COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID BORDEN, Complainant	:	
v.	:	PHRC CASE NO. 200205129 EEOC CHARGE NO. 17FA362014
MOTHERSWORK, INC., Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant herein is David Borden (hereinafter "Borden"), an adult who resides at 2607 B, Tremont Street, Philadelphia, Pennsylvania. (N.T. 22)

2. The Respondent herein is Motherswork, Inc. (hereinafter "Motherswork").

3. In or about July 2001, Borden was hired by Motherswork as the manager of Motherswork's flat pack processing. (N.T. 23-24)

4. Motherswork manufacturers and sells maternity wear retail. (N.T. 23)

5. Borden has a Bachelor of Science in accounting from Temple University and has attended professional seminars and taken graduate courses. (N.T. 23)

6. On or about October 2, 2003, Borden was placed on 30 days probation after he received a below average performance review. (N.T. 27)

7. Borden was told that he had to work on his communication skills with respect to his communications with the six supervisors under his direction. (N.T. 27, 33)

8. After being placed on probation, Borden informed the six supervisors under his direction that he had been placed on probation. (N.T. 29)

9. On October 9, 2002, Borden was called into a conference room and informed that since he had informed his supervisors that he had been placed on probation, he was being terminated, effective immediately. (N.T. 29)

10. A representative of Motherswork's Human Resource Department presented Borden with a proposed Confidential Severance Agreement and General Release. (N.T. 29; C.E. 1)

11. Borden attempted to negotiate payment of his salary until the end of the week but was informed that his termination was effective immediately. (N.T. 34)

12. Borden took the proposed Confidential Severance Agreement and General Release home and without reading any part of it, signed it on October 11, 2002 and mailed it to Motherswork. (N.T. 36, 37)

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

N.T.	Notes of Testimony
O.D.	Official Docket
C.E.	Complainant Exhibit

13. In pertinent part, the Confidential Severance Agreement and General Release contains the following provision:

> Employee...intending to be legally bound, does hereby RELEASE AND FOREVER DISCHARGE the company...of and from all manner of actions and causes of actions, suits, debts, claims and demands whatsoever in law or in equity, which Employee ever had, now has...by reason of any manner, cause or thing whatsoever, from the beginning of his employment with the Company until the present, and particularly, but without limitation of the foregoing general terms, any claims concerning or relating in any way to Employee's employment relationship or the termination of his employment relationship with the Company, including but not limited to, any claims which have been asserted or could have been asserted...including any claims arising under...the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. §301 et seq., ...This Release specifically includes claims that may not be know as of the date hereof. (C.E. 1)

14. The Confidential Severance Agreement and General Release also provided that, in exchange for Borden signing the agreement, Motherswork would pay Borden $2,384.62, an amount equal to two weeks salary and for which he would not otherwise have been eligible to receive. (C.E. 1)

15. The Confidential Severance Agreement and General Release also provided Borden with 21 days to consider the agreement and 7 days after he executed the agreement to revoke the agreement. (C.E. 1)

16. Although the agreement advised Borden to consult with an attorney prior to signing the agreement, he did not consult with an attorney. (N.T.35; C.E. 1)

17. In the language of the agreement, Borden acknowledged that he signed the agreement voluntarily and knowingly. (C.E. 1)

18. After Borden signed the agreement and returned it to Motherswork, Motherswork sent Borden a check in the amount of $2,384.62 which Borden cashed. (N.T. 55; C.E. 2)

19. At no time did Borden either return or attempt to return the money he received as part of the agreement he made with Motherswork. (N.T. 55)

20. Borden's current job position is Contract Manager for TNT Logistics. (N.T. 46, 56)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the Complainant's complaint.

2. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.

3. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.

4. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint a Rule to Show Cause may be issued.

5. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the PHRC may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of appropriate damages.

6. In this matter, the Respondent's failure to file a properly verified answer or to respond to a Rule to Show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.

7. When determining the validity of a release, Pennsylvania general contract principles apply.

OPINION

This case arose on a complaint filed by David Borden ("Borden") against Motherswork, Inc. ("Motherswork"). Borden's complaint at PHRC Case No. 200205129 alleged that until discharged on October 9, 2002, Borden was harassed because of his religion, and that his discharge was because of his sex, his age, and his religion. Borden's complaint states claims under Section 5(a) of the PHRA.

