COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR., Complainant v. KIMBERLY-CLARK CORPORATION Respondent	DOCKET NO. E-68573-D

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR.,	:	
	:	
COMPLAINANT	:	
	:	
v.	:	DOCKET NO. E68573D
	:	
KIMBERLY-CLARK CORPORATION,	:	
	:	
RESPONDENT	:	

STIPULATIONS OF FACT

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

1. The Complainant herein is Ronald Bigger, Sr., an adult African American (hereinafter "Complainant").

2. The Respondent herein is Kimberly-Clark Corporation, (hereinafter "Respondent" or "Kimberly-Clark Corporation").

3. On or about March 29, 1994, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission Docket Number E68573D against Scott Paper Company. A copy of the complaint will be included as a docket entry in this case at time of hearing.

JE 1.

4. On or about June 20, 1994, Scott Paper Company filed an answer to the complaint. A copy of the answer will be included as a docket entry in this case at time of hearing.

5. Scott Paper Company, effective December 12, 1995, merged into Kimberly-Clark Corporation.

6. Both Scott Paper Company and Kimberly-Clark Corporation, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.

7. In correspondence dated April 21, 1999, Commission staff notified the Complainant and Respondent that probable cause existed to credit the allegations found in the complaint.

8. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

8. In correspondence dated November 5, 1999, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

Michael Hardiman
Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

Date: January 28, 2000

William J. Delany, Esquire
(Counsel for Respondent)

Date: Jan. 27, 2000

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR.,	:	
	:	
Complainant,	:	
	:	
v.	:	**DOCKET NO. E68573D**
	:	
KIMBERLY-CLARK CORPORATION,	:	
	:	
Respondent.	:	

ADDITIONAL STIPULATION OF FACTS

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

1. Available payroll records for 1992 indicate that the following Move-up Supervisor (MUS) opportunities occurred:

   a. week ending 5/9/92 - Joe Morris - 9.2 hours;
   b. week ending 5/30/92 - Complainant - all week;
   c. week ending 8/8/92 - Joe Morris - 12 hours;
   d. week ending 9/5/92 - Joe Morris - 17.10 hours;
   e. week ending 9/12/92 - Ed Reilly - all week;
   f. week ending 10/10/92 - Joe Morris - 33.2 hours;
   g. week ending 10/24/92 - Ed Reilly - all week;
   h. week ending 11/14/92 - Complainant - 10.8 hours;
   i. week ending 11/28/92 - Complainant - 11.5 hours.

2. Payroll records were not available for the months of June, July and December, 1992.

3. Available payroll records for 1993 indicate that the following Move-up Supervisor (MUS) opportunities occurred:

a. week ending 1/23/93 - John Paterek - 23.2 hours;

b. week ending 1/30/93 - John Paterek - all week;

c. week ending 2/20/93 - John Paterek - 9.6 hours;

d. week ending 5/8/93 - Complainant - 19.5 hours;

e. week ending 6/19/93 - John Paterek - 15.6 hours;

f. week ending 6/26/93 - John Paterek - all week;

g. week ending 7/31/93 - John Barbosa - 17.9 hours;

h. week ending 8/14/93 - John Barbosa - 7.5 hours;

i. week ending 8/21/93 - John Barbosa - all week;

j. week ending 8/28/93 - John Barbosa - all week;

k. week ending 9/18/93 - Al Swider - 7.5 hours.

4. Payroll records were not available for the months of October, November and December, 1993.

5. An additional one week Move-Up Supervisor opportunity was available in October, 1993.

6. John Paterek functioned as Move-Up Supervisor for one week in December, 1993.

7. Joe Morris functioned as Move-Up Supervisor for one week in December, 1993.

8. Available payroll records for the months of January through May, 1994 indicate that the following Move-Up Supervisor (MUS) opportunities occurred:

a. week ending 1/29/94 - John Barbosa - 10.1 hours;

b. week ending 2/12/94 - John Paterek - all week;

c. week ending 5/28/94 - John Paterek - all week.

9. The Facilities Maintenance Department discontinued the use of the Move-Up Supervisor position after May, 1994.

10. Respondent's payroll records reflect that Bob Barkman, an hourly employee in the Rigging Department, has time recorded under the Move-Up Supervisor code in the Rigging Department in 1994, including the following occasions after 6/1/94:

a. week ending 6/4/94 - all week;

b. week ending 6/11/94 - all week;

c. week ending 6/18/94 - all week;

d. week ending 6/25/94 - all week;

e. week ending 7/2/94 - all week;

f. week ending 7/9/94 - all week.

11. Respondent's payroll records reflect that Leo Richardson, an hourly employee in the Rigging Department, has time recorded under the Move-Up Supervisor code in the Rigging Department in 1994, including the following occasions after 6/1/94:

a. week ending 8/27/94 - 15 hours;

b. week ending 9/10/94 - all week;

c. week ending 9/17/94 - all week;

d. week ending 9/24/94 - all week;

e. week ending 10/1/94 - all week;

f. week ending 10/8/94 - all week;

g. week ending 10/15/94 - all week;

h. week ending 10/22/94 - all week;

i. week ending 10/29/94 - all week;

j. week ending 11/6/94 - all week.

12. Respondent's payroll records reflect that James DiAntonio, an hourly employee in the Finishing Department, has time recorded under the Move-Up Supervisor code in the Finishing Department throughout the time period 6/1/94 through 10/31/94.

13. The Complainant was out of work from December 20, 1993 through April 11, 1994 on an approved medical leave of absence pursuant to the Respondent's Accident and Sickness Benefit Plan.

14. The parties stipulate to the job reference codes, position codes and social security numbers attached hereto as Exhibit A.

_____ _____

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(Counsel for the Commission in Support of the Complaint)

Date

_____ _____

William J. Delany
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(Counsel for Respondent, Kimberly-Clark Corporation)

Date

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR.,	:	
COMPLAINANT	:	
v.	:	DOCKET NO. E68573D
KIMBERLY-CLARK CORPORATION,	:	
RESPONDENT	:	

SECOND SET OF ADDITIONAL STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.[1]

15. Available payroll records for 1992 indicate that for the week ending 9/12/92 Ed Reilly received a gross pay of $1,336.90 as the MUS for the entire week and that the Complainant received a gross pay of $684.36 for that same week.

16. Available payroll records for 1992 indicate that for the week ending 10/24/92 Ed Reilly received a gross pay of $1,787.58 as the MUS for the entire week and that the Complainant received a gross pay of $983.35 for that same week.

[1] The numbering of these stipulations continues the numbering sequence found in Joint Exhibit #2 which included stipulations of fact #1 through #14.

17. Available payroll records for 1993 indicate that for the week ending 1/23/93 John Paterek received a gross pay of $684.04 for that portion of the week that he functioned as the MUS.

18. Available payroll records for 1993 indicate that the Complainant was at work for the entire week ending 1/23/93.

19. During the week ending 1/23/93 the hourly pay rate for a Facilities Maintenance 1st Class employee, the position generally held by the Complainant, was $14.75 and the scheduled work week was 37.5 hours.

20. Available payroll records for 1993 indicate that for the week ending 1/30/93 John Paterek received a gross pay of $1,505.17 as the MUS for the entire week and that the Complainant received a gross pay of $741.61 for that same week.

21. Available payroll records for 1993 indicate that for the week ending 2/20/93 John Paterek received a gross pay of $197.30 for that portion of the week that he functioned as the MUS.

22. Available payroll records for 1993 indicate that for the week ending 2/20/93 the Complainant was on vacation.

23. During the week ending 2/20/93 the hourly pay rate for a Facilities Maintenance 1st Class employee, the position generally held by the Complainant, was $14.75 and the scheduled work week was 37.5 hours.

