

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

WILMER J. BAKER, Complainant

v.

THE FROG SWITCH & MANUFACTURING CO., Respondent

**PHRC Case No. 199800386
Docket No. E-88319DAH
EEOC No. 17F983368**

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

STIPULATIONS

Procedural Stipulations

Respondent and Pennsylvania Human Relations Commission, Harrisburg Regional Office staff hereby stipulate to the following:

1. The Complainant-- Wilmer J. Baker-- is a competent adult who resides at 430 Run Road, Carlisle, Pennsylvania 17013.
2. Respondent-- The Frog, Switch & Manufacturing Co. ("Frog Switch")-- is an "employer" for purposes of the Pennsylvania Human Relations Act, with a mailing address of P.O. Box 70, Carlisle, PA 17013.
3. The employment actions challenged in the Complaint occurred in Cumberland County.
4. Mr. Baker filed a timely Complaint with the Pennsylvania Human Relations Commission (the "PHRC"), alleging that Frog Switch first suspended and then dismissed him in

retaliation for having opposed practices forbidden by the Pennsylvania Human Relations Act.

5. PHRC Harrisburg Regional Office staff docketed the Complaint on August 12, 1998.
6. PHRC Harrisburg Regional Office staff served Frog Switch with a true and correct copy of the Complaint on September 9, 1998.
7. PHRC Harrisburg Regional Office staff conducted a Fact Finding Conference on November 17, 1998, which was attended by both Mr. Baker and Frog Switch.
8. PHRC Harrisburg Regional Office staff served Frog Switch with a Probable Cause Finding on May 25, 2000.
9. By letter dated May 25, 2000, PHRC Harrisburg Regional Office staff invited Frog Switch to attend a Conciliation Conference.
10. PHRC Harrisburg Regional Office staff convened a Conciliation Conference on June 6, 2000.
11. The case did not conciliate.
12. All jurisdictional prerequisites for a public hearing have been satisfied.
13. Jerry Kucharczyk is no longer employed by Respondent. He resides outside of Pennsylvania and more than 100 miles away.

Fact Stipulations

14. Frog Switch hired Mr. Baker on or about June 18, 1973, as a "rough grinder."
15. Mr. Baker later became a welder for Frog Switch.
16. From on or about May 15, 1993, to on or about May 15, 1997, Mr. Baker was president of the union representing Frog Switch's production employees.
17. On March 6, 1998, Mr. Baker was employed as a Welder on first shift in the grinding room at Frog Switch. First shift ended at 2:00 p.m., but employees were permitted to quit working at 1:50 p.m. in order to clean up and take a shower, if they desired.
18. The welders in the grinding room performed welding duties in the welding booths and on certain mills, including the VBM.
19. At approximately 1:25 p.m. on March 6, 1998, Tracy Carter, a Tool Mill Operator, asked Mr. Baker if he could weld a piece on her mill at the VBM.
20. At approximately 1:30 p.m. on March 6, 1998, Mr. Baker was standing outside of the welding booth in the grinding room with his welding gear under his arm.
21. At that time, Jerry Kucharczyk and Ken Alexander were walking through the area and approached Mr. Baker.
22. Mr. Kucharczyk asked Mr. Baker if he was done for the day. Mr. Baker responded that he was because he could not get the crane and the piece in his welding booth was finished. Mr. Kucharczyk told Mr. Baker that he had 20 minutes left in his workday and that he was required to go back to work until 10 minutes of 2:00 p.m. Mr. Baker responded that he understood Mr. Kucharczyk's instruction. Mr. Baker then turned in the direction of his welding booth and Mr. Kucharczyk and Mr. Anderson proceeding to walk through the plant.
23. Some time thereafter, Mr. Baker left his work area and walked over to the other side of the building, put his gear in his cupboard and proceeded to the shower room.
24. Mr. Baker arrived in the shower room prior to 1:50 p.m.

25. Mr. Kucharczyk and Mr. Alexander then approached Mr. Baker in the shower room and told him that they wanted to see him in the office on Monday, March 9, 1998, and that he should bring a shop steward with him.
26. On March 9, 1998, Glenn Gribble, Frog Switch's director of human resources, issued Mr. Baker a five-day suspension with an intent to discharge for "insubordination."
27. On March 12, 1998, Frog Switch discharged Mr. Baker.
28. Frog Switch's computerized records for the period between November 2, 1995 through September 21, 1998 purport to list the following employees as having been charged with "insubordination" on the indicated dates:

Jason Rohrer – 8/18/98;
Samuel Wolfe – 1/7/98;
George Hoffman – 6/6/97;
Harvey Fawber – 4/18/96, 3/30/98, 8/15/98;
W. Jay Baker – 3/29/96, 3/9/98; and
Michael Chaluisan – 12/18/95, 4/10/96.