Borden's verified complaint was filed on or about February 5, 2003. By correspondence dated May 23, 2003, the PHRC Philadelphia regional office petitioned then Motions Commissioner Denson for a Rule to Show Cause, indicating that Motherswork had not properly answered Borden's complaint. The petition indicated that by correspondence dated May 6, 2003, Motherswork was notified that its failure to properly answer Borden's complaint could result in a judgment being entered for Borden.

On June 5, 2003, a Rule to Show Cause was issued directing Motherswork to respond on or before July 7, 2003. After no response was filed, on July 28, 2003, then Motions Commissioner Denson recommended a finding of liability to the full PHRC. On August 26, 2003, the full PHRC determined that Borden had been harassed because of his religion and terminated on October 9, 2002 because of his sex, his age and his religion.

After the finding of liability in this case, conciliation efforts were unsuccessfully attempted. After conciliation efforts failed, this matter was approved for a public hearing on the limited issue of appropriate damages.

The public hearing on the issue of appropriate damages was held on June 9, 2004 in Philadelphia, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Charles L. Nier, III, Esquire, PHRC Assistant Chief Counsel, oversaw the state's interest in the complaint. Scott M. Pollins, Esquire and David C. Berman, Esquire, attorneys for

Borden were present at the Public Hearing but did not participate. Pam R. Jenoff, Esquire, represented Motherswork.

Following the public hearing, post-hearing briefs from Attorney Nier and Attorney Jenoff were received on August 9, 2004. Subsequently, on August 20, 2004, Attorney Jenoff filed a Reply Brief.

To determine the appropriate damages in this case, we must first look at the Confidential Severance Agreement and General Release that Borden signed on October 11, 2002 and assess whether he knowingly and voluntarily executed the agreement, and if we determine that he did, we must then determine the effect of his having executed that document on the question of appropriate damages in this case.

In Pennsylvania, releases are normally evaluated in the same manner as other contracts. Clark v. Philadelphia College of Osteopathic Medicine, 693 A.2d 202, 207 (1997). Whether a release is enforceable thus begins with the question of whether the document in question satisfies the essential common law elements necessary to constitute a contract. Was there an offer, an acceptance, was there valid consideration, and did the parties enter the agreement knowingly and voluntarily?

While the PHRC regional office post-hearing brief, at least in part, seeks an evaluation of the agreement Borden signed using standards established by the Older Workers Benefit Protection Act, 29 U.S.C. §621 et seq., Pennsylvania law, not federal law, should be applied. See Wastak v. Lehigh Valley Health Network, 342 F.3d 281, 295 (3rd Cir. 2003). This case generally held that when determining the validity of a release of a PHRA claim, Pennsylvania contract principles of law apply rather than the Older Workers Benefit Protection Act.

In the post-hearing brief submitted by the PHRC regional office, a number of attacks are made on the validity of the release Borden signed. First, it is argued that when Borden

was called to the meeting where he was informed that he was terminated, he was verbally told that he only had until the end of the week to sign the release. This argument submits that the language in the agreement providing Borden with 21 days to consider the agreement was irrelevant and meaningless.

In response to this argument, Motherswork's post-hearing brief correctly observes that Borden's testimony regarding what he was told at that meeting about the agreement must be rejected. Motherswork cites the case of Beckman v. Vassall-Dillworth Lincoln Mercury, Inc., 321 Pa. Super. 428, 438, 468 A.2d 784, 789 (1983) for the principle that when there are written terms of a contract, those terms constitute the agreement of the parties and the written terms cannot be either added to or subtracted from by testimony about purported oral conversations. All prior statements are considered merged into and superseded by the written contract.

Interestingly, the court in Beckman noted another legal principle regarding failure to read a contract. The court cited the Pa. Supreme Court case of Estate of Brant, 463 Pa. 230, 344 A.2d 806 (1975) where the court held that in the absence of proof of fraud, the failure to read a contract one signs is an unavailing excuse or defense, and cannot justify an avoidance, modification or nullification of the contract or any provision thereof. See also, Stanley A. Klopp, Inc. v. John Deere Co., 510 F. Supp. 807 (E.D. Pa. 1981).

