

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN BROOKS,

Complainant

v.

VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

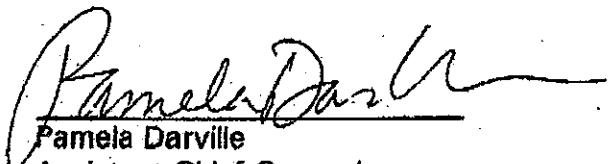
5. On or about September 7, 2001, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.

6. On or about February 1, 2002, Respondent filed an Amended Answer in response to the complaint. A copy of the Amended Answer will be included as a docket entry in this case at the time of hearing.

7. In correspondence dated November 28, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint.

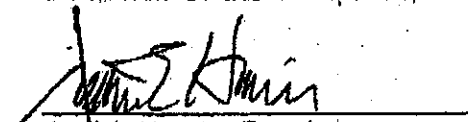
8. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

9. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

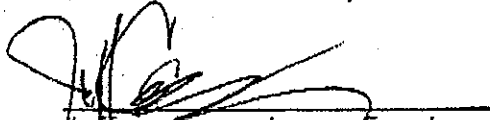


Pamela Darville  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complainant)

6-28-02  
Date

  
Judith Harris, Esquire  
(Counsel for the Respondent)

6/28/02  
Date

  
Jeffrey Campolongo, Esquire  
(Counsel for the Complainant)

6/28/02  
Date

8. The Complainant stopped working for Respondent Infinity on May 15, 2001. (N.T. I, 28)

9. During the course of his employment with Respondent Infinity, the Complainant was offered stock options. (N.T. I, 32; C.E. 15)

10. The Complainant's immediate supervisor was Joseph Zurzolo. (N.T. I, 33)

11. Zurzolo was supervised by Peter Kleiner, who, in turn, was supervised by Ken Stevens. (N.T. I, 33)

12. Zurzolo scheduled a meeting for account executives to discuss sales and dress code issues. (N.T. I, 33-34)

13. The meeting took place on Wednesday, May 9, 2001. (N.T. I, 34)

14. At the meeting, Zurzolo distributed the book, "New Dress for Success." (N.T. I, 34, C.E. 3)

15. Zurzolo also stated to the account executives at the meeting, "Per human resources, use it." (N.T. I, 34, 106; C.E. 3)

16. The Complainant took the book home that evening and read it. (N.T. I, 34)

17. The Complainant had a negative reaction to the book and felt that there were specific passages that were particularly offensive. (N.T. I, 34-54).

18. The passages from the book that were offensive to the Complainant were (N.T. I, 36-54):

**a. WHEN BLACKS AND HISPANICS SELL TO WHITES (AND VICE  
VERSA)**

- vii. If you are from a Hispanic background and you wish to sell to American business, the best outfit for you to wear is a medium range or dark gray two or three-piece suit and a very conservative tie, preferably blue and maroon silk foulard. Men from Hispanic backgrounds also have to be careful that their hair is very neatly trimmed and very conservative. (C.E. 3, pp. 211-212).
- viii. If you are white selling to blacks, you will fare much better if you dress in non-establishment patterns. Black America is essentially divided into two camps, establishment and anti-establishment, and the divisions are not dictated by income alone. (C.E. 3, p. 212).
- ix. Almost all members of Northern ghettos who are in the lower socioeconomic groups are understandably anti-establishment. When selling to them, you can wear nothing that carries an establishment touch. It does not matter what you are selling; cars, insurance, bonds, gold. You must not wear the traditional suit, shirt and tie uniform. Women are much better at selling to blacks because they are considered to be outside the establishment. (C.E. 3, p. 212);
- x. White salesman selling to anti-establishment blacks do better if they wear mustaches and they do even better with beards. If you must wear a suit, the best suit is a conservative two-piece model, but you should avoid dark blue since it has a very negative association for blacks. Turtleneck sweaters work very well, but if you must wear a tie, it should obviously be non-authoritative or non-establishment. (C.E. 3, p. 212);
- xi. The black establishment includes all blacks who have made it along with almost all Southern, rural blacks, no matter what their position. Southern blacks do not consider themselves disenfranchised and their reactions to clothing are the same as the reaction of their more successful counterparts. If you are white and selling to this group, it is almost essential that you wear a shirt and tie, but it is absolutely essential that no article of your clothing represent you as a member of the establishment. Pinstripe suits, Ivy League and club ties, white shirts, all are out. Any color shirt but white, and any nondescript tie are acceptable. A paisley tie is most likely to elicit the greatest trust. (C.E. 3, p. 212);