29. In March of 1998, Frog Switch did not have any knowledge of any efforts undertaken by Mr. Baker between January 1, 1998 and March 12, 1998, to assist any co-employees in filing charges with the Pennsylvania Human Relations Commission.
30. The Union pursued Mr. Baker's grievance to arbitration under the Collective Bargaining Agreement between Frog Switch and the United Steelworkers, Local 4442. An arbitration hearing was held on September 3, 1998 before Arbitrator Richard Kasher.
31. The Collective Bargaining Agreement calls for arbitration hearings to be conducted in accordance with the Rules for Labor Arbitration published by the American Arbitration Association.
32. The evidence offered by the Union at the arbitration hearing included Mr. Baker's own testimony and the testimony of five witnesses on his behalf.
33. In the arbitration proceeding, the Union sought the remedies of both back pay and reinstatement.
34. Mr. Baker was represented at the arbitration hearing by United Steelworkers Staff Representative Joe Pozza.
35. The Union filed a Post-Hearing Brief to the Arbitrator after the hearing was concluded.
36. On December 18, 1998, Arbitrator Kasher issued his Arbitration Opinion and Award. Arbitrator Kasher's Award provided, in pertinent part:

"The grievance is sustained in part and denied in part in accordance with the above findings. The Company is directed to reinstate the Grievant with seniority unimpaired but without backpay."

37. In his Arbitration Opinion and Award, Arbitrator Kasher included the following specific findings:
 - a. Mr. Baker was approached by Mr. Kucharczyk and Mr. Alexander at approximately 1:30 p.m. on the afternoon of March 6, 1998.
 - b. Mr. Baker was told and understood that there were "twenty minutes to go" on his shift.

- c. When they next confronted Mr. Baker he was in the shower, "lathered up," and that at the latest it was 1:41 p.m.
- d. Mr. Baker "quit work" at the latest between 1:38 and 1:40 p.m.
- e. Mr. Baker did not produce any reliable probative evidence that Messrs. Kucharczyk and Alexander observed other employees in the process of putting down their gear and leaving the vicinity of their work stations at 1:30 p.m.
- f. Mr. Baker was not "singled out" on the afternoon of March 6, 1998, and was not treated differently in terms of a quitting time directive.
- g. Mr. Baker failed to follow a direct order from management to work until his 1:50 p.m. quitting time.
- h. Frog Switch agreed to reinstate Mr. Baker, in spite of his insubordination, if he would acknowledge that he had been insubordinate.
- i. The termination of Mr. Baker's employment was an overly severe penalty under the labor contract in the context of what might be considered mitigating circumstances.
- j. Frog Switch had not in the past terminated employees for insubordination, except in one circumstance when an employee was guilty of repeated offenses of the same nature and had "pushed a supervisor."
- k. There had been numerous instances of insubordination, including Mr. Baker having previously been disciplined for being insubordinate, and such acts have not resulted in termination of employment.
- l. Mr. Baker, to some extent, followed Mr. Kucharczyk's direction and returned to his work area and performed some work.
- m. While Mr. Baker should not have left his workstation ten minutes early, the fact is that Mr. Baker did not "sneak off" immediately after being directed to return to work.
- n. Prior to March 6, 1998, Frog Switch had been lax in the manner in which it enforced the rules regarding break times and quitting times.
- o. Mr. Baker was not the only employee who quit early on March 6, 1998.
- p. George Sheriff was in the shower at least as early as was Mr. Baker.
- q. While Sheriff could have been considered to have been "stealing time" from Frog Switch, he received no more than a verbal warning.
- r. Mr. Baker and Mr. Sheriff were guilty of different types of offenses.
- s. Frog Switch had not viewed early quits as serious breaches of the rules of conduct.
- t. Mr. Baker by his own actions failed to mitigate his damages and was not entitled to any back pay.
- u. "The Grievant was clearly guilty of conduct justifying his being disciplined. The Company, in good faith, offered the Grievant an opportunity to return to work with the only condition being that he acknowledge his wrongdoing. The Grievant's failure to do so, although he was clearly guilty of the charges leveled by management, resulted in his termination. In these circumstances the grievant would be unjustly enriched if this Arbitrator was to award him any back pay."
- v. Mr. Baker bears substantial animus toward the Company.

38. Mr. Baker did not file any claims against the Union for breach of its duty of fair representation at the arbitration hearing.
39. On January 4, 1999, Mr. Baker was reinstated to his job at Frog Switch.
40. Frog Switch has offered Mr. Baker more than one full week of back wages plus reasonable expenses incurred in pursuing his claim before the Commission. Mr. Baker has refused this offer.

Damages Stipulations

41. Mr. Baker's rate of pay at the time of his termination was \$ 14.70 per hour.
42. Mr. Baker earned \$ 967.24 in other employment between the period of March 6, 1998 and his reinstatement by Respondent on January 4, 1999.