31. Available payroll records for 1993 indicate that for the week ending 8/14/93 John Barbosa received a gross pay of $177.78 for that portion of the week that he functioned as the MUS.

32. Available payroll records for 1993 indicate that the Complainant was at work for the entire week ending 8/14/93.

33. During the week ending 8/14/93 the hourly pay rate for a Facilities Maintenance 1st Class employee, the position generally held by the Complainant, was $15.30 and the scheduled work week was 37.5 hours.

34. Available payroll records for 1993 indicate that for the week ending 8/21/93 John Barbosa received a gross pay of $1,809.27 as the MUS for the entire week and that the Complainant received a gross pay of $983.10 for that same week.

35. Available payroll records for 1993 indicate that for the week ending 8/28/93 John Barbosa received a gross pay of $1,316.41 as the MUS for the entire week and that the Complainant received a gross pay of $1454.31 for that same week.

36. Available payroll records for 1993 indicate that for the week ending 9/18/93 Al Swider received a gross pay of $288.73 for that portion of the week that he functioned as the MUS.

37. Available payroll records for 1993 indicate that the Complainant was at work for the entire week ending 9/18/93.

38. During the week ending 9/18/93 the hourly pay rate for a Facilities Maintenance 1st Class employee, the position generally held by the Complainant, was $15.30 and the scheduled work week was 37.5 hours.

39. Available payroll records for 1994 indicate that for the week ending 1/29/94 John Barbosa received a gross pay of $255.53 for that portion of the week that he functioned as the MUS.

40. The Complainant during the week ending 1/29/92 received $392.50 in workers compensation benefits less 20% in attorneys' fees.

41. Available payroll records for 1994 indicate that for the week ending 2/15/94 John Paterek received a gross pay of $1,803.40 as the MUS for the entire week.

42. The Complainant during the week ending 2/15/94 received $392.50 in workers compensation benefits less 20% in attorneys' fees.

43. During the week ending 2/15/94 the hourly pay rate for a Facilities Maintenance 1st Class employee, the position generally held by the Complainant, was $15.77 and the scheduled work week was 37.5 hours.

44. Available payroll records for 1994 indicate that for the week ending 5/30/94 John Paterek received a gross pay of $2,052.36 as the MUS for the entire week.

45. Available payroll records for 1994 indicate that for the week ending 5/30/94 the Complainant was on vacation.

46. During the week ending 5/30/94 the hourly pay rate for a Facilities Maintenance 1st Class employee, the position generally held by the Complainant, was $16.24 and the scheduled work week was 37.5 hours.

Michael Hardiman
Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

Date: November 15, 2000

William J. Delany, Esquire
(Counsel for Respondent)

Date: November 18, 2000

BIGGER v. KIMBERLY CLARK CORP.
E-68573-D

Ronald Bigger, the Complainant has worked for Kimberly-Clark, formerly Scott Paper Co., for over 30 years. In the early 1990's, Bigger was working in the company's facilities maintenance department, (FMD). In early 1992, Bigger was the third most senior hourly employee in this department.

Under a provision of the applicable collective bargaining agreement, the senior hourly employee in the FMD held a position known as the Permanent Leader. In early 1992, the Permanent Leader in the FMD was a man by the name of Ted Kennedy. Kennedy had been the Permanent Leader since the early 1980's. Both Kennedy and Bigger were the only African American employees in the FMD department which had between 12 to 17 hourly employees.

In May 1992, Kennedy retired leaving open the Permanent Leader position. The next senior employee in the FMD, Joe Morris, a white employee then became Permanent Leader.

In the FMD, there were also two opportunities given to hourly employees to temporarily fill what was called "move-up" positions: Move-

up Leader and Move-up Supervisor. The Move-up Leader temporarily filled the Permanent Leader position in the Permanent Leader's absence and the Move-up Supervisor temporarily filled the department's Supervisor's position in the Supervisor's absence. The Move-up Leader position assignment is controlled by the collective bargaining agreement in that the most senior hourly employee must be afforded the opportunity to fill temporary openings. The Move-up Supervisor position was the subject of Bigger's allegation in that Bigger believed and ultimately proved that he was denied numerous opportunities to fill the Move-up Supervisor position because of his race. One of Kimberly-Clark's main points was that this position was not controlled by the collective bargaining agreement. Instead, the appointment of Move-up Supervisor was at the discretion of the company.

At about January 1992, the FMD supervisor changed. Lenny Scholtzhauer, a white management employee who had been an employee for 38 years, was transferred into the FMD.

When Scholtzhauer became the Supervisor of the FMD, the long standing past practice was to use the most senior hourly employee to fill the temporary Move-up Supervisor position. This practice continued until

shortly after Morris advised Scholtzhauer that no longer had an interest in filling the Move-up Supervisor position. Although Bigger was used several times as the Move-up Supervisor, Schlotzhauer stopped selecting Bigger and, instead, afforded less senior white hourly employees the opportunity to fill the Move-up Supervisor position.

This skipping over of Bigger continued until approximately May of 1994, when Kimberly-Clark discontinued the use of Move-up Supervisor. At that time, since Bigger was now the most senior employee in the FMD, he was the Permanent Leader and effectively functioned as the Move-up Supervisor thereafter.

This case presents an example of how the credibility of witnesses is important regarding the outcome. Here, Scholtzhauer was found to lack credibility in his offering of reasons why he skipped over Bigger when Move-up Supervisor opportunities arose. In essence, the PHRC found that a race-based bias had warped management's view of Bigger as compared to other FMD employees. Accordingly, the PHRC found for Bigger and awarded him almost $9,000 which represents the amount he lost by not being selected to fill temporary Move-up Supervisor positions. Additionally, the PHRC awarded Bigger an additional $4,438 which is the

difference between amounts Bigger received while on worker's compensation for 16 weeks and the amount Bigger would have earned had he been working at the time. The PHRC also awarded interest on these amounts. Finally, Bigger established that he incurred $195.80 of certifiable travel expenses and this amount was also awarded to him.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR., **Complainant** **v.** **KIMBERLY-CLARK CORPORATION** **Respondent**	**DOCKET NO. E-68573-D**

FINDINGS OF FACT

1. The Complainant herein is Ronald Bigger, Sr., an African American (hereinafter "Bigger"). (J.E. #1 at S.F. #1).[1]

2. The Respondent herein is Kimberly-Clark Corporation, (hereinafter "Kimberly-Clark"). (J.E. #1 at S.F. #2).

3. All procedural prerequisites to holding a Public Hearing have been met. (S.F. 3 Paragraph 8).

4. For over thirty years Bigger has been employed by Kimberly-Clark and its predecessor, Scott Paper Company, as an hourly employee. (N.T. 65-66, 67).

5. Throughout the course of his employment, Bigger has been a member of Local

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[1] **Explanation of abbreviations**

J. E. - Joint Exhibit
C. E. - Complainant Exhibit
R. E. - Respondent Exhibit
N. T. - Notes of Testimony
S. F. - Stipulation of Fact

448, United Paper Workers Union. (N.T. 66).

6. As of January, 1992, Bigger was assigned to the Facilities Maintenance Department (FMD) as a facilities maintenance service person. (N.T. 66).

7. Facilities maintenance service workers performed a variety of maintenance work throughout the plant. (N.T. 66-67).

8. Bigger's immediate supervisor in January, 1992, was Lenny Schlotzhauer, a Caucasian. (N.T. 74).

9. Schlotzhauer, a thirty-eight year employee, was transferred into the FMD beginning at or around January, 1992. (N.T. 72, 74, 141, 229, 231).

