

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**JAMES SMITH, Complainant**

**v.**

**UNIVERSAL REFRACTORIES, INC., Respondent**

**Docket No. E-40089**

**JOINT STIPULATION OF FACTS**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES SMITH, Complainant


v.

UNIVERSAL REFRACTORIES, INC., Respondent


Docket No. E-40089

JOINT STIPULATION OF FACTS

1. A complaint docket was received by the PA Human Relations Commission from Mr. Smith on April 16, 1987.
2. Complainant, James Smith, is an adult individual who resided in Pennsylvania at the time of the complaint at issue.
3. At all times relevant to the complaint at issue, Respondent employed more than four employees.
4. A probable cause finding was approved by Commission counsel on or about March 16, 1988 Respondent was notified by letter.
5. Conciliation efforts were unsuccessful.
6. On or about July 9, 1990 a request for a public hearing was approved by the Commission.
7. On July 19, 1990, the Commission scheduled a pre-hearing conference for October 9, 1990. At the conference a hearing was scheduled for January 14, 1991.
8. Permanent Employees are required to work for 400 hours at probationary status. prior to obtaining full time status.
9. The laborer classification is a union position upon passing probation.
10. All permanent employees are required to pass a physical prior to or shortly after completing probation.
11. Complainant's company physical was completed on February 2, 1987.
12. In February 21, 1987 Complainant was laid off from work.
13. Complainant had completed 376 hours of the 400 hour probation period when he was laid off.
14. Complainant was never recalled to work.
15. Complainant's position was filled shortly after his discharge.
16. Complainant's base rate was \$7.13 per hour during his employment.
17. Under the union contract, in 1987, upon completion of probation Complainant's base rate would have been \$8.03 per hour.
18. Complainant began alternate employment on September 11, 1987 at approximately \$11.00 per hour.

  
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## FINDINGS OF FACT

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

N.T. Notes of Testimony  
R.E. Respondent's Exhibit  
S.F. Stipulation of Fact

1. The Complainant, James Smith, (hereinafter "Smith"), is a 55 year old male, with an 8th grade education. (N.T. 10)
2. The Respondent, Universal Refractories, Inc. (hereinafter "Universal"), is a manufacturing business which has plant facilities in Greenville and Wampum, Pa. (N.T. 98)
3. Between 1968 and 1970, Smith had worked at Universal. (N.T. 31)
4. In 1968 Smith was temporarily laid off from his then employer, Knox Glass, during which period Smith worked 6 months full time with Universal. (N.T. 11, 31)
5. For 2 years after Smith's recall to Knox Glass, Smith continued to work part time for Universal until 1970. (N.T. 31)
6. Smith remained an employee of Knox Glass for 34 years until the Knox Glass plant was closed in December 1986. (N.T. 11, 12, 26)
7. Knowing the Knox Glass plant would be closing Smith inquired into openings at Universal. (N.T. 107-108)
8. On several occasions, Smith contacted Universal's plant manager, Noble Miller, (hereinafter "Miller"), about working at Universal. (N.T. 107-108)
9. Miller remembered that Smith was a good worker when Smith worked for Universal in 1968-1970. (N.T. 107)
10. In November 1986, Clyde Bowen, the shipper at Universal's Greenville plant, (hereinafter "Bowen"), went off sick. (N.T. 109, 143)
11. On December 5, 1986, Miller hired Smith as a laborer at the Greenville plant. (N.T. 106, 108-109)
12. Prior to Smith's hire, Smith completed an employment application. (N.T. 23, 26, 108)
13. Smith answered no to a question on the application which asked whether he had any physical condition which may limit his ability to perform the job for which he was applying. (N.T. 23, 114; R.E. 1)
14. At Universal, new hires had a 400 hour probationary period. (N.T. 32)
15. The Greenville facility had several full time job classifications which included: injection operators, oven men, shipper, truck driver and maintenance. (N.T. 104)
16. Universal also utilized part time employees who worked on an as needed basis. (N.T. 53-54, 102, 103, 104, 124)
17. Some universal employees were hourly employees and others who were directly involved in manufacturing products were on incentive pay. (N.T. 86, 112)
18. Universal's Greenville plant ran a 3 shift operation and employed approximately 15 employees. (N.T. 15)
19. Normally, Smith was utilized on the 7 am - 3 pm shift. (N.T. 15)