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FINDINGS OF FACT *

1. Wilmer J. Baker (hereinafter "Complainant") participated in numerous PHRC proceedings while serving as his union's local president. (N.T. IV, 118-119)
2. Glenn Gribble, Respondent's Human Resource Director, knew that the Complainant served as a support person at various PHRC fact-finding conferences. (N.T. IV, 59-60)
3. Mr. Gribble acquired this knowledge while attending fact-finding conferences on behalf of the Respondent. (N.T. IV, 60)
4. On May 25, 1994, Respondent employee Lindora Johnson filed a PHRC complaint alleging that the Respondent had removed her from her crane operator's position because she is black and/or because she is female. (N.T. II, 118-119)
5. In November 1994, the Complainant provided a witness statement to the PHRC investigator who was investigating Ms. Johnson's complaint. (N.T. I, 91)
6. In August 1995, the Complainant provided assistance to Ms. Johnson in settling her union grievance and her PHRC complaint. (N.T. I, 92-96)
7. The Complainant negotiated the settlement of Ms. Johnson's grievance and PHRC complaint with Mr. Gribble, Human Resources Director. (N.T. III, 119-120).
8. In August 1995, both Complainant and Mr. Gribble signed the Respondent and Complainant Agreement settling Ms. Johnson's PHRC complaint. (N.T. I, 91-92)

* To the extent that the Opinion that follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. I Notes of Testimony from October 9, 2003 Hearing
N.T. II Notes of Testimony from November 3, 2003 Hearing
N.T. III Notes of Testimony from November 17, 2003 Hearing
N.T. IV Notes of Testimony from December 17, 2003 Hearing
S.F. Stipulations of Facts
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

9. In May 1994, the Complainant assisted Respondent employee Dale Flaherty in pursuing a union grievance alleging disability discrimination. (N.T. I, 104)
10. In July 1996, Ms. Flaherty filed a PHRC complaint concerning her allegation of disability discrimination. (R.E. 53)
11. Mr. Gribble and the Complainant both attended Ms. Flaherty's union grievance meeting. (N.T. I, 104).
12. In 1995, the Complainant was involved in cases where he assisted employees in obtaining workers' compensation benefits for hearing loss. (N.T. II, 23)
13. In 1996, the Complainant assisted Clair Starner, Respondent employee, in filing a PHRC complaint. (N.T. I, 100)
14. Mr. Starner alleged that he had been wrongfully denied a return to a crane operator position because the Respondent regarded him as having a disability. (N.T. I, 100)
15. The Complainant believed that the Respondent regarded Mr. Starner as having a disabling mental condition. (N.T. I, 97)

16. The Complainant met with Mr. Starner's attorney and provided information for Mr. Starner's complaint. (N.T. I, 100)
17. The Complainant assisted Respondent employee, Harvey Fawber, in filing a PHRC complaint. (N.T. I, 100-101)
18. In 1995 and 1996, the Complainant assisted Mr. Starner and Mr. Fawber with union grievances. (N.T. I, 123-124)
19. Mr. Gribble, with the Complainant, attended the grievance meetings and PHRC fact-finding conferences regarding the allegations of Starner and Fawber. (N.T. I, 124)
20. In 1996, the Complainant assisted Respondent employee John Carter in pursuing allegations that he was denied overtime because of his race. (N.T. I, 101-102)
21. The Complainant assisted Mr. Carter in filing twelve union grievances and suggested that Mr. Carter take his case to the PHRC. (N.T. I, 101-102)
22. The Complainant, in 1996, assisted Respondent employee Morris Gadsen in pursuing allegations that he was being denied overtime because of race. (N.T. I, 107)
23. In 1996, the Complainant assisted Respondent employee LeVan Zorn with his PHRC complaint. (N.T. III, 27)
24. In November 1996, the Complainant assisted Russell Stone and Dale Stone in pursuing allegations of age discrimination with the PHRC. (N.T. I, 109-110; C.E. 7; C.E. 10)
25. The Complainant had concerns regarding allegations of age discrimination against one shift of Respondent's work force. (N.T. I, 110-113)
26. Starner, Dale Stone and Russell Stone were all members of that particular shift. (N.T. I, 110-113)
27. The Complainant believed that the Respondent was discriminating against older crewmembers of the Respondent's V-I team. (N.T. II, 38)
28. The Complainant observed that older members "were constantly being taken to the office and told they might lose their jobs," "were getting slips for discipline," and "were being compared to younger crews." (N.T. II, 38)
29. The Complainant took Starner, Dale Stone and Russel Stone to the PHRC in Harrisburg to file their age discrimination complaints. (N.T. I, 117)
30. In 1996, the Complainant assisted Harvey Gandy and Ralph Zorn in pursuing union grievances about alleged discrimination. (N.T. I, 135-136)
31. Mr. Gribble was present at the meetings concerning Ralph Zorn's grievance. (N.T. I, 135-136)
32. In September 1996, the Complainant and Respondent representatives met with United Steelworkers of America (hereinafter "USWA") International Union Civil Rights Specialist Alex Powell, at which time the PHRC complaints filed by employees were discussed. (N.T. I, 128)
33. Mr. Gribble attended this meeting and stated there were too many PHRC complaints pending against the Respondent. (N.T. IV, 111)
34. Mr. Gribble also stated that they were tired of them and wanted to get a handle on the situation. (N.T. IV, 111).
35. Approximately 30-40% of the union grievances the Complainant administered as local president were allegations of unlawful discriminatory practices under the Pennsylvania Human Relations Act. (N.T. II, 77)
36. Mr. Gribble attended all grievance meetings. (N.T. I, 103)