10. Schlotzhauer, at all times relevant to this case, was Bigger's immediate supervisor; and, at all relevant times, Schlotzhauer's immediate supervisor was Jim Murray, who is also Caucasian. (N.T. 74-75, 351).

11. The position of FMD supervisor is a management position. (C. E. # 3).

12. In January, 1992, there were between 13 and 17 facilities maintenance service workers in the FMD. (N.T. 72).

13. At all relevant times, all hourly employees in FMD, except for Bigger and one other employee (Ted Kennedy), were Caucasian. (N.T. 73, 142).

14. The job assignments of facility maintenance service workers assigned to the FMD were made by an FMD hourly employee who held the position of Permanent Leader who reported directly to the FMD supervisor. (N.T. 75-76)

15. The Permanent Leader position was covered by the terms of a collective bargaining agreement and, pursuant to that agreement, the permanent leader position

was to be filled by the most senior, qualified, hourly employee in the department. (N.T. 77, 203, 320).

16. Accordingly to a Collective Bargaining Agreement provision, the employee assigned as the FMD permanent leader was paid a higher hourly rate of pay than that paid to other employees within the FMD. (N.T. 81; J.E. #4).

17. In January, 1992, Ted Kennedy, (hereinafter "Kennedy") an African American, was the permanent leader and had been since 1981 or 1982. (N.T. 68, 77-78).

18. Until his retirement in May, 1992, Kennedy was the most senior hourly employee in the FMD in January, 1992. (N.T. 68, 73, 142).

19. Upon Kennedy's retirement, Joe Morris, (hereinafter "Morris"), a Caucasian, who was the next most senior hourly employee in the FMD, became the FMD permanent leader. (N.T. 68, 69, 73, 79).

20. After Morris, Bigger was the next most senior employee in the FMD. (N.T. 70, 73; C.E. #3).

21. Morris remained the FMD permanent leader until approximately July or August, 1994 when Morris retired. (N.T. 70.)

22. In approximately July or August, 1994, Bigger became the permanent leader. (N.T. 70, 131, 281, 320, 345).

23. At all relevant times, when the permanent leader was unavailable, Kimberly Clark selected a temporary fill-in for the permanent leader. This temporary position was referred to as the "move-up leader" (hereinafter "MUL"). (N.T. 79, 80; C.E. #3).

24. On those occasions when a MUL was selected, the collective bargaining agreement required that the employee in FMD with the next most seniority to the permanent leader had to be asked first if he wanted to function as the MUL. (N.T. 79, 235, 340; C.E. #3).

25. On those occasions when a MUL was used, the most senior employee had the option of accepting or not accepting the MUL position. (N.T. 79-80, 82, 295).

26. If the most senior employee did not accept, the collective bargaining agreement required Kimberly Clark to continue down the seniority list until someone accepted. (N.T. 81-82, 295).

27. If an employee did not accept the MUL position on any given occasion, there were no negative consequences regarding future MUL opportunities because the collective bargaining agreement provided that for each opportunity that the position was available the most senior employee had to be asked first. (N.T. 79-80, 85).

28. When an employee functioned as the MUL, that employee was paid the hourly rate listed in the collective bargaining agreement for the permanent leader. (N.T. 81).

29. As a supplement to the collective bargaining agreement, the union and Kimberly Clark had in effect a written agreement that provided an opportunity for employees from FMD to work in the Rigging Department when the Rigging Department required extra help. (N.T. 82, 155, 205).

30. This supplemental agreement provided that before the start of every shift, the Rigging Department would contact the FMD when they needed one or more

employees and based on seniority FMD employees would be given the opportunity to work in the Rigging Department for that shift. (N.T. 82-83, 156, 206, 295-296).

31. The Rigging Department paid a hourly wage rate more than the rate of a facilities maintenance service person and also more than the rate for either the FMD permanent leader position or MUL position. (N.T. 84, 214, 295; J.E. #4).

32. On a number of occasions Bigger turned down the offers to do the MUL position because of the opportunities to make more money by working in the Rigging Department. (N.T. 86-87).

33. On May, 1993, Bigger turned down an opportunity to be MUL due to a personal matter involving his daughter. (N.T. 86, 163, 166, 250).

34. Other FMD employees also turned down the MUL position to make more money in the Rigging Department. (N.T. 87, 167).

35. On those occasions when the FMD supervisor was unavailable a temporary fill-in for the supervisor was selected. This position was referred to as the "move-up supervisor" (hereinafter "MUS"). (N.T. 87, 147; C.E. #3).

36. The MUS position, unlike that of the MUL, was not covered by the terms of the collective bargaining agreement as the selection for the MUS position was discretionary. (N.T. 147; C.E. #3).

37. An employee functioning in the MUS position was paid a higher rate of pay than the Permanent Leader position and a higher rate of pay than working in the Rigging Department. (N.T. 214).

38. At all times prior to Schlotzhauer becoming the FMD supervisor, the practice

in the FMD had been to select the most senior employee in the FMD to function as the MUS. (N.T. 88, 150, 377).

39. Kennedy routinely functioned as the MUS prior to the time that Schlotzhauer became supervisor. (N.T. 78, 144, 151).

40. When Schlotzhauer was transferred to the FMD, Kennedy was acting as MUS because, for a period of time, the FMD did not have a supervisor. (N.T. 78, 283).

41. Schlotzhauer continued to use Kennedy as MUS until his retirement in May, 1992. (N.T. 79, 88-89, 237, 283).

42. Prior to 1992, on those occasions when Kennedy was not available to function as MUS, Morris, the next senior employee, was selected to be MUS. (N.T. 215).

43. After Kennedy retired, Schlotzhauer routinely selected Morris, the next most senior employee to be MUS until Morris advised Schlotzhauer that he was not always interested in serving as the MUS. (N.T. 79, 89, 90, 284).

44. Until Kennedy retired, Morris became the Permanent Leader of the FMD. (N.T. 283).

45. Bigger as the next most senior employee to Morris, expected that he would routinely be asked to function as MUS on those occasions when Morris declined to do so. (N.T. 90).

46. Beginning in 1992, and not long after Morris advised Schlotzhauer that he was not always interested in functioning as MUS, less senior Caucasian employees were being asked to function as MUS in addition to Bigger. (N.T. 91-92, 178, 238, 284).

47. Scholtzhauer indicated to the FMD that he wanted to give employees a chance

to see what it was like to be the MUS, then he posted a sign-up sheet on which any employee could sign up expressing interest in assignment as the MUS. (N.T. 169, 170, 173, 219, 238, 286-287, 293, 341)

48. Bigger and others signed up. (N.T. 173, 347)

49. In addition to less senior Caucasian employees functioning as MUS, occasionally Morris also did so. (N.T. 93).

50. Available payroll records for 1992 indicate that the following MUS opportunities occurred:

a. week ending 5/9/92 - Morris - 9.2 hours;

b. week ending 5/30/92 - Bigger - all week;

c. week ending 8/8/92 - Morris - 12 hours;

d. week ending 9/5/92 - Morris - 17.10 hours;

e. week ending 9/12/92 - Ed Reilly - all week;

f. week ending 10/10/92 - Morris - 33.2 hours;

g. week ending 10/24/92 - Ed Reilly - all week

h. week ending 11/14/92 - Bigger - 10.8 hours;

i. week ending 11/28.92 - Bigger - 11.5 hours.

(J.E. #2 at S.F. #1).

51. Ed Reilly (hereinafter "Reilly") is Caucasian and had less seniority than Bigger. (N.T. 92).

52. Payroll records were unavailable for the months of June, July and December, 1992. (J.E. #2 at S.F #2).

53. Bigger never refused an opportunity to function as the MUS. (N.T. 91, 96-97).

54. Continuing into 1993, less senior, Caucasian employees were routinely being asked to be MUS. (N.T. 92-94).

55. In June, 1993, Bigger expressed to Bill Phipps, ("Phipps"), a union official, an interest in filing a grievance over not being selected for the MUS. (N.T. 94).