Quite simply, Borden's problem was not that he may have been told that he only had until Friday to consider the agreement, but that he took it home with him and never even read it. Borden was a manager of six supervisors who themselves supervised approximately 100 employees. Interestingly, his next job was as a Contract Manager, yet with all his education and experience in business, Borden did not take time to read the release he was asked to consider. Instead, the record shows that all that was on his mind

was the money he would receive once he did sign the agreement and returned it to Motherswork.

Here, we are dealing with two separate moments surrounding the agreement Borden eventually signed - the time surrounding the presentation of the agreement to him and his signing of it. These moments in time are fundamentally distinguishable. Well-established Pennsylvania law states that "Where the parties to an agreement adopt a writing as the final and complete expression of their agreement...evidence of negotiations leading to the formation of the agreement is inadmissible to show an intent at variance with the language of the written agreement." McGuire v. Schneider, Inc., 368 Pa. Super. 344, 348, 534 A.2d 115 (1987) "Alleged prior or contemporaneous oral representations or agreement concerning the subjects that are specifically dealt with in the written contract are merged in or superseded by that contract. McGuire citing Bardwell v. Willis Company, 375 Pa. 503, 507, 100 A.2d 102, 104 (1953). Thus the written contract, if unambiguous, must be held to express all of the conversations made prior to its execution, and oral testimony is not admissible to explain or vary the terms of the contract. The only time oral testimony is allowed would be as an attempt to prove fraud in the execution of a contract, not in the inducement to execute it. Only if a party to a contract averred that a promise had been omitted from the final written contract because of fraud, accident, or mistake could oral evidence properly be admitted, Abel v. Miller, 293 Pa. Super. 6, 10, 437 A.2d 963, 965 (1982).

Applying these long standing principles to the circumstances present here, since Borden signed the agreement that contains the unambiguous provision that provided him with 21 days to consider the agreement, he cannot now justifiably rely upon the purported prior oral representation that he had only 2 days. For this reason, the argument that the provision providing Borden with 21 days to consider the agreement is irrelevant and

meaningless is rejected. The agreement signed by Borden provided him with 21 days. He did not know this only because he neglected to read the agreement and this is not an excuse he will be permitted to use to his advantage now.

Next, in effect, the PHRC regional office post-hearing brief submits that Borden's educational and professional experience did not equip him to understand the language of the agreement. This argument is wholly without merit. We must keep in mind that Borden did not even attempt to read the agreement and if he had, he testified that he at least understood that once he did, he understood that it gave him 21 days to consider the agreement. A man with a bachelor's degree in accounting from Temple and who has taken graduate courses cannot suggest that he was unable to understand the language of the agreement presented to him. Such an argument simply lacks any merit.

Similarly, the PHRC regional office post-hearing brief next argues that Motherswork failed to communicate to Borden the consequences of executing the release. The meeting where Borden was given the proposed agreement was very short and the discussion was said to revolve primarily around Borden receiving approximately $2,300 if he executed the agreement. Once again, had he only read it, the agreement clearly instructed Borden to consult with an attorney before he signed the agreement and also quite clearly provided Borden with the full scope and import of the agreement language. Again, not reading it is no excuse.

Next, the PHRC regional office post-hearing brief asserts that Borden "felt pressured" to sign the release. Clearly, like many who are confronted with a choice of either getting money to release an employer or receiving nothing, the pressure Borden felt was financial in nature. On this point, the law is very clear, "the existence of financial pressure to sign a waiver is insufficient to establish that it was executed involuntarily." Wastak at 295, citing Cirillo v. Arco Chem. Co., 862 F.2d 448, 452 n.2 (3rd Cir. 1988).

Lastly, the post-hearing brief of the PHRC regional office argues that Borden did not consult with an attorney prior to signing the agreement. Once again, the reason Borden did not consult with an attorney rests entirely with Borden. The record is clear that the only concern Borden had was getting the money Motherswork was offering. He did not even care to read the document other than knowing that he would receive money for signing it. Certainly, Borden was advised to seek the counsel of an attorney, choosing not to was entirely his responsibility.