37. The Complainant was always present at union grievance meetings regarding discrimination allegations at the PHRC. (N.T. II, 20)
38. On March 6, 1998, the Complainant was employed as a welder on the first shift in the grinding room at Frog Switch. (S.F. 17)
39. The first shift ended at 2:00 p.m., but employees were permitted to quit working at 1:50 p.m. in order to clean up and take a shower. (S.F. 17)
40. The welders in the grinding room performed welding duties in the welding booths and on certain mills. (S.F. 18)
41. At approximately 1:24 p.m. on March 6, 1998, Tracey Carter, a Tool Mill Operator, asked the Complainant if he could weld a piece on her mill. (S.F. 19)
42. At approximately 1:30 p.m., the Complainant was standing outside of the welding booth in the grinding room with his welding gear under his arm. (S.F. 20)
43. At that time, Jerry Kucharczyk and Ken Alexander, both supervisors, were walking through the area and approached the Complainant. (S.F. 21)
44. Mr. Kucharczyk asked the Complainant if he was done for the day and the Complainant replied that he was because he could not use the crane at that moment and the piece in his welding booth was finished. (S.F. 22)
45. Mr. Kucharczyk told the Complainant that he [Complainant] had 20 minutes left in his workday and he was required to work until 1:50 p.m. (S.F. 22)
46. The Complainant responded that he understood and turned in the direction of his welding booth. (S.F. 22)
47. Mr. Kucharczyk and Mr. Alexander continued walking through the plant. (S.F. 22)
48. Some time thereafter, the Complainant left his work area and walked to the other side of the building, put his gear in his cupboard and proceeded to the shower room. (S.F. 23)
49. The Complainant arrived in the shower room prior to 1:50 p.m. (S.F. 24)
50. Mr. Kucharczyk and Mr. Alexander approached the Complainant in the shower room and told him that they wanted to see him in the office on Monday, March 9, 1998. (S.F. 25)
51. They also informed the Complainant that he should bring his union shop steward with him. (S.F. 25)
52. On March 9, 1998, Mr. Gribble, Human Resources Director, issued the Complainant a five-day suspension with an intent to discharge for "insubordination." (S.F. 26)
53. On March 12, 1998, the Respondent discharged the Complainant for insubordination. (S.F. 26, 27)
54. The employees working on the Complainant's shift operated on the buddy system, in which they relied on other employees to know when to go to the shower. (N.T. I, 142)
55. The buddy system was used throughout the Respondent's plant. (N.T. III, 11-12)
56. There were other employees from the Complainant's shift taking showers when Mr. Kucharczyk and Mr. Alexander approached the Complainant. (N.T. I, 83)
57. George Sheriff was already in the shower when Mr. Kucharczyk and Mr. Alexander came into the shower room on March 6, 1998. (N.T. IV, 26-27)
58. Mr. Sheriff received a verbal warning for leaving early; he did not receive any discipline for insubordination. (N.T. IV, 26-27)
59. Mr. Kucharczyk asked the Complainant if he would admit to being insubordinate and the Complainant refused. (N.T. I, 147)
60. The Complainant did not feel that he had been insubordinate and was concerned about the ramifications of admitting insubordination. (N.T. I, 148-149)

61. During the meeting on March 9, 1998, Mr. Kucharczyk told the Complainant that he was tired of all of the PHRC complaints. (N.T. II, 75)
62. The Complainant felt that Mr. Kucharczyk was referring to the individuals that the Complainant had assisted with PHRC complaints. (N.T. II, 75)
63. At the time the Complainant was terminated, he had no prior disciplinary action for insubordination in his personnel file. (N.T. III, 95)
64. The Complainant is the only Respondent employee ever terminated for an alleged "first time" insubordination offense. (N.T. I, 159)
65. The Respondent's own work rules do not require that an employee be terminated for insubordination. (N.T. IV, 22; R.E. 6)
66. The severity of the discipline for insubordination is at the discretion of the Respondent. (N.T. IV, 22)
67. In April 1996, the Respondent charged Harvey Fawber with insubordination after he had used abusive language. (N.T. IV, 39-40)
68. The Respondent issued a verbal warning to Mr. Fawber, not a five-day suspension with intent to discharge. (N.T. IV, 40-41)
69. In August 1998, Mr. Fawber was again charged with insubordination, and once again, he received a warning. (N.T. IV, 38-39; R.E. 22)
70. In January 1998 the Respondent issued Samuel Wolfe a written warning for "Insubordination: Failure or refusal to obey a reasonable order given by a supervisor." (N.T. IV, 42; C.E. 27)
71. The Respondent did not suspend Mr. Wolfe for five days with intent to discharge. (N.T. IV, 43)
72. In June 1997 the Respondent charged George Hoffman with "Insubordination: Failure or refusal to obey a reasonable order given by a supervisor." (N.T. IV, 43-44; C.E. 28)
73. Mr. Hoffman received a warning and was not suspended for five days with intent to discharge. (N.T. IV, 44).
74. The Respondent charged Russel Stone with insubordination on July 6, 1998, May 6, 1999 and May 27, 1999 (C.E. 34, 35, 36)
75. The Respondent gave Russel Stone a warning in all three instances, not a suspension with intent to discharge.
76. The issue at the arbitration hearing that resulted in Mr. Baker's reinstatement was whether the Respondent had discharged Mr. Baker for "just cause." (N.T. I, 41)
77. "Just cause" is not the issue facing the PHRC in this case. (N.T. I, 41)
78. In making his decision, the arbitrator was bound by the language of collective bargaining agreement in place between the Respondent and the United Steelworkers of America. (N.T. I, 41).
79. The attorney who represented the Respondent at the arbitration hearing knew the arbitrator and was on a first-name basis with him. (N.T. I, 33)
80. The Complainant was represented at the arbitration by a USWA representative, Joe Pozza. (N.T. I, 35, 44)
81. Mr. Pozza is not an attorney. (N.T. I, 35, 44)
82. The Complainant was not satisfied with the representation he received from the USWA during the arbitration process. (N.T. I, 54)
83. The Complainant had state charges pending against the USWA at the time. (N.T. I, 54)