56. Bigger agreed with Phipps' suggestion that Bigger try to resolve the issue by going directly to Scholtzhauer. (N.T. 95).

57. In June, 1993, Bigger met with Schlotzhauer to discuss his concerns about not being asked to function as MUS and that racial discrimination was the reason. (N.T. 96, 188, 193, 392, 393).

58. Bill Phipps, a union official, was also present at the June 1993 meeting. (N.T. 94, 393).

59. At the June 1993 meeting, Schlotzhauer told Bigger that he had not been asking Bigger to be the MUS because he was under the impression that Bigger was not interested in the MUS position. (N.T. 96, 98, 248, 394).

60. Schlotzhauer gave Bigger no other reason for not asking Bigger to be the MUS. (N.T. 98, 99, 394-395).

61. Bigger clarified to Schlotzhauer that he remained interested in functioning as MUS whenever the opportunity arose. (N.T. 97).

62. Scholtzhauer informed Bigger that he had taken Bigger's name off the MUS

list but he would put his name back on the list. (N.T. 97, 248, 394).

63. Both Bigger and Phipps left the June meeting believing the matter had been resolved and that Bigger would be asked to function as MUS when future opportunities arose. (N.T. 99, 394).

64. Subsequent to the June, 1993 meeting, Bigger was never again given the opportunity to function as MUS even though a number of opportunities arose. (N.T. 100-101; J.E. #2 at S.F. #3).

65. Subsequent to the June, 1993 meeting, each time a MUS opportunity arose, Schlotzhauer selected a Caucasian employee to function in the MUS position and on all but one of those occasions the employee was less senior than Bigger. (J.E. #2 at S.F. #3-#9).

66. On December 13, 1993, Bigger met with Schlotzhauer and Jim Murray to discuss Bigger's continuing concern that he was not being asked to function as MUS because of his race. (N.T. 106, 108, 193, 194, 278-279, 361).

67. Bill Phipps and Al Trusty, a union official who served on a joint company/union diversity team, were also present. (N.T. 106-108, 279, 362).

68. At the December 13, 1993 meeting, Bigger was told that Kimberly Clark intended to discontinue use of the MUS position as of that point in time. (N.T. 109).

69. On December 16, 1993, Bigger learned that John Paterek, a Caucasian, who was less senior than Bigger, was selected to function as MUS during the following week. (N.T. 110).

70. At the December 13, 1993 meeting, Bigger was neither told that it had been

previously decided that Bigger would not be used as MUS, nor that management was concerned about Bigger's leadership or attitude. (N.T. 383, 395-396).

71. Available payroll records for 1993 indicate that the following MUS opportunities occurred:

a. week ending 1/23/93 - John Paterek - 23.2 hours;

b. week ending 1/30/93 - John Paterek - all week;

c. week ending 2/20/93 - John Paterek - 9.6 hours;

d. week ending 5/8/93 - Bigger - 19.5 hours;

e. week ending 6/19/93 - John Paterek - 15.6 hours;

f. week ending 6/26/93 - John Paterek - all week;

g. week ending 7/31/93 - John Barbosa - 17.9 hours;

h. week ending 8/14/93 - John Barbosa - 7.5 hours;

i. week ending 8/21/93 - John Barbosa - all week;

j. week ending 8/28/93 - John Barbosa - all week;

k. week ending 9/18/93 - Al Swider - 7.5 hours.

(N.T. 100; J.E. #2 at S.F #3).

72. John Paterek, John Barbosa and Al Swider are each Caucasian and each had less seniority than Bigger. (N.T. 92-93).

73. Payroll records were not available for the months of October, November and December, 1993. (J.E. #2 at S.F. #4).

74. An additional one week opportunity was available in October, 1993. (N.T. 102)

75. Three days after the December 13, 1993 meeting, John Paterek functioned as MUS for the week beginning December 16, 1993.

(J.E. #2 at S.F #6).

76. Morris also function as MUS for one week in December 1993. (J.E. #2 at S.F. #7).

77. Perceiving continuing racial discriminatory treatment, Bigger became extremely upset emotionally and sought professional psychological help. (N.T. 110, 111-115).

78. Bigger was out of work from December 20, 1993 through April 11, 1994 on an approved medical leave of absence. (N.T. 116; J.E. #2 at S.F. #13).

79. On or about April 11, 1994, Bigger filed a claim for workers compensation benefits with respect to the above-described medical leave of absence in which he asserted that he had suffered an emotional psychic injury attributable to racial discrimination practiced by his supervisor in passing him over for the MUS position that led to his absence from work. (N.T. 116-117; C.E. #1 at finding of fact #2).

80. After a hearing, Bigger was awarded workers compensation benefits, based upon findings that the injury that caused him to be unable to work was a result of the abnormal employment environment and the refusal of the Kimberly-Clark to allow Bigger to funciton as the MUS because of Bigger's race. (N.T. 118; C.E. 1).

81. The Workers Compensation determination was that Bigger was unable to work during the December 20, 1993 through the April 11, 1994 as a direct result of the racial discrimination that had occurred with respect to the MUS position.

(N.T. 117, 198; C.E. #1).

82. Shortly after returning to work on April, 1994, Bigger determined that Schlotzhauer's attitude towards him and his opportunity to function as MUS had not changed. (N.T. 126-129).

83. As a direct result, Bigger realized that psychologically he needed additional time away from the work site so he immediately took five weeks vacation that he had accrued and did not return to work until the beginning of June, 1994. (N.T. 128, 199).

84. Kimberly Clark continued to use the MUS procedure during Bigger's absence through April 11, 1994 and during the period of time that Bigger was on vacation in May, 1994. (J.E. #2 at S.F. #8).

85. Available payroll records for the months of January through May, 1994 indicate that the following MUS opportunities occurred:

a. week ending 1/29/94 - John Barbosa - 10.1 hours;

b. week ending 2/12/94 - John Paterek - all week;

c. week ending 5/28/94 - John Paterek - all week.

(J.E. #2 at S.F. #8).

86. The FMD discontinued the use of MUS after May, 1994. (N.T. 131, 281, 319; J.E. #2 at S. F. #9).

87. After June, 1994, Bigger effectively became the FMD's MUS because he had become the FMD's Permanent Leader. (N.T. 131, 281, 319, 345).

88. Kimberly Clark Departments, other than FMD, continued the use of MUS after May, 1994. (N.T. 131-134; J.E. #2 at S.F. #10 through #12).

89. Respondent's payroll records reflect that after 6/1/94, Bob Barkman, an hourly employee in the Rigging Department, has six weeks recorded under the Move-Up Supervisor code in the Rigging Department in 1994. (N.T. 131-132; J.E. #2 at S.F. #10).

90. Respondent's payroll records reflect that after 6/1/94, Leo Richardson, an hourly employee in the Rigging Department, has over nine weeks recorded under the Move-Up Supervisor code in the Rigging Department in 1994. (N.T. 133; J.E. #2 at S.F. #10).

91. Respondent's payroll records reflect that James DiAntonio, an hourly employee in the Finishing Department, has time recorded under the Move-Up Supervisor code in the Finishing Department from June 1, 1994, through October 31, 1994. (J.E. 2; S.F. 10).

92. Bigger incurred travel expenses in connection with his case by traveling 32 miles round trip between Chester and Philadelphia apporximately ten times. (N.T. 138-139).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject matter of this case.