- xvi. Mexican-Americans react negatively to anyone coming from outside the area, including other Mexicans wearing what is described as Mexican bullfighters red. (C.E. 3, p. 214).

• **SOME ADVICE FOR MINORITIES**

- xvii. A group of black executives in Chicago hired me to do a report on the best image for upwardly mobile blacks in corporate America. It was one of the most interesting studies I have ever done. We found that Blacks had not only to dress more expensively than their white counterparts if they wanted to have an equal impact. (C.E. 3, p. 233).
- xviii. We also discovered that it was more important for blacks to put their clothing together well and to choose clothing that was finely tailored because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites. We also found they should avoid any of the obvious signs of being chic – Italian suits, designer attaché cases and so on – because those announced that although they had the money to spend on them, they had not quite moved into the executive class. I titled my report, Dress White. (C.E. 3, p. 233).
- xviii. About a week after I sent it to the committee that had hired me, one of the fellows on the committee whom I considered a friend called me and said, "John, we're printing out your report, but we've changed it." I became incensed and said, "How dare you change it. It didn't need to be changed." He tried to explain, but I said, "Before you print anything with my name on it, I want to see it," and hung up the telephone. I knew if I rushed, I would catch the two o'clock flight to Chicago. And I did catch it, just barely. When I arrived at my friend's office, he turned to his associates and said, "He actually came." I shouted, "Let me see the report," and he, with a smile, said, "There's a copy on my desk." After reading it twice, I told him that I could find no changes. He told me to read the cover. On the cover, he had written one word: in red ink the title now read, "Dress Very White." (C.E. 3, p.234).
- xix. The man I once again considered my friend apologized for making me fly to Chicago, but explained that it was not his fault that I had jumped to conclusions. He said that the black executives who hired me knew the game, and that they

being identified by his success rather than his background. But clothing can help. For 16 years, I have been giving the following advice to my black and Hispanic clients: Dress conservatively; wear those garments that are considered upper-middle-class symbols – pinstripe suits, end-on-end blue shirts, Ivy League ties; wear and carry only those accessories that convey the same message. (C.E. 3, p. 235);

xxiv. In speaking before some groups of black executives, I been criticized for attempting to make Uncle Toms out of them. My only answer is that my black clients include officers of several of America's major corporations and representatives of foreign governments. They are hardly Uncle Toms. I stick to my advice. If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (C.E. 3, p. 235-236).

xxv. This requirement of dress is not one that is imposed on you strictly because you are of a minority race; it is imposed on anyone who wishes to go up the corporate ladder. If you have to work harder at it than the white man next to you – well, so does the very short man who has a larger man at the desk next to him. Consciously manipulating your dress for success is not giving in; it is a recognition by the man who is doing it that he deserves a crack at the upper echelons of business and he's going to play the same game everyone else is playing, even if he has to play a little harder. (C.E. 3, p. 236).