20. As plant manager of both the Greenville and Wampum facilities, Miller supervised the 3 foremen at the Greenville Plant. (N.T. 100)
21. Miller normally used the telephone to keep in contact with his Greenville foremen because Miller only visited the Greenville facility approximately one afternoon per week. (N.T. 48, 49, 99, 100)
22. Approximately 95% of the time, Smith was supervised by the day shift supervisor, Paul Johnson (hereinafter "Johnson"). (N.T. 15, 16, 30, 47, 55)
23. On occasion, Smith was also supervised by the second shift supervisor, Ken Shrader, (hereinafter "Shrader") and the third shift supervisor, Jim Brady. (N.T. 16, 86)
24. The work Smith performed beginning in December 1986 was similar to the work he had previously performed in 1968-70. (N.T. 32)
25. Smith was utilized as a fill in wherever he was needed and worked both hourly and incentive jobs. (N.T. 12, 13, 55, 57, 110-111)
26. At the Greenville plant, there were 3 large ovens used to manufacture several types of liner inserts to be used in Steel Mills. (N.T. 12, 70-71, 81, 82, 101)
27. The ovens were approximately 100' long and 8' wide. (N.T. 83-84)
28. During the 6 hour baking process, oven temperatures were between 350 degrees – 420 degrees Fahrenheit. (N.T. 70-71, 83)
29. Three man crews operated the ovens. (N.T. 83)
30. Two men manned the beginning of the process with the other man at the end where the finished product weighing between 45-60 lbs. was lifted from the machine. (N.T. 82-83)
31. Smith's production kept pace with other employees. (N.T. 18, 19, 33, 48-49, 60, 73)
32. On one occasion, Shrader happened upon Smith who was coughing and had spit up. (N.T. 87, 93)
33. Shrader asked Smith if he was okay and told Smith to sit awhile. (N.T. 87)
34. Smith informed Shrader he was alright and was okay after a short time. (N.T. 87)
35. Shrader reported the incident to Miller. (N.T. 88, 113)
36. Since Smith primarily worked the first shift, Shrader didn't have an opportunity to observe Smith again. (N.T. 89)
37. Prior to being hired as a permanent employee, probationary employees were required to get a physical. (N.T. 33)
38. Approximately 1½ weeks after Shrader reported the coughing and spitting-up incident to Miller, Smith was sent for a physical. (N.T. 93)
39. The primary reason Smith was scheduled for a physical was that he was approaching the end of his 400 hour probationary period. (N.T. 34, 59, 114)
40. During his February 2, 1987 examination, Smith told the examining physician that between 1978-1980, he had undergone surgery to remove an ulcer and that he had experienced no problems since. (N.T. 24, 34, 35; S.F. 11)
41. Smith's physical was arranged and paid for by Universal. (N.T. 115)
42. Although generally indicating Smith's exam was normal, the examination report noted there was a past history of chronic peptic ulcer disease and that there had been previous surgery for a perforated peptic ulcer. (R.E. 3)
43. Although recognizing that Smith had passed his physical, Miller called Smith in to discuss the ulcer notation. (N.T. 19, 36, 117, 123)
44. Miller was then and remains unaware of the meaning of Smith's noted past history of peptic ulcers. (N.T. 116)