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

3. Bigger is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").

4. Kimberly-Clark is an employer within the meaning of the PHRA.

5. Bigger has met his initial burden of establishing a *prima facia* case of race-based discrimination by proving that:

   a. he is a member of a protected class;

   b. that he was qaualified for selection as MUS;

   c. that he was not selected; and

   d. that Kimberly-Clark selected others not in Bigger's protected class to fill MUS opportunities.

6. Kimberly-Clark articulated legitimate nondiscriminatory reasons for not providing Bigger with MUS opportunities.

7. Bigger has shown Kimberly-Clark's reasons to be pretextual.

8. The PHRC has broad discretion in fashioning a remedy.

9. Bigger is entitled to lost wages, plus six percent interest for the years 1993 through 1999, and eight percent interest beginning in calendar year 2000 and ending in calendar year 2001, and nine percent interest beginning in calendar

year 2001.

OPINION

This case arises on a Pennsylvania Human Relations Commission, (hereinafter "PHRC), complaint filed on or about March 29, 1994, by Ronald Bigger, Sr. (hereinafter "Bigger") against Scott Paper Company. Effective December 12, 1995, Scott Paper Company merged into Kimberly-Clark Corporation (hereinafter either "Kimberly-Clark"or "Respondent").

Bigger's complaint alleges race-based disparate treatment in the terms and conditions of employment. Bigger's race-based allegation alleges a violation of Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §951, et seq. (hereinafter "PHRA").

PHRC staff investigated the allegation, and at the investigation's conclusion informed Kimberly-Clark that probable cause existed to credit Bigger's allegation. 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 September 18, 2000, in Media, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The PHRC's interest in the complaint was overseen by PHRC staff attorney Michael Hardiman. William J.

Delany, Esquire, appeared on behalf of Kimberly-Clark. The parties were afforded an opportunity to submit briefs. Both Attorney Hardiman's post-hearing brief and Kimberly-Clark's post-hearing brief were received on November 27, 2000. Additionally, Kimberly-Clark requested and was granted the opportunity to file a Reply Memorandum which was received on December 18, 2000.

In this disparate treatment case, Bigger generally alleges that Kimberly-Clark treated him less favorably than others because of his race, black. To prevail, Bigger is required to prove that Kimberly-Clark had a discriminatory intent or motive. Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987).

Since direct evidence is very seldom available, we consistently apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 n.8 (1981). Bigger must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing, supra; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The phrase "prima facie case" denotes the establishment of a legally mandatory, rebuttable presumption, which is inferred from the evidence. Burdine, 450 U.S. at 254 n.7. Establishment of the *prima facie* case creates the presumption that the employer unlawfully discriminated against the employee. Id. at 254. The *prima facie* case serves to eliminate the most common nondiscriminatory reasons for the employer's actions. Id. It raises an inference of discrimination "only because we presumed

these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 467, 577 (1978).

In McDonnell Douglas, the U.S. Supreme Court held that a plaintiff may prove a *prima facie* case of discrimination in a failure-to-hire case by demonstrating:

(i) that he belongs to a racial minority;

(ii) that he applied and was qualified for a job for which the employer was seeking applicants;

(iii) that, despite his qualifications, he was rejected; and

(iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of the *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, at 802, n.13. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v. General Electric Co., 816 F.2d 264, 268, 43 FEP 1018 (6th Cir. 1987).

Here, we adapt the McDonnell Douglas test because this case involves alleged race-based failure to periodically select Bigger to temporarily fill the position of Move-up Supervisor ("MUS"). Bigger attempts to show that comparable persons not in his

protected class were treated better. Accordingly, to establish a *prima facie* case, Bigger must show:

1. that he is a member of a protected class;
2. that he was qualified for selection as MUS;
3. that he was not selected; and
4. that Kimberly-Clark selected others not in Bigger's protected class to fill MUS opportunities.

See, Bray v. Marriott Hotels, 110 F3d 986 (3rd Cir. 1997).

If Bigger can establish a *prima facie* case, the burden would shift to Kimberly-Clark to "articulate some legitimate, nondiscriminatory reason" for its actions. McDonnell Douglas, 411 U.S. at 802. Kimberly-Clark would be required to rebut the presumption of discrimination by producing evidence of an explanation, Burdine, 450 U.S. at 254, which must be "clear and reasonably specific," Id. at 285, and "legally sufficient to justify a judgment" for Kimberly-Clark. Id. at 255. However, Kimberly-Clark would not have the burden of "proving the absence of discriminatory motive." Board of Trustees v. Sweeney, 439 U.S. 24, 25, 18 FEP 520 (1982).

If Kimberly-Clark carries this burden of production, Bigger must then satisfy a burden of persuasion and show that the legitimate reasons offered by Kimberly-Clark are a pretext for discrimination. McDonnell Douglas, 411 at 804. To establish that a proffered reason is pretextual, Bigger must prove both that the reason offered was false, and that discrimination was the real reason for the challenged failure to select him. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993). This burden

merges with Bigger's burden of persuading us that he has been the victim of intentional discrimination. Burdine, 450 U.S. at 256. The ultimate burden of persuading the trier of fact that Kimberly-Clark intentionally discriminated against Bigger remains at all times with Bigger. Id. at 253.

On the initial question of whether Bigger can establish a *prima facie* case, only the PHRC brief on behalf of the complaint addresses whether the elements of the requisite *prima facie* case have been shown. In a footnote in Kimberly-Clark's brief, the elements of a *prima facie* case are listed. However, Kimberly-Clark makes no effort to contest any element of the requisite *prima facie* showing. Instead, Kimberly-Clark's brief begins by asserting that Kimberly-Clark has met its production burden of articulating a legitimate non-discriminatory reason for not selecting Bigger.

First, Kimberly Clark's brief generally asserts that Bigger was not selected as the MUS because he was unreliable and ineffective as a supervisor. Kimberly-Clark also submits that when Schlotzhauer first became the FMD supervisor he selected the MUS by seniority, but shortly after becoming the supervisor of the FMD Schlotzhauer exercised his discretion regarding selection of MUS by initially establishing a rotation system whereby any employee who expressed interest in working as the MUS would be given that opportunity. Kimberly-Clark submits that such a rotation system enabled Schlotzhauer to identify reliable and effective leaders who could then be selected based upon their performance.

Kimberly-Clark also asserts that prior to June 1993, there came a time when Schlotzhauer did not select Bigger because he had indicated he did not want to be

considered for the MUS position. After Bigger complained at a June 1993 meeting with Schlotzhauer, Kimberly-Clark submits that Schlotzhauer told Bigger that he would be considered in the future. However, Kimberly Clark asserts that Schlotzhauer did not thereafter use Bigger often because Bigger was unreliable.

Kimberly-Clark's brief argues that the conclusion that Bigger was unreliable is based primarily on Bigger's department history regarding the MUL position. Kimberly-Clark contends that Bigger refused the MUL position over twenty-times and when he did accept the MUL position, he refused to stay the MUL for an entire week as requested. Kimberly Clark states that when Bigger would back out of the MUL position before the expected return of the FMD permanent leader, Schlotzhauer had to scramble to find a replacement.

By articulating these reasons, Kimberly-Clark sufficiently meets its burden of production. If believed, the reasons offered collectively demonstrate a nondiscriminatory reason for the non-selection of Bigger for MUS position opportunities.

Because Kimberly-Clark has successfully articulated legitimate nondiscriminatory reasons, Bigger has the task of providing that the reasons proffered are not worthy of belief and that the true reason for his non-selection was race-based discrimination. Bigger must:

> demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence" and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons.