- **FOR LAWYERS: HOW TO DRESS UP YOUR CASE AND WIN JUDGES AND JURIES**

xxvi. In most suburban societies, you will find a varied but white population, and you will therefore generally face a white jury mixed with socio-economic backgrounds. In this area, I suggest dark blue suits, white shirts, rep ties and very structured appearances. This is the uniform that the lower-middle-class members of the jury expect. When dealing with lower-middle-class whites on a suburban jury, never wear a gray suit. I know this is the suit that most lawyers wear, but that's because they don't know not to. (C.E. 3, pp. 297-298).

one essential rule before such juries is to wear nothing that indicates that you are more sophisticated than they, nothing that indicates that you are better than they, and absolutely nothing that associates with big-city clothing. Whenever one of the richest and most successful lawyers in Chicago must try a case in southern Illinois, he drives down in a pickup truck and dresses very much as if he is more familiar with the truck than with a courtroom. (C.E. 3, p. 299).

19. The Complainant, after reading the book, did not complain to Zurzolo, his supervisor. (N.T. I, 55)
20. The Complainant testified that he did not trust Zurzolo (N.T. I, 55)
21. The Complainant felt that Zurzolo had offended him on a number of occasions. (N.T. I, 55)
22. During the Complainant's employment, Zurzolo made a comment to the Complainant about, "having to go with [the Complainant's] fiancée. (N.T. I, 57-58)
23. The Complainant perceived this comment to mean Zurzolo wanted to have sex with Complainant's fiancée. (N.T. I, 57-58)
24. The Complainant felt that Zurzolo made this comment because he [Complainant] worked for him. (N.T. I, 58)
25. The Complainant testified that he did not tell anyone in the office because he did not trust anyone in the office. (N.T. I, 68)
26. The Complainant further indicated that he did not know if the views of Zurzolo were the views of others in the office. (N.T. I, 68)
27. The Complainant felt that those views were tolerated and accepted in the office. (N.T. I, 68)

39. Sandra Shields, at all times relevant to the complainant, was the Business Manager, Office Manager and Human Relations Director for Infinity Broadcasting. (N.T. I, 276)

40. Ms. Shields was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place as of May, 2001. (N.T. I, 278-279)

41. The policy states:

Infinity Broadcasting Corporation will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran status, marital status, or height or weight. (N.T. I, 281)

42. Harassment is defined in the policy, as follows:

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; degrading jokes and display or circulation in the workplace of written or graphic material that designates or shows hostility or aversion toward an individual or group; including through e-mail. (N.T. I, 284)

43. Ms. Shields indicated in her testimony that harassment complaints need not be in writing, but may be made orally. (N.T. I, 287)

44. In addition, the policy dictates what an employee should do if the employee feels complaining to a supervisor is not appropriate:

Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other Infinity designated representatives. (N.T. I, 285)

45. Ms. Shields had several conversations with the Complainant regarding his concerns over the book, New Dress for Success. (N.T. I, 288)

46. Ms. Shields was aware of the Complainant's feeling that the book contained offensive passages. (N.T. I, 289)



58. The Complainant had pending accounts when he resigned his employment. (N.T. I, 140-145)

59. After Complainant's resignation, he was depressed, frustrated and angry. (N.T. I, 78)

60. The Complainant attended an out treatment program at the University of Pennsylvania. (N.T. I, 80)

61. After attending the program, the Complainant felt reassured that he had done the right thing in resigning his employment with Respondent. (N.T. I, 81)

62. Prior to January 2002, the Complainant collected unemployment compensation. (N.T. I, 82)

63. The Complainant, prior to January 2002, submitted his resume to various websites on the Internet. (N.T. I, 82)

64. In January 2002, the Complainant worked for Phillip Insurance Brokers. (N.T. I, 83)

65. In 2002, the Complainant earned \$8,000, which consisted of commission payments. (N.T. I, 83)

66. Presently, the Complainant is employed by ExpenseWatch. (N.T. I, 84; C.E. 27)

67. Dr. Elijah Anderson is a professor of sociology at the University of Pennsylvania. (N.T. I, 202)

68. Dr. Anderson has been employed at the University of Pennsylvania for approximately twenty-seven years. (N.T. I, 202)

79. The Complainant advised Dr. Anderson that he sought medical treatment regarding his emotional and mental state after resigning from Respondent Infinity. (N.T. I, 231)