84. The Complainant had a stormy relationship with Mr. Pozza during the arbitration process. (N.T. I, 57)
85. Mr. Pozza continuously asked the Complainant about the state charges he had filed against USWA for election fraud. (N.T. I, 57)
86. The USWA retaliated against the Complainant by not presenting all the existing favorable evidence to the arbitrator. (N.T. I, 55)
87. Mr. Pozza refused to consider using at the arbitration hearing Mr. Kucharczyk's prior testimony at an unemployment compensation hearing that he had looked at his watch when he saw the Complainant in the shower and that his watch indicated it was 1:50. (N.T. I, 58, 73)
88. Prior inconsistent statements from unemployment compensation transcripts can be used to impeach witnesses at arbitration hearings. (N.T. I, 51-52)
89. After the Complainant pointed out Mr. Kucharczyk's statement in the unemployment transcript to Mr. Pozza, Mr. Pozza threw the transcript in the wastepaper can. (N.T. I, 58)
90. The USWA presented testimony through one of its representatives, John Hazer, that painted the Complainant as an unreasonable zealot. (N.T. I, 56-57)
91. Arbitration hearings are not public; they are held in private. (N.T. I, 31)
92. There was no transcript of the Complainant's arbitration hearing taken or prepared. (N.T. I, 45)
93. The arbitrator's opinion in the Complainant's arbitration includes no formal, numbered findings of fact but, rather, includes a simple narrative of the factual background. (N.T. I, 50; R.E. 2)
94. The PHRC pre-hearing procedures are entirely different from the pre-hearing procedures in arbitration—the PHRC's procedures are "far more structured and far more documented." (N.T. I, 42-43)
95. In the arbitration process, there is no pre-hearing exchange of documents. (N.T. I, 31, 43)
96. In the arbitration process, there are no pre-hearing depositions. (N.T. I, 31, 43)
97. There were no requests for admissions exchanged prior to the Complainant's arbitration hearing. (N.T. I, 43)
98. The Respondent did not fire Michael Chaluisan for insubordination as the arbitrator found; rather, the Respondent fired Mr. Chaluisan for instituting an aggressive act when he assaulted a supervisor. (N.T. I, 55-56)
99. There was testimony presented at the arbitration hearing that as a condition of being reinstated, the Complainant had to admit to insubordination and not go to an "outside agency." (N.T. I, 60,70,75)
100. The Complainant was never asked a question at the arbitration hearing concerning whether the offer of reinstatement was contingent upon not going specifically to the PHRC. (N.T. I, 75)
101. After the arbitration hearing, the Complainant contacted the National Labor Relations Board and complained about an "unfair arbitration" and the lack of "full and fair representation" by the USWA. (N.T. I, 61)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The Commission has jurisdiction over the subject matter of the complaint under the PHRA.
3. The parties and the Commission have fully complied with the procedural prerequisites for a public hearing in this matter.
4. The Complainant is a person within the meaning of Section 5(a) of the PHRA.
5. The Respondent is an employer within the meaning of Section 4(a) of the PHRA.
6. The complaint filed in this matter satisfies the filing requirements set forth in Section 9 of the PHRA.
7. The Complainant has established a *prima facie* case of discriminatory retaliatory discharge by proving that:
 - 1) the Complainant was engaged in protected activity;
 - 2) the Respondent was aware of the protected activity;
 - 3) subsequent to participating in the protected activity, the Complainant was subjected to an adverse employment action by Respondent; and
 - 4) there is a causal connection between the Complainant's participation and the adverse employment action.
8. Once a *prima facie* case has been established, the burden of production shifts to the Respondent to produce evidence of legitimate, nondiscriminatory reasons for its actions.
9. The Respondent met its burden of producing evidence of legitimate nondiscriminatory reasons for discharging the Complainant.
10. Once the Respondent met its burden of production, the Complainant has shown that the proffered reasons were pretextual.
11. The Commission has broad discretion in fashioning a remedy after a finding of unlawful discrimination.
12. The Commission may also order the Respondent to cease and desist from the discriminatory practice and further order the Respondent to take affirmative measures to remedy the unlawful practice.