Fuentes v. Perskie, 32F.3d 759 (3rd Cu 1999, quoting McDonnell Douglas Corp.,

911 U.S. at 802.

The Pennsylvania Supreme Court also articulated principles which are useful in the ultimate resolution of this case. The court stated that:

> [A]s in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes." Aikens, 460 U.S. at 716, 103 S.Ct. at 1482. The plaintiff is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief or is otherwise inadequate in order to persuade the tribunal that her evidence does preponderate to prove discretion. She is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up."

Allegheny Housing, supra at 319.

Careful scrutiny of the totality of the evidence in this case reveals that the reasons offered by Kimberly-Clark for Bigger's non-selection for MUS opportunities are pretextual. What emerges is an overall picture of illegal bias as the actual reason for Bigger's non-selection. Numerous discrepancies in the evidence points to a sad situation in which subtle racial animus had all too easily warped management's view of Bigger as compared to other employees in the FMD.

The picture of MUS selection begins with the undisputed fact that at Kimberly-Clark it had been a long standing practice to select the most senior employee of a department to whom to offer available MUS opportunities. Contrary to Kimberly-

Clark's statement to the PHRC dated June 15, 1994, (C.E. 3), when Schlotzhauer came to the FMD in January of 1992, the most senior FMD employee, Ted Kennedy, continued to be offered MUS opportunities until his retirement in May 1992. Once Kennedy retired, the resultant senior employee Joe Morris, began to receive the opportunity to work as the MUS until Morris advised Schlotzhauer that he was not always interested in serving as the MUS.

The record is not precise regarding exactly when Morris began to express disinterest, but the record does show that at least as late as October 1992, Morris functioned as the MUS.

Several interesting observations can be made from a detailed reading of this record. First, Schlotzhauer suggested that his transition into the supervisory FMD took two to three months. (NT-232) When he first came to the department he asked what the practice was regarding the selection of MUS. Upon being told, Schlotzhauer retained the practice for a considerable period beyond a two to three month transition period. Kimberly-Clark's June 15, 1994 statement to the PHRC suggested that Schlotzhauer immediately changed the MUS selection procedure. (C.E. 3). Further, Schlotzhauer at one point suggested that it was company policy to move up whoever was thought to be the right person. (N.T. 285). This assertion lack credibility in the face of the clear long standing practice of utilizing the senior person for MUS.

Schlotzhauer testified that he did not decide to make a change until Morris indicated it was okay with him to use someone else to move up because he was too

uncomfortable. (N.T. 238-284). At that point Bigger was the next senior FMD employee. A careful analysis of Scholtzhauer's testimony reveals that Schlotzhauer first had the okay of the senior person, Morris, before considering the new system which effectively circumvented Bigger's opportunities. By waiting for Morris' okay, Schlotzhauer creates the reasonable inference that he too believed that seniority controlled with respect to offering MUS opportunities.

It is worth noting that Schlotzhauer testified that he considered the role of MUS as important to plant safety and operations, (N.T. 23), and that he was interested in an individual who demonstrated leadership qualities and dependability. In furtherance of these fitting ideals under his new system, Schlotzhauer initially sought to fill the MUS position by posting a simple sign-up sheet for approximately one week, to be signed by anyone interested. Schlotzhauer testified that those who signed were merely rotated into the MUS as the opportunities arose.

A review of those to whom an MUS position opportunity was given throughout 1992 and 1993 provides no evidence of a rotation system. The evidence supports a finding that Schlotzhauer's testimony that he rotated those who signed up is simply not credible. While Schlotzhauer selected employees less senior to Bigger, the process was not by rotating sign-ups.

Schlotzhauer also testified that the MUS position helped the company identify potential people to move into management positions. (N.T. 290). This is interesting because Schlotzhauer continued to use Morris even though he retired in the Summer of 1994. (N.T. 291). Schlotzhauer went so far as to indicate that when Morris

expressed discomfort and disinterest, Schlotzhauer coached Morris through it until "he got a little better." (N.T. 289).

On the issue of the MUS as a management identification device, Schlotzhauer is again seen as less than credible. Initially, Schlotzhauer testified that his supervisor, Jim Murray had been selected for management because he had been good as a MUS. On cross-examination, Schlotzhauer admitted he did not know why Murray had been selected for management. (N.T. 293). The limited probative value of this secondary point is applicable to Schlotzhauer's credibility only.

Schlotzhauer's credibility is further weakened with regard to another aspect of his testimony concerning his decision to move away from the historical practice of using the most senior employee as MUS and instead purportedly using a "rotation system." Murray testified that Schlotzhauer never discussed with him any criteria to be used for MUS selection. (N.T. 353) Instead Murray testified that he and Schlotzhauer were pretty much in agreement with what they were looking for because, in effect, they just "kind of knew" what they wanted. In fact, Murray could not even recall Schlotzhauer indicating why he wanted to give others MUS opportunities. (N.T. 353-359). Further, although Schlotzhauer generally referenced several criteria he used, it appears he never informed employees of a new selection criteria. Schlotzhauer went so far as to testify that he began to write down the new practice, (N.T. 238), but such a writing was never introduced. Interestingly, Murray testified that at the meeting in December 1993, at which Bigger again lodged a race-based allegation of failure to use him as the MUS, Bigger was asked to help

Schlotzhauer develop MUS selection standards. (N.T. 369). If there had been standards developed earlier, there would have been no need to have Bigger and Schlotzhauer develop them after December 1993. In reality, without much thought, Schlotzhauer simply put up a sign up sheet which effectively avoided Bigger's selection.

This brings us to the main reason offered by Schlotzhauer and Murray as to why Bigger was not selected. Both Schlotzhauer and Murray point to the MUL position and Bigger's experience of refusing MUL opportunities as evidencing his lack of desire. Two particular aspects of the MUL process were identified as presenting a problem for Schlotzhauer. First, Schlotzhauer suggested that Bigger had refused MUL opportunities over twenty times. (N.T. 257). Clearly, an employee is not obligated to accept MUL opportunities. In accordance with the collective bargaining agreement, the senior employee in the department must be asked, but there is no obligation to accept.

Understandably, Bigger often refused MUL opportunities because of an alternate opportunity to go to the rigging department where the hourly rate of pay was higher than the rate paid for the MUL position. Because of his seniority, Bigger often had the option of either the rigging department or the MUL position. It certainly does no reflect negatively on one's desire to choose a higher paying opportunity.

The second aspect of the MUL process is where the real controversy is found. Without question, Bigger and Schlotzhauer differed on the question of whether an

employee had to obligate themself for an entire week as a MUL, or did an employee have a choice which could be made on a daily basis? Bigger's position was that the choice was daily, while Schlotzhauer testified that he expected a week's commitment. It is important to note that, while there was a clear difference of opinion, this issue was never formally resolved. However, on one occasion in July 1993, Bigger was asked if he wanted to be MUL for a week. He declined to be MUL on the Monday of that week, choosing instead to go to the rigging department. When he was not asked about the MUL position on Tuesday, Bigger complained and was prepared to file a grievance. Schlotzhauer agreed to both pay Bigger the MUL rate for Tuesday and to ask him on Wednesday. (N.T. 265-266). By doing so, Schlotzhauer was, in effect, conceding that Bigger's view was correct.

Schlotzhauer also points to an incident on May 28, 1993, where Bigger failed to complete a full week as MUL. Bigger credibly testified that on that occasion, Bigger informed Schlotzhauer that he had to attend to an extremely personal matter involving his daughter. Schlotzhauer's testimony that this reflected a lack of desire simply does not comport with common experience. There appears to be no question that Bigger had a pressing family emergency to attend to and that he informed Schlotzhauer of his need. Even the most heartless of employers have some compassion when an employee has a family emergency. To suggest that such a scenario forms any part of a perception that an employee lacks desire is simply not credible.