45. During their meeting, Miller just asked Smith why he had not told him earlier about having had surgery, to which Smith responded that he presently had no problems and was not even under a doctor's care. (N.T. 19, 20, 117)
46. Miller then indicated to Smith that he did not know if he would be able to use Smith as a full-time employee. (N.T. 118)
47. During the meeting a discussion regarding insurance coverage of Universal employees resulted in Smith offering to waive his right to coverage. (N.T. 19, 37, 119)
48. Universal self insures its employees up to \$10,000 per employee per year, after which other insurance coverage kicks in. (N.T. 142, 151)
49. After his meeting with Miller, Smith continued to work 3 or 4 more days until production became caught up, whereupon, Smith and another employee were laid off for the weekend. (N.T. 38, 39, 61)
50. It was a usual event to be laid off for short periods after production was caught up. (N.T. 39)
51. After the weekend, Smith was not recalled. (N.T. 39, 62; S.F. 14)
52. Miller had instructed Johnson not to recall Smith. (N.T. 63)
53. Shortly after Smith's termination, he was replaced. (N.T. 20, 41, 64, 74, 130; S.F. 15)
54. Between his termination and September 1987, Smith unsuccessfully attempted to find work locally. (N.T. 12, 22)
55. On September 11, 1987, Smith began working for a company in Florida. (N. T. 13; S.F. 18)
56. During the period between his termination and finding a job in Florida, Smith collected unemployment compensation. (N.T. 14, 21, 42)

### **CONCLUSIONS OF LAW**

1. Complainant is an individual within the meaning of the PHRA.
2. Respondent is an employer within the meaning of the PHRA.
3. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of this case.
4. All procedural prerequisites to a public hearing in this case have been met.
5. The Complainant has shown that: (1) he had a handicap or disability within the meaning of the PHRA and applicable regulations; (2) that he held a position for which he was qualified; (3) that he was discharged; and (4) that his discharge was under circumstances which give rise to an inference of discrimination.
6. The Respondent regarded the Complainant's past medical history as being a physical impairment which substantially limited him in the conduct of a major life activity, working.
7. The Respondent articulated legitimate non-discriminatory reasons for the Complainant's discharge.
8. The Complainant successfully rebutted the reasons articulated by the Respondent for its action.
9. The PHRC has wide discretion in fashioning remedies where unlawful discrimination has been shown.

## OPINION

This case arises on a complaint filed by James Smith (hereinafter "Smith") against Universal Refractories, Inc., (hereinafter "Universal") on or about April 16, 1987, at Docket No. E-40089. Smith's complaint alleged that Universal discharged Smith from his position as a laborer because Smith had a history of stomach ulcer problems, and because Universal feared that a recurrence would increase Universal's insurance costs. Smith claimed that Universal's action violated Section 5(a), of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended 43 P.S. §§951 et seq. (hereinafter the "PHRA" ) .

PHRC staff conducted an investigation and found probable cause to credit the allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. The efforts were unsuccessful, and this case was approved for Public Hearing. The hearing was held on January 14, 1991 in Mercer, Pennsylvania before Carl H. Summerson, Permanent Hearing Examiner. Briefs submitted by the parties were received on March 4, 1991. It was noted that pages 3 through 6 of the Respondent's brief purported to review several testimonies taken in several depositions. As these depositions were not made a part of the Public Hearing record in this case, all references thereto have been deemed inappropriate for consideration.

Section 5(a) of the PHRA declares that "[i]t shall be an unlawful discriminatory practice...[f]or any employer because of the...non-job related handicap or disability...of any individual to...discharge from employment such individual, or to otherwise discriminate against such individual with respect to...conditions or privileges of employment..."

In this disparate treatment case, the order and allocation of proof shall follow the oft repeated general pattern first defined in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and clarified by the Pa. Supreme Court in Allegheny Housing Rehabilitation Corp. v. P.H.R.C., 516 Pa. 124, 532 A.2d 315 (1987). The PA Supreme Court's guidance indicates that a Complainant must first establish a prima facie case of discrimination. If a 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 that the entire body of evidence produced demonstrates 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 U.S. 248, 256 (1981). Although McDonnell Douglas Corp. v. Green was a refusal to hire case, the Court in Allegheny Housing Rehabilitation Corp., *Supra*, recognized that the order and allocation of proof principles set forth therein are also applicable to discharge cases. In a discharge case, the principal modification of McDonnell Douglas pertains to the prima facie showing. In Allegheny Housing Rehabilitation Corp., the Pa. Supreme Court dealt with a discharge question, however, the Court did not set forth the requisite elements of a prima facie showing in a discharge case. Instead, the Court simply reviewed the elements which had been used by the PHRC and by the Commonwealth Court and suggested that those formulations "might be considered flawed."