OPINION

On August 12, 1998, Wilmer J. Baker (hereinafter "Complainant") filed a verified complaint against The Frog Switch & Manufacturing Co. (hereinafter "Respondent"), PHRC Case No. 199800386 and Docket No. E-88319-DAH. In his complaint, the Complainant alleges that the Respondent terminated his employment in retaliation for having opposed discrimination in the past in the workplace and/or for having assisted individuals with bringing claims before the Pennsylvania Human Relations Commission. The Complainant alleges that the Respondent's actions are in violation of Section 5 (d) of the Pennsylvania Human Relations Act (hereinafter "PHRA" or "Act"), the Act of October 27, 1955, P.h.744, as amended, 43 P.S. Section 955(a).

PHRC staff conducted an investigation and found probable cause to credit the allegations raised in the complaint. The PHRC staff and the parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. These efforts proved unsuccessful and the case was approved for public hearing.

The public hearing in this matter was held on four separate dates in Carlisle, Pennsylvania: October 9, 2003, November 3, 2003, November 17, 2003 and December 17, 2003. A panel of three Commissioners was assigned to hear this case. The Hearing Panel consisted of Commissioners Raquel Otero de Yiengst, Chairperson of the panel, Commissioner Sylvia A. Waters and Commissioner Toni M. Gilhooley. Phillip A. Ayers, Permanent Hearing Examiner, served as Panel Advisor. Ronald W. Chadwell, PHRC Assistant Chief Counsel, represented the State's interest in the complaint. Andrew L. Levy, Esquire, represented the Respondent at the public hearing. Both parties filed post-hearing briefs in support of their respective positions.

Section 5 (d) of the PHRA is the specific provision that forbids employer retaliation against employees who file charges or otherwise engage in protected activity. Section 5(d) states in pertinent part:

It shall be an unlawful discriminatory practice...[f]or any...
employer...to discriminate in any manner against any individual because such
individual has opposed any practice forbidden by this act, or because such
individual has made a charge, testified or assisted, in any manner, in any
investigation, proceeding or hearing under this act.

In the instant case, there is an allegation of disparate treatment. The analytical model for cases of this nature was first set forth in the landmark case of McDonnell-Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 35 L.Ed. 2d 668 (1973). Under that model, the Complainant bears the initial burden of establishing a *prima facie* case. The burden of establishing a *prima facie* case is not an onerous burden. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1980). In several cases, the Pennsylvania Supreme Court approved the analytical model set forth in McDonnell-Douglas. See Allegheny Housing Rehabilitation Corporation v. Pennsylvania Human Relations Commission, 532 A.2d 315 (1987) and General Electric Corp. v. Pennsylvania Human Relations Commission, 365 A.2d 649 (1976). Once a *prima facie* case is established, the burden of proof shifts to the Respondent to articulate a legitimate non-discriminatory reason for its action. Once the Respondent has met this burden, the Complainant, in order to prevail, must show that the proffered reason is pretextual. The Complainant always retains the ultimate burden of establishing by a preponderance of the evidence that he is a victim of unlawful discrimination.

In order to establish a *prima facie* case of retaliation, the Complainant must show:

- 1) he was engaged in a protected activity;
- 2) the Respondent was aware of the protected activity;
- 3) subsequent to his participation in the protected activity, the Complainant was subjected to an adverse employment action by the Respondent; and
- 4) there is a causal connection between the Complainant's participation in the protected activity and the adverse employment action.

Robert Wholey Co. v. Pa Human Relations Commission, 606 A.2d 982 (Pa. Commonwealth Ct. 1992). *Allocatur* denied, 532 Pa 659, 615 A.2d 1314.

The record before the Commission clearly reflects that the Complainant engaged in protected activity. He participated in numerous PHRC proceedings and opposed practices that were unlawful under the PHRA. The Complainant also opposed alleged unlawful practices at union grievance meetings and also at meetings with Mr. Gribble, Human Resources Director. The Complainant met with Respondent's management, USWA International personnel and other employees to discuss PHRC complaints (N.T. I, 128; N.T. IV, 111). The Complainant easily meets the first prong of the *prima facie* showing.