As Bigger credibly testified, while he may have chosen to go to the rigging

department whenever he could, he never turned down a MUS opportunity. On the other hand, it appears that John Paterek, another employee in the FMD, was free to choose the rigging department over a MUS opportunity without any adverse consequences. (N.T. 308). Along with Paterek we find Morris' degree of desire revealing. When Morris told Schlotzhauer he lacked interest, Schlotzhauer not only continued to use him, Schlotzhauer coached Morris through it. (N.T. 289).

It would appear that only Bigger's choice to make more money in the rigging department resulted in some adverse impression about his level of desire. Furthermore, when Morris emphatically expressed a lack of desire to be the MUS, Scholtzhauer continued to use Morris. (N.T. 289-290). Schlotzhauer went so far as to call Morris "dependable." (N.T. 342). These incidents of glaring disparity deserved careful scrutiny.

On the issue of desire, while Kimberly-Clark attempts to portray Bigger as lacking adequate desire, we find Bigger requesting two separate meetings to express his desire to be afforded the opportunity to be MUS. Bigger certainly could not have been more clear than he was at the end of the June 1993 meeting when he emphatically told Schlotzhauer he wanted to be MUS.

On this point, another credibility issue is found. Schlotzhauer testified that the reason he had not asked Bigger to be MUS was because Bigger had previously requested that he not move him up anymore. Schlotzhauer related that Bigger had said "don't even consider me to move up anymore." When asked when Bigger had said these things, Schlotzhauer offered that he was sure his notes would reflect

when Bigger had made the request. (N.T. 247). Schlotzhauer testified that he documents as much as he can in his date planner. (N.T. 339) However, on cross-examination, Schlotzhauer testified that he could not recall if he noted in his planner when Bigger told him he did not want to move up anymore. Further, after review, there was no such entry found in Schlotzhauer's date planner. On this point Bigger's testimony that he never told Schlotzhauer he did not want MUS opportunities is far more credible. Both Murray and Schlotzhauer spoke of Bigger as displaying "negative" characteristics. First, this component appeared for the first time at the Public Hearing. In Kimberly Clark's June 15, 1999 statement, there is no mention of negativity as a reason for not selecting Bigger as MUS. (C.E. 3).

A review of the instances of conduct described as "negative" further illustrates that the articulated reasons offered lack credibility. First, Schlotzhauer offered testimony that in March 1993, after a heavy snowfall, Bigger had violated company rules by giving his wife a ride in a company truck. (N.T. 169) Bigger credibility testified that his wife was walking towards the plant to convey an important message to Bigger. Bigger lived only three to four blocks from the plant and owned only one car. Bigger had been assigned to take the company snowplow and go to another location to plow snow. On his way, he saw his wife trudging in knee deep snow, so he merely drove her home which was on his way.

Bigger testified that when he returned to the plant, Schlotzhauer asked Bigger if he had a woman in the truck. When Bigger explained that the woman was his wife, Schlotzhauer told Bigger it was okay and that he would have done the same

thing under the circumstances. (N.T. 209-210).

No discipline was imposed for the truck incident and Bigger was used as MUS after the matter. More importantly, Schlotzhauer testified that his decision not to use Bigger was not the result of Bigger providing his wife a ride in a heavy snowstorm. On this issue, we find Bigger's version of the impact of offering his wife a ride in the company vehicle credible.

While no precise date was offered for when the decision was made not to use Bigger as MUS anymore, the evidence reveals that as late as May 8, 1993, Bigger was the MUS. Further we also know that in June 1993, Bigger met with Schlotzhauer to lodge a complaint that less senior employees were being offered MUS opportunities. Accordingly, a decision appears to have been made in May or June 1993. (N.T. 300-301)

Several examples offered by Schlotzhauer as evidence of Bigger's negativity clearly occurred after the decision not to use him was made. Schlotzhauer testified that in July 1993, Bigger requested to be allowed to go to the credit union on his break. While it is unclear how this would contribute to an opinion that Bigger was negative, it is clear that this happened after the critical decision was made not to use Bigger.

Similarly, Schlotzhauer related another incident occurring in November 1993, when Bigger's wife came to the plant guardhouse in an attempt to reach Bigger. Schlotzhauer testified that negativity was displayed when Bigger did not answer his pager during the lunch period. Again, it is unclear why this would be deemed

negative and clear that this happened after the decision in question. Such attempted examples are classic after-the-fact rationalizations which in no way serve to dispel the notion that these proffered justifications were considered post hoc and therefore pretextual.

One final example of purported negativity did occur prior to the decision. Murray testified that in either the spring or fall of 1992, the area was experiencing severe flooding. Murray testified that the plant was preparing for the possibility of flooding by sandbagging in front of the main office building. Murray says that he drove by and observed Bigger and others "standing around with no urgency." (N.T. 356).

Regarding this time interval, Kennedy would have been the permanent leader if the flood was in the Spring of 1992, and Morris if the flood was in the fall of 1992. Beyond this, Murray indicated that he never even spoke with Bigger about his purported observation. Further, there is nothing of record to suggest that what Murray observed as "standing around" was anything more than employees on a short break from what is clearly very strenuous work. In any event, it is not credible that this incident of nearly a year earlier would have contributed to a perception of negativity in Bigger.

To further weaken the credibility of this articulated reason offered by Murray and Schlotzhauer we find that behavior of several others, which Schlotzhauer agreed should be characterized as negative, did not prevent their selection as MUS. (N.T. 315-316). Schlotzhauer's date planner had noted that Al Snider, a less senior FMD

employee had taken an unauthorized break on one occasion, came in late on March 15, 1993, and stopped work approximately a half hour before quitting time and was found dressed ready to go home. Such incidents occurred prior to Snider's selection as MUS. (N.T. 311-312, 315, 316).

On July 19, 1993 another employee, Spangler was discovered taking an unauthorized break. Although Spangler took a break from 1:30 to 1:45 pm, he and Snider were discovered taking another break at 2:00 pm. (N.T. 315). Again, this did not prevent Spangler from a subsequent MUS opportunity.

The final effort to establish pretext is Bigger's evidence that the purported shortcomings of Bigger were not mentioned at either the June 1993 meeting or the December 1993 meeting. If Schlotzhauer's reasons were as he contends, he would not have hesitated to tell Bigger at these meetings. Instead, at the June 1993 meeting he feigns a misunderstanding, and at the December 1993 meeting, Bigger is told only that his backing out of the MUL position was a problem. In addition, Bigger was told the MUS process would not continue.

Considering the totality of the evidence, Bigger successfully demonstrates that Kimberly-Clark's articulated reasons are pretextual. Bigger has shown that he was denied MUS opportunities because of his race. Accordingly, we turn to consideration of an appropriate remedy.

Section 9(f)(1) of the PHRA generally outlines the remedies the PHRC is authorized to order. This section provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory

> practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to hiring, reinstatement or upgrading of employees with or without back pay ... as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

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

The first aspect we must consider regarding making Bigger 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 FEB 1259 (11th Cir. 1982). Once liability has been established, it becomes a Respondent's burden to show that monetary relief is not proper. See U.S. v. International Brotherhood of Teamsters, 431 U.S. 324 (1977). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the complainant] would probably have earned ...." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975), aff'd. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., Slip Op. at 41-42 (3rd Cir., Mar 29, 1988).

In the present matter, sufficient evidence was presented from which a reasonable calculation of back pay lost can be made. In 1992, the following two MUS opportunities were given to a less senior Caucasian FMD emloyee, Reilly.

Week ending September 12, 1992 - all week.

Week ending October 24, 1992 - all week.

Reilly earned $652.54 more than Bigger for the week ending September 12, 1992, and $804.23 more than Bigger for the week ending October 14, 1992.