80. The Complainant also advised Dr. Anderson that he felt stereotyped as a black man at his workplace. (N.T. I, 236)

81. The Complainant was encouraged, at the workplace, to participate in the use of ethnic slurs, but he chose not to. (N.T. I, 236)

82. The Complainant testified that he was the object of ridicule in that he drew attention to his size, the way he dressed, the way he spoke and the fact that he drove a nice car. (N.T. I, 237)

83. The Complainant indicated to Dr. Anderson that Mr. Zurzolo had presented the book to the account executives because the group needed it. (N.T. I, 238)

84. Zurzolo felt that there were some shortcomings with sales and the book would be helpful to that end. (N.T. I, 238)

85. The Complainant told Dr. Anderson he was greatly offended by the book. (N.T. I, 238-239)

86. There were attempts to communicate with the Complainant, but the Complainant did not want to speak with his supervisor because he [Complainant] felt it was a hostile work environment. (N.T. I, 240)

87. Dr. Anderson's opinion was that the actions and the inactions of the corporate decision makers of the Complainant's employer subjected him to a hostile work environment. (N.T. I, 242-243)

98. Furthermore, Zurzolo never expressed any displeasure with Mr. Snodgrass, even though he [Snodgrass] admitted he read the book when he first purchased it. (N.T. II, 78)

99. As sports sales manager, Mr. Snodgrass was familiar with the payment structure for account executives in May 2001. (N.T. II, 58)

100. When the Complainant left Respondent Infinity, Mr. Snodgrass took over a number of the Complainant's accounts. (N.T. II, 62)

101. These accounts included: Jiffy Lube (\$20,000), Eagle Limousine (\$20,000 and \$6,000) and Nucar Hummer (\$80,000). (N.T. II, 62)

102. The Complainant also had a Penske account (\$98,000), which was closed by Mr. Snodgrass. (N.T. II, 64)

103. All of the above accounts had a twenty percent commission. (N.T. II, 60-64)

104. At all times relevant to the instant complaint, Peter Kleiner (hereinafter "Kleiner") was the General Sales Manager for the WYSP and the Philadelphia Eagles Radio Network. (N.T. II, 104)

105. Mr. Zurzolo was supervised by Kleiner. (N.T. II, 142)

106. Kleiner was aware that the Complainant was upset about the contents of the book. (N.T. II, 128)

107. Kleiner testified that, "If Mr. Brooks felt it was offensive, then therefore it was offensive." (N.T. II, 147)

108. Kleiner and Sandy Shields were the individuals who collected the books that were distributed at the sales meeting. (N.T. II, 129)

119. Those four Account Executives were: Hopeck, Snodgrass, Peterson and Reynolds. (N.T. II, 192)

120. After comparing the earning capacity to what the Complainant actually earned since 2001, the difference in back pay is approximately \$286,262. (N.T. II, 194, 201)

121. In his estimation of front pay, Mr. Verzilli used the same earning capacity of \$130,000 minus the Complainant's interim earnings of \$29,532. (N.T. II, 196)

122. Mr. Verzilli's testimony limited the front pay at five years, based on the Complainant's age, education and similar employment. (N.T. II, 196)

123. In his calculation of front pay, Mr. Verzilli presented a value range to represent a discount rate for present value minus the wage growth rate. (N.T. II, 196)

124. Assuming a discount rate of 2.5%, the difference in front pay is \$328,000.

- b. the harassment was severe or pervasive;
- c. the harassment detrimentally affected the Complainant;
- d. the harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition;
- e. the harasser was a supervisory employee or agent;

9. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.

10. A case of constructive discharge constitutes a tangible employment action.

11. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign.