In regard to the second prong of the *prima facie* case, Mr. Gribble and Mr. Kucharczyk, management employees, were certainly aware of the Complainant being engaged in and participating in protected activity. Specifically, Mr. Gribble testified that he was aware that the Complainant participated in PHRC proceedings as a support person for complainants because he had seen the Complainant at fact-finding conferences (N.V. IV, 59-60). The third prong is met because the Respondent suspended and then discharged the Complainant. (S.F. 26-27)

We now move to the fourth prong of the *prima facie* case; whether there is a causal connection between the Complainant's participation in the protected activity and the adverse employment action. In Robert Wholey Co. v. Pa Human Relations Commission *Supra* at 984, the court stated that, "When participation in a protected activity and the occurrence of an adverse employment action occur within close proximity in time, causation is inferred." The Third Circuit has recently ruled on this specific issue in two cases: Kachmar v. Sungard Data Systems, 109 F.3d 173, 73 Fair Empl. Prac. Cas. (BNA) 707, (3rd Cir. 1997) and Woodson v. Scott Paper Co, 109 f.3D 913 73 Fair Empl. Prac. Cas. (BNA) 1237 (3rd Cir. 1997). In Kachmar, the court held that an employee alleging retaliation can, of course, establish causation by showing a "temporal proximity between the employee's protected activity and the adverse employment action." One can still establish retaliation where the protected activity and the adverse employment action are not so close in time. In Woodson, there was a two-year period between the protected activity and the adverse employment action.

The Kachmar case also stands for the proposition that "absent temporal proximity, circumstantial evidence of a 'pattern of antagonism' following the protected conduct can also give rise to the inference". In the instant case, the Complainant credibly testified that subsequent to his assisting other employees with their PHRC complaints, the Respondent's harassment intensified. A description of the Respondent's treatment of the Complainant follows:

I was held accountable for everything I did at Frog and Switch. Sort of like I was the rabbit waiting for the dog to jump on me in hunting season. Everything I did was called into question. Anytime I was anywhere, going to the bathroom or anything, I was followed and timed, wrote up for how long I went to the bathroom, I take my breaks too early, I leave work too early...
N.T. 78-79

The Complainant, in addition to the antagonism, has shown that he was treated more harshly than other employees who were charged with insubordination. Finally, this fourth prong can be established by showing the Respondent's anger toward Complainant's participation in protected activity. Mr. Gribble had stated that he was tired of all the PHRC filings and wanted to get a handle on the situation. In addition, Respondent staff sought to extract a promise from the Complainant that he would not go to the PHRC in the future. Accordingly, the Complainant has met the fourth prong, causation, of the *prima facie* case.

Once the Complainant establishes his *prima facie* case, the burden of production then shifts to the Respondent to articulate a legitimate non-discriminatory reason for its action in discharging the Complainant. In the instant case, the Respondent articulated that the Complainant was discharged for insubordination. This articulation satisfies the Respondent's burden of production.

When a respondent meets its burden of articulating a non-discriminatory reason, the Complainant can still prevail by showing that the Respondent's proffered reason is pretextual. A review of the record before the Commission reveals that the Respondent's reason is pretextual. Firstly, both Mr. Gribble and Mr. Alexander testified that the Complainant was discharged because he was "insubordinate" for not returning to his welding booth. However, neither Mr. Gribble nor Mr. Alexander saw the Complainant go to the shower instead of returning to his welding booth. Interestingly, Mr. Kucharczyk testified through his deposition that the Complainant returned to his welding booth after he (Mr. Kucharczyk) had spoken to him. Consequently, none of the individuals involved in this decision had any knowledge as to whether the Complainant returned to the welding booth.

The record in this case indicates that the Respondent had a number of employees who were charged with insubordination and were not discharged. In fact, none of those employees were even suspended. The employees who were charged with insubordination and not suspended were: Fawber, Wolfe, Hoffman and Russel Stone. The record reflects that another employee, George Sheriff, was in the shower prior to the Complainant, but was not suspended or discharged. However, none of these employees were involved with assisting others in the filing of PHRC complaints. Most importantly, the Complainant is the only employee discharged by the Respondent for a first time insubordination offense.

The record also reflects that Mr. Kucharczyk, one of the decision makers, repeatedly stated, as did Mr. Gribble, that he was tired of all the PHRC complaints employees were filing. He further stated that in order to retain his employment, the Complainant would have to agree not to continue PHRC activity. (N.T. I, 60)

The record certainly reflects that the Complainant has clearly shown that he was treated more harshly because of his engaging in assisting employees with their PHRC complaints. Therefore, the Complainant has shown, by a preponderance of the evidence, that he is a victim of unlawful discrimination.

We now move to the issue of remedy. We must briefly review the Commission's authority to award relief. The Commission has broad discretion in fashioning an award to effectuate the purposes of the PHRA. Murphy v. Pa. Human Relations Commission, 486 A.2d 388 (1985). Any remedy awarded

under the PHRA has two distinct purposes. The first purpose is to insure that the unlawful discriminatory practice is eradicated, usually by a cease and desist order. The second purpose is to not only restore the injured party to pre-injury status and make him whole, but also to deter future discrimination. Williamsburg Community School District v. Pennsylvania Human Relations Commission, 512 A.2d, 339 (1986).

In the instant case, the Respondent should be ordered to cease and desist from discriminating against individuals by retaliating against them for engaging in a protected activity. This remedy is extremely significant in that the actions of the Respondent clearly could have a chilling effect on employees who raise concerns about workplace issues. Secondly, the Complainant should be awarded back pay for the forty-three weeks, from March 6, 1998 to January 4, 1999, between his termination and his reinstatement. In addition, the Complainant regularly worked overtime for eight hours each week.