Generally, there is rarely a problem articulating the first three elements of a prima facie case. These include: (1) that the complainant was a member of a protected class; (2) that the complainant was qualified to perform the duties of the position from which the complainant was discharged, and (3) that the complainant had been discharged. The difficulty usually arises in the establishment of the fourth element.

Before stating the requisite fourth element in this case, several general principles should be kept in mind. First, the burden of establishing a prima facie case should not be onerous. Second, the purpose of the prima facie case is to give rise to an inference of unlawful discrimination.

In discharge cases, we should recognize that the evidence necessary to create an inference that there is a connection between a Complainant's protected status and the discharge will vary depending on the circumstances of the discharge in question. Here, the surrounding circumstances present questions of whether there was work for Smith and whether Smith was physically able to perform assigned tasks. Accordingly, in this case, the fourth element which Smith must show to establish a prima facie case is either that he was discharged under circumstances which give rise to an inference of discrimination, see *i.e.* Burdine v. Texas Department of Community Affairs, 450 U.S. 248 (1981), or that the Respondent sought people with Smith's qualifications to fill his former job after his discharge. See Osborne v. Cleland, 22 FEP 1292, 620 F.2d 195 (8th Cir. 1980).

Here, Universal does not contest the fact that Smith quite easily established the second and third elements of his prima facie case. Clearly, the record reveals that Smith was considered not only qualified for the laborer position he held, but was also viewed as a good worker by his supervisor. Just as clear is the fact that Smith was terminated.

The first major area of contention in this matter deals with whether Smith was a handicapped/disabled individual within the meaning of the PHRA and applicable regulations. Section 4(p) of the Act defines "non-job related handicap or disability" as:

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 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.

Regulations adopted by the Commission prior to the filing of this complaint define "handicapped or disabled person" as one 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. 16 Pa. Code §44.4(i)

Phrases used in these basic definitions are further defined:

(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; respiratory, including speech organs; cardiovascular, reproductive; digestive; genitourinary; hemic and lymphatic; skin, and endocrine or a mental or psychological disorder, such as mental illness, and specific learning disabilities.

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

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

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

16 Pa. Code §§44.4(ii)

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

Universal argues and the record supports a finding that Smith's past history of peptic ulcers did not amount to a physical impairment which substantially limited one or more major life activities. Accordingly, subsection (A) of 16 Pa. Code §§44.4(i) would not apply to Smith. However, we find that Smith was a handicapped person within the meaning of §§44.4(i)(B) and (C), because Smith has a record of peptic ulcers and Universal clearly regarded Smith as having an impairment.

The Pa. Commonwealth Court has provided guidance on what the phrase "regarded as" shall include. In Pa. State Police v. PHRC, 85 Pa. CmwltH Ct. 621, 483 A.2d 1039 (1984), citing Pa. State Police v. PHRC, 72 Pa. CmwltH Ct. 520, 457 A.2d 584 (1983), the court stated that "[if] an employer rejects an applicant for medical reasons, that act under the Commission's regulations is an impairment, per se, of a major life activity, employment." Further, the court found irrelevant the fact that a Complainant believes he can perform all the duties which would be required of him and the fact that the examining physician does not consider an applicant to be disabled. These issues were deemed irrelevant with respect to a determination of whether a Complainant was "regarded" as having such an impairment. (N.T. 141)

Under the circumstances presented here, Miller's testimony was revealing on the "regarded as" question. For example, Miller offered an affirmative response to a question which asked him if, in part, he had formed an opinion that Smith could not maintain an acceptable production pace



"...in light of the fact that he had a chronic peptic ulcer disease " (N.T. 121) Miller also indicated that he felt that, physically speaking, Smith posed a risk in the workplace. (N.T. 141)