12. The Complainant has established the existence of a constructive discharge.

13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.

conclusion of the public hearing, and after receipt of the hearing transcript, the parties filed post-hearing briefs in support of their positions.

Section 5(a) of the Pennsylvania Human Relations Act provides, *inter alia*, that is an unlawful discriminatory practice:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination. More specifically, the Complainant asserts that the instant case is a mixed motive case wherein there is evidence that a discriminatory factor played a motivating part of the Respondent's action. The United States Supreme Court has considered this issue in a number of cases. In Price Waterhouse v. Hopkins, 490 U.S. 228(1989), the Court determined that if there is evidence that a discriminatory motive partially influenced a decision, then the burden shifted to the respondent to establish that it would have taken the same actions absent the motivating factor. However a more recent case, Desert Palace, Inc. v. Costa, 91 FEP Cases 1569 (U.S. 2003) bears on this issue. In Desert Palace, the Court provided that a complainant could show that an unlawful discriminatory consideration was a motivating factor through circumstantial or direct evidence. Consequently, we must consider whether the

produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination.

We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3<sup>rd</sup> Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3<sup>rd</sup> Cir. 1990).

In the matter before the Commission, the parties have stipulated that the Complainant is African American and the record reflects that the Complainant suffered intentional discrimination because of his race. The record reveals that the Complainant, the only African American account executive, was handed a book that contained derogatory and stereotypical statements with regard to African Americans. The book contained references to "anti-establishment blacks," "ghettos," and "ghetto black." It also advised that black salesmen should "dress very white." (C.E. 3)

Zurzolo referring to himself using ethnic slurs, Zurzolo indicating his wish to have sex with the Complainant's fiancée and Zurzolo's habit of "palming" the head of Respondent's African American receptionist. Accordingly, the Complainant has shown that the Respondent's conduct meets this prong of the *prima facie* case.

The next element of the *prima facie* case is whether the harassment detrimentally affected the Complainant. In the instant case, the Complainant, through his own testimony and that of Dr. Anderson, has shown that he was detrimentally affected by the harassment, negating his ability to work. The Complainant creditably testified that he was depressed, very angry and frustrated (N.T. I, 78). He also testified that he was unable to sleep and was enrolled in an out-treatment program at the University of Pennsylvania. Dr. Anderson testified that the Complainant was "quite provoked by the whole thing and was quite disturbed, agitated mentally," (N.T. I, 231). There is no question that the Complainant meets this element of the *prima facie* case.

The next step is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. More specifically, whether a reasonable African American would find the conduct hostile or abusive to the extent that it would cause a constructive discharge. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). There was substantial testimony at the public hearing from the Complainant and Dr. Anderson regarding the Complainant's feeling about his workplace. The Complainant felt that the longer he worked for the Respondent, the more he came to find that he was working in a hostile work environment, given the use of ethnic slurs at the



burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. After reviewing the racially offensive conduct at the workplace, it is understood that the Complainant felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3<sup>rd</sup> Cir. 2001). The Complainant credibly testified that he did not know to whom he should turn to because he felt he could not trust anyone at the office (N.T. I, 68). He further explained that he was unsure whether the views expressed in the book were the views of everyone in the office because it was tolerated and accepted (N.T. I, 68). Furthermore, he felt it was useless to complain to Zurzolo since he was the person who distributed the book. When the Complainant contacted Sandy Shields, he did not receive any action from her. The Complainant felt he had to resign because no one had taken his complaint seriously and no one from Corporate Headquarters had spoken with him. Lastly, Dr. Anderson testified that it was reasonable for the Complainant to feel he had no choice but to resign his position. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the

Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides, in pertinent part:

(f)(1) 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582

A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic

reasonably expect to receive from his job and what he earned after his constructive discharge. (N.T. 2, 186)