Another factor establishes that the agreement executed by Borden is now valid is the fact that since receiving the money from Motherswork, Borden has effectively ratified the agreement. Fundamentally, a former employee's failure to return the consideration received for a release constitutes ratification of that agreement. See i.e., Jordan v. Smithkline Beecham, Inc., 958 F. Supp. 1012 (E.D. Pa. 1997), and Livingston v. Bev-Pak, Inc., 112 F. Supp. 2d 242 (N.D.N.Y. 2000).

After considering these factors, we find that the Confidential Severance Agreement and General Release is valid. Accordingly, we turn to the question of whether, irrespective of the validity of the agreement, an award of individual relief to Borden is appropriate. On this general question, we find that it is not.

The PHRC regional office post-hearing brief argues that even if the agreement is valid, that damages should be awarded to Borden. In effect, placed at issue here are two separate public policy considerations. First, a public policy of the PHRC is to take measures to eliminate discrimination in the Commonwealth. Second, there is a public policy to maintain the sanctity of contracts for the sake of avoiding chaos in the commercial world. C.I.T. Corp. v. Jonnet, 214 A.2d 620, 622 (Pa. 1965).

Here, we must recognize that while liability has been found against Motherswork, it was found for the sole reason that Motherswork did not file a verified answer to Borden's

complaint. Whether there was actually discrimination in Borden's allegations was not addressed due to Motherswork's failure to submit an answer. Given this circumstance, set aside the fact that Borden executed a valid release, the state's primary interest in this matter would be served by the issuance of a cease and desist order that requires Motherswork to timely answer any future PHRC complaints that may be filed against it. Additionally, such a cease and desist order should cover the specifics of the allegations of Borden's claims. However, to award individual damages to Borden contrary to the release he signed would not preserve a state interest. Instead, such an award would serve to give Borden a double recovery. Fundamentally, he already received compensation for the execution of the release agreement.

Motherswork's post-hearing brief cites numerous instances where courts not only have precluded an individual from recovering damages where they had executed a release. See, Roche v. Supervalu, Inc., No. Civ. A. 97-2753, 1999 WL 46226 at *5 (E.D. Pa. Jan. 15, 1999), aff'd 193 F.3d 514 (3rd Cir. 1999), and Bickings v. Bethlehem Lukens Plate, 82 F.Supp. 2d 402, 410 (E.D. Pa. 2000). Additionally, Motherswork cites one case where the EEOC could seek injunctive relief but not back pay for a Complainant who had released his claims, EEOC v. Goodyear Aerospace Corp., 813 F.2d at 1539 (9th Cir. 1987).

Here, after consideration of all the circumstances present, we find that Borden's execution of a valid release precludes an award of back pay. Accordingly, relief is ordered as directed in the Final Order that follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNER'S OFFICE

PENSYLVANIA HUMAN RELATIONS COMMISSION

DAVID BORDEN, Complainant	:	
v.	:	PHRC Case No. 200205129
	:	EEOC Charge No. 17FA362014
MOTHERSWORK, INC., Respondent	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the state's interest in this matter requires a cease and desist order. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

September 17, 2004
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNER'S OFFICE

PENSYLVANIA HUMAN RELATIONS COMMISSION

DAVID BORDEN,	:	
Complainant	:	
	:	
v.	:	PHRC Case No. 200205129
	:	EEOC Charge No. 17FA362014
MOTHERSWORK, INC.,	:	
Respondent	:	

FINAL ORDER

AND NOW, this 28th day, of September, 2004, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Recommendation of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Recommendation into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That Motherswork shall cease and desist from failing to file a verified answer to any future PHRC complaint(s) that may be filed against it.
2. That Motherswork shall cease and desist from permitting any employee to be harassed because of that employee's religion.

3. That Motherswork shall cease and desist from terminating an employee because of that employee's age, sex, or religion.

4. That within 30 days of the effective date of the Order, Motherswork shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier, III, Esquire, in the Commission's Philadelphia Regional Office, 711 State Office Building, Broad and Spring Garden Streets, Philadelphia, PA 19130-4088.

PENNSYLVANIA HUMAN RIGHTS COMMISSION

By: _____
Stephen A. Glassman
Chairperson

ATTEST:

_____
Sylvia A. Waters
Secretary