Furthermore, after learning of Smith's medical history of peptic ulcer problems and corrective surgery, Miller called Smith into a meeting. At their meeting Miller expressed concern that Smith had not told him of these medical matters earlier. Smith credibly testified that Miller then told Smith that he had to let him go because Smith had had an ulcer and there was a possibility of recurrence which would raise Universal's insurance costs. Although Miller's version differs, Miller did agree that the conversation at some point turned to Smith offering to sign a waiver relinquishing his right to insurance coverage. As a whole, the record contains sufficient credible testimony to support the premise that Smith's past medical history was "regarded as" a handicap. Accordingly, Smith successfully met his burden of establishing by a preponderance of the evidence that he was handicapped within the meaning of the PHRA.

Regarding the fourth element, considerable evidence was submitted which corroborated the allegation that Miller's actions were motivated by a mistaken idea that Smith's condition might recur. First once again, Smith testified that upon learning of Smith's medical history, Miller told Smith he had to let him go because of the possibility of recurrence and increased insurance costs. (N.T. 19, 36) Johnson also testified that Miller told Johnson that Smith had been terminated because of his prior condition and that Miller feared recurrence which would raise insurance costs. (N.T. 41, 50) Finally, the union shop steward, Bowen, testified that he and another shop steward, Ron King, were also told by Miller that the main reason Smith was terminated was that Universal was worried about Smith's ulcer causing Smith trouble in the future which would raise Universal's insurance costs. (N.T. 69) Interestingly, although Miller testified after Johnson and Bowen, he never denied that he told both Johnson and Bowen that his motivation for discharging Smith was the fear of peptic ulcer recurrence and increased insurance costs.

Several other factors lead to the inference that Smith's discharge was discriminatorily motivated. First, Miller's supervisor, Regis Frederick, indicated that before a plant manager terminates someone, the plant manager should be in contact with the employee's foreman. (N.T. 153-154) Here, Johnson testified that Miller had not inquired about Smith's productivity. (N.T. 49) Instead, Johnson indicates that despite Smith's performance and productivity being okay, Miller had decided to terminate Smith because of his past medical history. (N.T. 50-52)

Next, although Miller only visited the Greenville plant one afternoon per week, Miller suggests his decision to terminate Smith was based in part on personal observation. Under all the circumstances presented, this explanation was not credible.

Finally, Miller also submits that he formed a judgment that Smith would be unable to maintain a production pace based on very slim information: one short lived coughing and spitting-up incident and seeing Smith "laboring hard." How often does an employer attach a negative implication to an employee who is laboring hard especially during a probationary period? This simply is not in line with common sense. Miller's testimony reveals that he perceived Smith was maintaining pace, but Miller never the less, came to the conclusion that Smith would not be able to maintain an acceptable pace. Clearly, the factor of Miller learning of Smith's medical history played a significant role in Miller's decision.

Regarding the alternate possible fourth element of the prima facie showing, there was evidence that Smith was replaced quite rapidly. However, the record contains no information regarding a comparison of qualifications of Smith and his replacement. Accordingly, Smith sufficiently presented evidence that his discharge was under circumstances which give rise to an inference of discrimination but not that Universal sought others with Smith's qualifications to fill his former position. Despite the lack of qualification evidence, Smith established the first alternative fourth element of his prima facie showing.

At this stage, we must ascertain whether Universal articulated any legitimate non-discriminatory reasons for Smith's discharge. In this regard, Universal's brief argues that "Smith was discharged for economic reasons and because of Universal's dissatisfaction with Smith's performance."

After this initial declaration that there was an economic reason for Smith's discharge very little additional mention is made in the remainder of Universal's brief regarding economics playing a role in Smith's discharge. While true, Smith and a co-worker were laid-off for the weekend prior to Smith's discharge after production was caught up, it is quite clear that Smith was replaced shortly after the decision to terminate him was made. To cite economics as a reason for Smith's discharge is clearly pretextual.

This leaves Smith with the ultimate burden of persuasion to establish that Universal's remaining assertion was also pretextual. The totality of the record presented enables Smith to meet this ultimate burden.