The function of the back pay relief is to put the victim of discrimination in the position he would have been absent the discrimination. PHRC v. Transit Casualty Insurance Co., 478 Pa 430, 387 A.2d 58 (1975). In regard to the mitigation of damages, it is the Respondent's burden to show that the Complainant did not exercise reasonable diligence in seeking substantial equivalent employment. Cardin v. Westinghouse Electric Corp., 850 F.2d 1005 (3rd Cir. 1988). At the public hearing, the Respondent did not produce any evidence showing that the Complainant did not exercise reasonable diligence. In addition, the Respondent did not produce any evidence that substantially equivalent employment was available to the Complainant during the forty-three week period. However, the Complainant's back pay award should be reduced by the income he earned during the forty-three week period, \$967.24 (S.F. 42). Therefore, the Complainant's back pay award should be as follows:

Regular Pay

$(\$14.70/\text{hour})(40 \text{ hours/week})(43 \text{ weeks}) = \$25,284.00$

$\$25,284 - 967.24 = \$24,316.76$

Overtime Pay

$(\$14.70/\text{hour})(1.5) = \$22.50/\text{hour overtime rate}$

$(43 \text{ weeks})(8 \text{ hours/week}) = 344 \text{ hours}; (344 \text{ hours})(\$22.05/\text{hour}) = \$7,585.20$

In the instant case before the Commission, the Respondent asserts, in a Motion *In Limine* and a Motion to Dismiss, that the Arbitrator's findings should be binding on the Commission. This argument is without merit. The doctrine of collateral estoppel provides that the prior proceeding afford an opportunity to fully and fairly litigate factual issues. Rue v. K-Mart Corp., 552 Pa. 13, 713 A.2d 82 (1998). As Commission Counsel indicates, the arbitration process does not provide an opportunity to fairly and fully litigate issues. Most importantly, the issue before the arbitrator was not whether the PHRA was violated, but whether the collective bargaining agreement had been violated. Both the hearing and the pre-hearing procedures are vastly different from the PHRC process. In addition, an individual, Joe Pozza, with whom he had a fractious relationship, represented the Complainant. The record at the public hearing, taken as a whole, reflects that the Complainant did not have a fair and full opportunity at the arbitration, and therefore, the finding of the arbitrator are not binding on the Commission.

Lastly, the Respondent argues that the Complainant was offered full remedy in the instant matter (S.F. 40). However, it appears that the "offer" had a number of attachments to it. The attachments

were that the Complainant refrain from PHRC activity and that he admit he was insubordinate. Certainly, the Complainant is not obligated to accept such offers of reinstatement. Maines v. Pa., Unemployment Compensation Board of Review, 532 A.2d 1248 (Pa Cmwlth 1987)

An appropriate Order follows.

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

WILMER J. BAKER, Complainant

v.

THE FROG SWITCH & MANUFACTURING CO., Respondent

PHRC Case No. 199800386

Docket No. E-88319DAH

EEOC No. 17F983368

RECOMMENDATION OF HEARING PANEL

Upon consideration of the entire record in the above captioned case, this Hearing Panel finds that the Complainant has proven discrimination in violation of the Pennsylvania Human Relations Act. It is, therefore, the Hearing Panel'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, this Hearing Panel recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Commissioner Sylvia A. Waters
Commissioner Raquel Otero de Yiengst
Commissioner Toni M. Gilhooley

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
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WILMER J. BAKER, Complainant

v.

THE FROG SWITCH & MANUFACTURING CO., Respondent

PHRC Case No. 199800386

Docket No. E-88319DAH

EEOC No. 17F983368

FINAL ORDER

AND NOW, this 21st day of December, 2004, after 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 of the Hearing Panel. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Stipulations of Fact, 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 the Respondent shall cease and desist from discriminating by retaliating against persons who have participated in PHRC cases or who have opposed unlawful practices under the PHRA.
2. That the Respondent shall pay Wilmer J. Baker \$24, 316.76, which represents the regular pay he lost between March 6, 1998 and January 4, 1999, minus Mr. Baker's interim earnings of \$967.24 ($\$25,284.00 - 967.24 = \$24,316.76$).
3. That the Respondent shall pay Wilmer J. Baker \$7,585.20 for the eight hours of overtime per week (\$22.05/hour) he lost between March 6, 1998 and January 4, 1999.
4. That the Respondent shall pay six percent interest on the back pay award including regular and overtime pay to Mr. Baker from March 6, 1998 until December 31, 1999 in the amount of \$3,349.71.
5. That the Respondent shall pay eight percent interest on the back pay award to Mr. Baker for the calendar year 2000 in the amount of \$2,552.16.
6. That the Respondent shall pay nine percent interest to Mr. Baker from January 1, 2001 until the date of this Final Order in the amount of \$11,484.72.

7. That the Respondent shall report the means by which it will comply with the Order, in writing, to Ronald W. Chadwell, PHRC Assistant Chief Counsel, Harrisburg Regional Office, within thirty days of the date of this order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Stephen A. Glassman, Chairperson
Attest: Daniel D. Yun, Assistant Secretary