Accordingly, Bigger lost $1,456.77 by not being offered these MUS opportunities in 1992.

In 1993, three less senior Caucasian FMD employees (Paterek, Barbosa, and Snider), filled the MUS position on the following twelve occasions.

Week ending January 23, 1993 - Paterak 23.2 hours.

Week ending January 30, 1993 - Paterak All week.

Week ending February 20, 1993 - Paterak 9.6 hours.

Week ending June 19, 1993 - Paterak 15.6 hours.

Week ending June 26, 1993 - Paterak All week.

Week ending July 31, 1993 - Barbosa 17.9 hours.

Week ending August 14, 1993 - Barbosa 7.5 hours.

Week ending August 21, 1993 - Barbosa All week.

Week ending August 28, 1993 - Barbosa All week.

Week ending September 18, 1993 - Snider 7.5 hours.

One week in October 1993 - either Moms or Barbosa - All Week

One week in December 1993 - Paterak All week.

For the week ending January 23, 1993, Paternak earned $341.84 which Bigger would have earned had this MUS opportunity been given to him. For the week ending January 30, 1993, Paternak earned $763.56 more than Bigger. Bigger was on vacation the weeks ending February 20, 1993, and June 19, 1993, thus he would not have been available to function as MUS those weeks. For the week ending June 26, 1993, Paterak earned $765.34 more than Bigger. For the portion of the week ending July 31, 1993, worked by Barbosa as MUS, Barbosa earned an additional $112.31. For the portion of the week ending August 14, 1993, Barbosa was MUS, Barbosa earned an additional $63.03.

For the week ending August 21, 1993, Barbosa earned $826.17 more than Bigger. For the week ending August 28, 1993, Bigger earned more than Barbosa because Bigger worked a significant amount of overtime. The difference in pay Bigger lost for the week ending September 18, 1993 was $173.98.

For the final two weeks in 1993, the parties stipulated that Kimberly-Clark did not retain payroll records for October, November, and December 1993. There is no dispute that someone functioned as MUS for a week in October and that Patesek functioned as MUS for a week in December. As previously noted, uncertainties in calculating damages are borne by the wrongdoer. Applying this principle to a week in October 1993, we find that Barbosa functioned for that week. Accordingly, Bigger is entitled to an amount equal to that lost opportunity. A reasonable

estimation of a week's loss is deemed $765.00. This same amount is a reasonable estimate for the week lost in December 1993 when Paterak was MUS for a full week. Accordingly, Bigger lost a total of $4,576.23 in 1993.

In 1994, three MUS opportunities were missed by Bigger. The first two occurred when Bigger was out on a medical leave of absence from December 20, 1993, through April 11, 1994. The third missed opportunity occurred when Bigger was off on leave. The question to be answered is whether Bigger's absences were caused by Kimberly-Clark's race-based discrimination? The short answer is that both the medical leave of absence and Bigger's subsequent extended vacation were the result of discrimination. Accordingly, even though unavailable, Bigger would have been available to function as MUS on the three occasions in 1994, but for Kimberly-Clark's race-based discrimination. Accordingly, the following are MUS opportunities denied to Bigger in 1994:

Week ending January 29, 1994 - Barbosa 10.1 hours.

Week ending February 12, 1994 - Peterak All week.

Week ending May 28, 1994 - Peterak All week.

For the week ending January 29, 1994, Bigger lost $96.25. For the week ending February 12, 1994, Bigger lost $1,212.02. For the week ending May 28, 1994, Bigger lost $1,443.36. The total back pay lost by Bigger in 1994 is thus $2,751.63.

The following are thus Bigger's lost wages due to missed MUS opportunities:

1992	$1,456.77

1993	$4,576.23
1994	$2,751.63
TOTAL LOST WAGES DUE TO MISSED MUS OPPORTUNITIES	$8,784.63

In June 1994, Bigger effectively became the FMD/s MUS because the FMD discontinued the use of MUS after May, 1994. At that time, Bigger was the department's Permanent Leader.

We next turn to the fact that Bigger was out of work on worker's compensation from December 20, 1993, until April 11, 1994. Bigger missed approximately 16 weeks of work due to Kimberly-Clark's discrimination. During this period, Bigger received approximately $6,280 in workers compensation benefits, less 20 percent paid in attorney fees. Accordingly, we begin with the figure of $5,024 as the amount Bigger received in benefits. Had Bigger worked he would have earned at least $15.77 per hour for 37.5 hours per week for a total of $9,462.00. The difference between this amount and the amount Bigger received as workers compensation is $4,438.00. Bigger should also be awarded this amount as lost wages.

As for Bigger's travel expenses, Bigger testified that he made in excess of ten 32-mile round trips from Chester, PA, to Philadelphia. Bigger also indicated that on each trip he incurred parking expenses of between $5 to $6. Bigger further indicated that he attended depositions and incurred parking expenses of between $7 to $9.

The following are calculations based upon this evidence:

12 trips @ 32.5 cents per mile @ 32 miles	=	$129.80
10 parking @ $5.50 per	=	$ 55.00
2 parking @ $8.00 per	=	$ 16.00
TOTAL TRAVEL EXPENSES		$195.80

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR., **Complainant** **v.** **KIMBERLY-CLARK CORPORATION** **Respondent**	**DOCKET NO. E-68573-D**

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Bigger has proven discrimination in violation of Section 5(a) of the PHRA. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, Additional Stipulations of Facts, Second Set of Additional Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD BIGGER, SR., **Complainant** **v.** **KIMBERLY-CLARK CORPORATION** **Respondent**	**DOCKET NO. E-68573-D**

FINAL ORDER

AND NOW, this 27th day of March, 2001, 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, Additional Stipulations of Facts, Second Set of Additional Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Recommendation of Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Additional Stipulations of Facts, Second Set of Additional Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Recommendation of Permanent Hearing Examiner, as its own finding in this matter and incorporates the Stipulations of Fact, Additional Stipulations of Facts, Second Set of Additional Stipulations of Fact, Findings of Fact, Conclusions of Law, Opinion, and Recommendation of Permanent Hearing Examiner, into the permanent record of

this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. Kimberly-Clark shall cease and desist from discriminating against Bigger because of his race.

2. Kimberly-Clark shall pay Bigger the lump sum of $8,784.63, which amount represents the pay differential he would have received had he functioned as MUS on each occasion that a less senior Caucasian employee functioned in that position during the time period from May, 1992 through June, 1994. Interest at the rate of 6% per annum from May, 1992 through 1999 shall be added to the back pay award. Additionally, interest at the rate of 8% for the calendar year 2000, shall be added, and interest at the rate of 9% beginning in calendar year 2001, and continuing through the date of payment shall be added to the back pay award.

3. Kimberly-Clark shall pay Bigger the lump sum of $4,438.00, which amount represents the differential between the amount earned by Bigger while receiving workers compensation benefits during the 16 week period between December 20, 1993, and April 11, 1994 and which Bigger would have earned had he been at work during that same period of time. Interest at the rate of 6% per annum from December 1993 through 1999 shall also be paid. Additionally, interest at the rate of 8% for the calendar year 2000, shall be added, and interest at the rate of 9% beginning in calendar year 2001, and continuing through the date of payment shall be added.

4. Kimberly-Clark shall reimburse Bigger the sum of $195.80, which

amount represents the certifiable travel expenses incurred by Bigger in matters involving his complaint.

5. Kimberly-Clark shall report the means by which it will comply with this Order, in writing, to Michael Hardiman, Assistant Chief Counsel, PHRC Philadelphia regional office within thirty days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Carl E. Denson for
CARL E. DENSON, CHAIRPERSON

ATTEST:

BY: Gregory J. Celia for
GREGORY J. CELIA, SECRETARY