Miller's fluctuating position begins by a suggestion that Smith performed well until a point in late January 1987, when Smith was transferred over to an incentive position. Miller's description submits Smith worked Bowen's hourly shipper's position until January 27, 1987. After Bowen returned to the Greenville plant, Miller submits Smith was put on an incentive crew where the work was more difficult and a perception was ultimately formed that Smith would be unable to maintain the pace. Miller also candidly asserts that until that point, Smith was a good employee. At one point, Miller even described Smith's performance as outstanding. (N.T. 122)

Smith's physical on February 2, 1987 and the resulting report a few days later all too coincidentally mark the sudden turn in Smith's good performance record. Miller himself reveals through his testimony that his perception became, to a degree, based on questions surrounding Smith's history of peptic ulcers. (N.T. 121)

The degree of Miller's ultimate perception sufficiently carries the peptic ulcer history factor well beyond a "but for" cause of the ultimate decision to terminate Smith. See McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.10, 12 FED 1577(1976).

On another point, Miller and Johnson testified that Miller only came to the Greenville plant one afternoon per week yet Miller submits that he had sufficient occasion to make personal observations of Smith which would enable him to conclude Smith would be unable to maintain pace.

On the other hand, Johnson saw Smith all day everyday and formed the opinion that Smith was a good worker. Bowen too found Smith to be a good worker who did as much as anyone else. Bowen's observations of Smith had to be after January 27, 1987 since Bowen had been out sick previously. Clearly, Johnson's and Bowen's testimony subvert Miller's testimony.

Miller's true motive was expressed to four individuals, three of whom testified. Johnson, Bowen and King were each told by Miller that Smith was being terminated because Universal was concerned about a recurrence of Smith's medical problem and the possibility this posed to increased insurance costs. Immediately after Smith explained to Miller that his past surgery had dealt with his ulcer problems, Miller told Smith he would have to let him go because he had had an ulcer problem. Miller's own testimony corroborated Smith's version of what Miller told him after Miller learned of Smith's ulcer history. (N.T. 118)

Clearly, Smith met his ultimate burden of persuasion in this case. Accordingly, consideration of an appropriate remedy is necessary.

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

First, because Smith does not seek reinstatement, the major issue is how much backpay Smith is entitled to. Had Smith continued working, he would have earned \$7.13 per hour until he completed his 400 hours of probation. Upon completion of the 400 hours, the hourly rate went to \$8.03 per hour.

Several questions immediately arise. First, we must consider whether Smith attempted to mitigate his damages. Here, the record is replete with testimony that initially Smith exercised reasonable diligence by making unsuccessful attempts to find alternative employment. Next, Smith did find alternative employment beginning on September 11, 1987 whereupon he began earning more than he would have earned had he stayed with Universal. Since Smith obtained alternative employment with better pay, the backpay period terminates on September 11, 1987. The commencement date is the date Smith would have been recalled but for Universal's discrimination. The Joint Stipulations of the parties indicate that Smith was laid off on February 21, 1987 and but for Universal's discrimination Smith would have been recalled approximately February 24, 1987.

Because several gaps exist in this record, we are mindful that the method used to calculate the backpay award need not be rigid and may lack precision. See Pettway v. American Cast Iron Pipe Co. 494 F.2d 211, at 260, 7 FEP 1115, at 1153 (5th Cir. 1974). The gaps include the knowledge that there was a substantial difference between hourly wages and incentive pay, (N.T. 112) and exactly who Smith's replacement was and how many hours he worked.

We do have evidence of how many hours Smith worked until terminated, (R.E. 2), but must use considerable discretion regarding how many hours Smith would have worked had he remained with Universal. Two basic principles will be applied to make a computation: (1) unrealistic exactitude is not required; and (2) uncertainties in determining what an employee would have earned but for discrimination should be resolved against the discriminating employer. Id. 494 F.2d at 260-61, 7 FEP at 1154. The record considered as a whole suggests that Universal was busy throughout the summer of 1987. (N.T. 94, 131) Accordingly, in the exercise of discretion, Smith's backpay calculation shall be based on an average 40 hour per week work week at the rates of \$7.13 per hour for the remainder of Smith's 400 hour probationary period and \$8.03 per hour thereafter.