More specifically, Mr. Verzilli reasonably estimated regarding back pay that the Complainant would have earned at a rate of \$130,000 from May 2001 to the present. This estimation was based on the actual earnings of four Account Executives: Hopeck, Snodgrass, Peterson and Reynolds (N.T. II, 192). This figure was compared to what the Complainant actually earned since 2001. The difference in back pay is \$286,262. (N.T. II, 194)

In his calculation of front pay, Mr. Verzilli used the earning capacity of \$130,000 per year minus the Complainant's interim earnings of \$29, 532 per year (N.T. II, 196). The Complainant's front pay award should be limited to a five-year period. Mr. Verzilli's expert testimony included a range of values to reflect a discount rate for present value minus the wage growth rate (N.T. II, 1999). Upon review of the record, and using a discount rate of 2.5%, the Complainant should be awarded \$328,000 for the difference in front pay. Accordingly, the total figure for economic damages (back pay and front pay) is \$614,262.

Dr. Brian P. Sullivan testified on behalf of the Respondent in regarding to the issue of economic damages. A review of Dr. Sullivan's testimony indicates that he utilized information that was not entirely correct and he used a study based on assumptions not related to the instant case. Accordingly, Mr. Verzilli's testimony on this issue was found to be more credible.

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the

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Docket No. E99572D  
PHRC Case No. 200027223

**RECOMMENDATION OF THE HEARING PANEL**

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Hearing Panel that the Complainant has proven discrimination in violation of the PHRA. Accordingly, it is the Recommendation of the Hearing Panel that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

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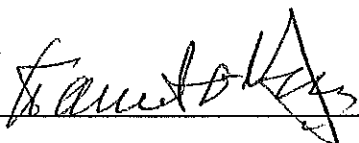
**FINAL ORDER**

AND NOW, this 28<sup>th</sup> day of February, 2005, 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 and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

6. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:   
Stephen A Glassman, Chairperson

ATTEST:   
Daniel D. Yun, Secretary

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SHAWN BROOKS,**

Complainant

v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

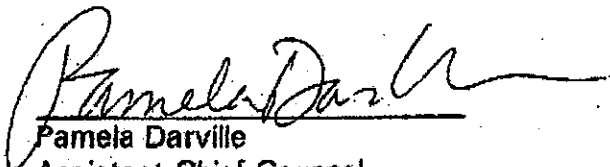
5. On or about September 7, 2001, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.

6. On or about February 1, 2002, Respondent filed an Amended Answer in response to the complaint. A copy of the Amended Answer will be included as a docket entry in this case at the time of hearing.

7. In correspondence dated November 28, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint.

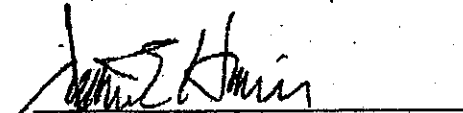
8. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

9. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.



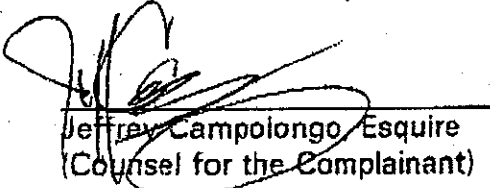
Pamela Darville  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complainant)

6-28-02  
Date



Judith Harris, Esquire  
(Counsel for the Respondent)

6/28/02  
Date



Jeffrey Campolongo, Esquire  
(Counsel for the Complainant)

6/28/02  
Date



8. The Complainant stopped working for Respondent Infinity on May 15, 2001. (N.T. I, 28)

9. During the course of his employment with Respondent Infinity, the Complainant was offered stock options. (N.T. I, 32, C.E. 15)

10. The Complainant's immediate supervisor was Joseph Zurzolo. (N.T. I, 33)

11. Zurzolo was supervised by Peter Kleiner, who, in turn, was supervised by Ken Stevens. (N.T. I, 33)

12. Zurzolo scheduled a meeting for account executives to discuss sales and dress code issues. (N.T. I, 33-34)

13. The meeting took place on Wednesday, May 9, 2001. (N.T. I, 34)

14. At the meeting, Zurzolo distributed the book, "New Dress for Success." (N.T. I, 34, C.E. 3)

15. Zurzolo also stated to the account executives at the meeting, "Per human resources, use it." (N.T. I, 34, 106; C.E. 3)

16. The Complainant took the book home that evening and read it. (N.T. I, 34)

17. The Complainant had a negative reaction to the book and felt that there were specific passages that were particularly offensive. (N.T. I, 34-54).

