made:

1988 -	March 1988 - December 1988 40 hours per week @ $11.10 per hour $444.00 per week @ 44 weeks =	$19,536
1989 -	40 hours per week @ $12.00 per hour $480.00 per week @ 52 weeks =	24,960
1990 -	40 hours per week @ $12.50 per hour $500.00 per week @ 52 weeks =	26,000
1991 -	40 hours per week @ $13.00 per hour $520.00 per week @ 52 weeks =	27,040
1992 -	January 1, 1992 - June 1, 1992 40 hours per week @ $13.93 per hour $557.20 per week @ 20 weeks =	11,144
	Gross Lost Earnings Total =	**$ 108,680**

In DiPasquale and Hansen's brief, they seek a recovery for anticipated overtime, however, no evidence was presented that overtime would have been available. Accordingly, an award for overtime is inappropriate.

The record is clear that DiPasquale and Hansen both received twenty-six weeks of unemployment and worker's compensation benefits from January 15, 1988 until their reinstatement on June 1, 1992.

Regarding the unemployment compensation benefits, the circuit court in Craig v. Y & Y Snacks, Inc., 721 F.2d 77 (3rd Cir. 1983), 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 twenty-six weeks of compensation DiPasquale and Hansen received. In these cases, we adopt the stated rationale in Craig as persuasive arguments.

On the other hand, the worker's compensation benefits were not paid from a collateral source. These benefits were paid by Johnson Matthey. Accordingly, it is appropriate to deduct the amounts Johnson Matthey paid out in worker's compensation to DiPasquale and Hansen.

DiPasquale's back pay award is thus reduced by $56,449.81:

$108,680.00	Gross Lost Earnings
- 56,449.81	Less, Worker's Compensation
$ 52,230.19	Total Back Pay

Hansen's back pay award is thus reduced by $62,557.48:

$108,680.00	Gross Lost Earnings
- 62,557.48	Less, Worker's Compensation
$ 46,122.52	Total Back Pay

Another issue raised by Johnson Matthey regarding an appropriate back pay award concerns DiPasquale's and Hansen's efforts to mitigate their damages. Here, the only evidence presented of either DiPasquale or Hansen to mitigate damages during approximately four and a half years they were unemployed was evidence that they pursued reemployment with Johnson Matthey.

On the one hand, DiPasquale and Hansen claim that their disabilities should not have barred them from working, and on the other, there is no evidence either DiPasquale or Hansen attempted to secure interim employment elsewhere. Under the circumstances present here, the degree of diligence exerted by DiPasquale and Hansen can only be described as minimal. In several prior PHRC cases, Ore v. Albert Einstein Medical Center, Docket No. E-19935 (Pa. Human Relations Commission, February 9, 1984), aff'd. 87 Pa. Cmwlth Ct. 145, 486 A.2d 575 (1985); and Mebane v. Reading Eagle Co., Docket No. E-30222-D, (Pa. Human Relations

Commission, June 28, 1990), the PHRC exercised its discretion in the remedy area by reducing back pay awards by one-half because complainants' mitigation efforts were insufficient.

Here, DiPasquale's and Hansen's minimal efforts to mitigate their damages result in a reduction in what they might otherwise be awarded. Accordingly, as in Ore, *supra*, and Mebane, *supra*, the lost wages of both DiPasquale and Hansen shall be halved for the following back pay awards:

DiPasquale -- $26,115.10

Hansen -- $23,061.26

The final issue regarding damages is the question of an appropriate amount of interest. On the back pay, minus worker's compensation and halved because mitigation efforts were insufficient, simple interest of six percent annually should be awarded. Williamsburg Community School District v. PHRC, 99 Pa. Cmwlth. Ct. 206, 512 A.2d 1339 (1986); and Goetz v. Norristown Area School District, 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1974). The following calculations regarding interest are made:

DiPasquale:	1988 - $4,700 @ 6%	$ 282.00
	1989 - ($4,700 + 5,800) = $10,500 @ 6%	630.00
	1990 - ($10,500 ÷ 6,300) = $16,800 @ 6%	1,008.00
	1991 - ($16,800 + 6,550) = $23,350 @ 6%	1,401.00
	1992 - ($23,350 + 2,750) = $26,100 @ 6%	1,566.00
	1993 - $26,100 @ 6%	1,566.00
	1994 - $26,100 @ 6%	1,566.00
	1995 - $26,100 @ 3%	783.00
	Total Interest due DiPasquale =	**$8,802.00**

Hansen:	1988 - $4,100 @ 6%	$ 246.00
	1989 - ($4,100 + 5,200) = $9,300 @ 6%	558.00
	1990 - ($9,300 + 5,700) = $15,000 @ 6%	900.00
	1991 - ($15,000 + 5,900) = $20,900 @ 6%	1,254.00
	1992 - ($20,900 + 2,150) = $23,050 @ 6%	1,383.00
	1993 - $23,050 @ 6%	1,383.00
	1994 - $23,050 @ 6%	1,383.00
	1995 - $23,050 @ 3%	691.50
	Total Interest due Hansen =	**$7,798.50**

Relief is, therefore, ordered as specified in the Final Order which follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

DOROTHY DI PASQUALE, **Complainant**	**DOCKET NO. E-46060**
and	
THE ESTATE OF M. JANE HANSEN, **Complainant**	**DOCKET NO. E-46062**
v.	
JOHNSON MATTHEY, INC., **Respondent**	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainants have proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, 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.

By:
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DOROTHY DI PASQUALE, Complainant	DOCKET NO. E-46060
and	
THE ESTATE OF M. JANE HANSEN, Complainant	DOCKET NO. E-46062
v.	
JOHNSON MATTHEY, INC., Respondent	

FINAL ORDER

AND NOW, this 25th day of June, 1996, 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 Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in these consolidated matters and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of these proceedings, to be served on the parties to these complaints, and hereby

ORDERS

1. That Johnson Matthey shall cease and desist from handicap/disability based discrimination.

2. That Johnson Matthey shall pay to DiPasquale within thirty days of the effective date of this Order the lump sum of $34,917.10, which amount represents back pay lost for the period between March 1, 1988 and June 1, 1992, plus interest.

3. That Johnson Matthey shall pay to Hansen within thirty days of the effective date of this Order the lump sum of $30,859.76, which amount represents back pay lost for the period between March 1, 1988 and June 1, 1992, plus interest.

4. That Johnson Matthey shall pay additional interest of six percent *per annum,* calculated from the date of this Order until payment is made.

5. That within thirty days of the effective date of this Order, Johnson Matthey shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Pamela Darville, Esquire, in the Commission's Philadelphia Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Gregory J. Celia /cth
Gregory J. Celia, Jr.
Secretary

Attest:

Russell S. Howell /cth
Russell S. Howell
Assistant Secretary