Between February 24, 1987 and September 11, 1987, there are approximately 28 weeks and 3 days. Since Smith had 24 hours remaining on his 400 initial hours the following calculations are made:

Wages during 400 hour probationary period - 24 hours x 7.13 per hour = \$ 171.12  
Wages following probation - 28 weeks x 40 hours at \$8.03 per hour = \$8,993.60

Total Backpay Cost \$9,164.72

As the PHRC is also authorized to award interest on the backpay award at the rate of 6%, Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975), interest shall also be ordered.

Section 9(f) of the PHRA also allows an award of \$50.00 for reimbursement of travel expenses. Here, the record contains evidence that Smith incurred at least \$50.00 travel expenses. Accordingly, the order which follows shall also award Smith travel expenses.

One final damage issue is the fact that during the interim period between Smith's termination and his locating alternative employment, Smith received unemployment compensation. As noted, the PHRC has wide discretion in fashioning remedies where unlawful discrimination has been shown. PHRC v. Alto-Reste Park Cemetery Association, 453 Pa. 124, 306 A.2d 881 (1973); Einstein Medical Center v. PHRC, 87 Pa. Cmwlt. Ct. 145, 486 A.2d 575 (1985). In Williamsburg Community School District v. PHRC, 99 Pa. Cmwlt. Ct. 206, 512 A.2d 1339 (1986) the Pa. Commonwealth Court approved PHRC action in not deducting unemployment benefits received by a Complainant from a backpay award. Accordingly, in this matter, unemployment compensation received shall not be deducted.

Relief is therefore ordered as described with specificity in the final Order which follows.

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**JAMES SMITH, Complainant**

**v.**

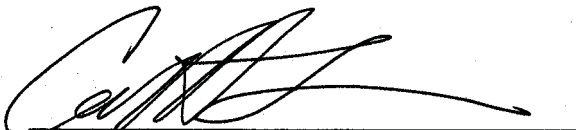
**UNIVERSAL REFRACTORIES, INC., Respondent**

**Docket No. E-40089**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Universal terminated Smith because it regarded Smith's past medical history as a handicap/disability. Accordingly, Smith has proven discrimination in violation of 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Joint Stipulation of Facts, 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  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JAMES SMITH, Complainant

v.

UNIVERSAL REFRACTORIES, INC., Respondent

Docket No. E-40089

FINAL ORDER

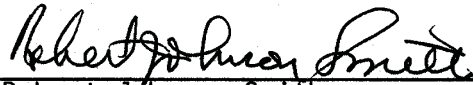
AND NOW, this 5<sup>th</sup> day of April 1991 after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Joint Stipulation of Facts, Findings of Fact, Conclusions of Law and Opinion as its own finding in this matter and incorporates the Joint Stipulation of Facts, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

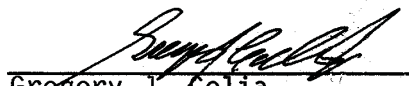
1. That Universal shall pay to Smith within 30 days of the effective date of this Order, the lump sum of \$9,164.72, which amount represents backpay lost for the period between February 24, 1987 and September 11, 1987, plus an additional amount of interest of 6% per annum, calculated up to the month during which the Public Hearing of this matter was held.
2. That Universal shall pay additional interest of 6% per annum calculated from the effective date of this Order until payment is made.
3. That Universal shall also pay Smith the amount of \$50.00, which amount represents lost travel expenses incurred by Smith.
4. That within 30 days of the effective date of this Order. Universal shall report to the PHRC on the manner of its compliance with the terms of this Order by letter, addressed to Diane Blancett-Maddock, Esquire in the PHRC Pittsburgh Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:

  
Robert Johnson Smith  
Chairperson

ATTEST:

  
Gregory J. Celia  
Secretary