18. The passages from the book that were offensive to the Complainant were (N.T. I, 36-54):

**a. WHEN BLACKS AND HISPANICS SELL TO WHITES (AND VICE  
VERSA)**

- vii. If you are from a Hispanic background and you wish to sell to American business, the best outfit for you to wear is a medium range or dark gray two or three-piece suit and a very conservative tie, preferably blue and maroon silk foulard. Men from Hispanic backgrounds also have to be careful that their hair is very neatly trimmed and very conservative. (C.E. 3, pp. 211-212).
- viii. If you are white selling to blacks, you will fare much better if you dress in non-establishment patterns. Black America is essentially divided into two camps, establishment and anti-establishment, and the divisions are not dictated by income alone. (C.E. 3, p. 212).
- ix. Almost all members of Northern ghettos who are in the lower socioeconomic groups are understandably anti-establishment. When selling to them, you can wear nothing that carries an establishment touch. It does not matter what you are selling; cars, insurance, bonds, gold. You must not wear the traditional suit, shirt and tie uniform. Women are much better at selling to blacks because they are considered to be outside the establishment. (C.E. 3, p. 212);
- x. White salesman selling to anti-establishment blacks do better if they wear mustaches and they do even better with beards. If you must wear a suit, the best suit is a conservative two-piece model, but you should avoid dark blue since it has a very negative association for blacks. Turtleneck sweaters work very well, but if you must wear a tie, it should obviously be non-authoritative or non-establishment. (C.E. 3, p. 212);
- xi. The black establishment includes all blacks who have made it along with almost all Southern, rural blacks, no matter what their position. Southern blacks do not consider themselves disenfranchised and their reactions to clothing are the same as the reaction of their more successful counterparts. If you are white and selling to this group, it is almost essential that you wear a shirt and tie, but it is absolutely essential that no article of your clothing represent you as a member of the establishment. Pinstripe suits, Ivy League and club ties, white shirts, all are out. Any color shirt but white, and any nondescript tie are acceptable. A paisley tie is most likely to elicit the greatest trust. (C.E. 3, p. 212);

- xvi. Mexican-Americans react negatively to anyone coming from outside the area, including other Mexicans wearing what is described as Mexican bullfighters red. (C.E. 3, p. 214).

• **SOME ADVICE FOR MINORITIES**

- xvii. A group of black executives in Chicago hired me to do a report on the best image for upwardly mobile blacks in corporate America. It was one of the most interesting studies I have ever done. We found that Blacks had not only to dress more expensively than their white counterparts if they wanted to have an equal impact. (C.E. 3, p. 233).
- xviii. We also discovered that it was more important for blacks to put their clothing together well and to choose clothing that was finely tailored because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites. We also found they should avoid any of the obvious signs of being chic – Italian suits, designer attaché cases and so on – because those announced that although they had the money to spend on them, they had not quite moved into the executive class. I titled my report, Dress White. (C.E. 3, p. 233).
- xviii. About a week after I sent it to the committee that had hired me, one of the fellows on the committee whom I considered a friend called me and said, "John, we're printing out your report, but we've changed it." I became incensed and said, "How dare you change it. It didn't need to be changed." He tried to explain, but I said, "Before you print anything with my name on it, I want to see it," and hung up the telephone. I knew if I rushed, I would catch the two o'clock flight to Chicago. And I did catch it, just barely. When I arrived at my friend's office, he turned to his associates and said, "He actually came." I shouted, "Let me see the report," and he, with a smile, said, "There's a copy on my desk." After reading it twice, I told him that I could find no changes. He told me to read the cover. On the cover, he had written one word: in red ink the title now read, "Dress Very White." (C.E. 3, p.234).
- xix. The man I once again considered my friend apologized for making me fly to Chicago, but explained that it was not his fault that I had jumped to conclusions. He said that the black executives who hired me knew the game, and that they

being identified by his success rather than his background. But clothing can help. For 16 years, I have been giving the following advice to my black and Hispanic clients: Dress conservatively; wear those garments that are considered upper-middle-class symbols – pinstripe suits, end-on-end blue shirts, Ivy League ties; wear and carry only those accessories that convey the same message. (C.E. 3, p. 235);

xxiv. In speaking before some groups of black executives, I been criticized for attempting to make Uncle Toms out of them. My only answer is that my black clients include officers of several of America's major corporations and representatives of foreign governments. They are hardly Uncle Toms. I stick to my advice. If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (C.E. 3, p. 235-236).

xxv. This requirement of dress is not one that is imposed on you strictly because you are of a minority race; it is imposed on anyone who wishes to go up the corporate ladder. If you have to work harder at it than the white man next to you – well, so does the very short man who has a larger man at the desk next to him. Consciously manipulating your dress for success is not giving in; it is a recognition by the man who is doing it that he deserves a crack at the upper echelons of business and he's going to play the same game everyone else is playing, even if he has to play a little harder. (C.E. 3, p. 236).

- **FOR LAWYERS: HOW TO DRESS UP YOUR CASE AND WIN JUDGES AND JURIES**

xxvi. In most suburban societies, you will find a varied but white population, and you will therefore generally face a white jury mixed with socio-economic backgrounds. In this area, I suggest dark blue suits, white shirts, rep ties and very structured appearances. This is the uniform that the lower-middle-class members of the jury expect. When dealing with lower-middle-class whites on a suburban jury, never wear a gray suit. I know this is the suit that most lawyers wear, but that's because they don't know not to. (C.E. 3, pp. 297-298).

one essential rule before such juries is to wear nothing that indicates that you are more sophisticated than they, nothing that indicates that you are better than they, and absolutely nothing that associates with big-city clothing. Whenever one of the richest and most successful lawyers in Chicago must try a case in southern Illinois, he drives down in a pickup truck and dresses very much as if he is more familiar with the truck than with a courtroom. (C.E. 3, p. 299).

19. The Complainant, after reading the book, did not complain to Zurzolo, his supervisor. (N.T. I, 55)
20. The Complainant testified that he did not trust Zurzolo (N.T. I, 55)
21. The Complainant felt that Zurzolo had offended him on a number of occasions. (N.T. I, 55)
22. During the Complainant's employment, Zurzolo made a comment to the Complainant about, "having to go with [the Complainant's] fiancée. (N.T. I, 57-58)
23. The Complainant perceived this comment to mean Zurzolo wanted to have sex with Complainant's fiancée. (N.T. I, 57-58)
24. The Complainant felt that Zurzolo made this comment because he [Complainant] worked for him. (N.T. I, 58)
25. The Complainant testified that he did not tell anyone in the office because he did not trust anyone in the office. (N.T. I, 68)
26. The Complainant further indicated that he did not know if the views of Zurzolo were the views of others in the office. (N.T. I, 68)
27. The Complainant felt that those views were tolerated and accepted in the office. (N.T. I, 68)

39. Sandra Shields, at all times relevant to the complainant, was the Business Manager, Office Manager and Human Relations Director for Infinity Broadcasting. (N.T. I, 276)

40. Ms. Shields was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place as of May, 2001. (N.T. I, 278-279)

41. The policy states:

Infinity Broadcasting Corporation will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran status, marital status, or height or weight. (N.T. I, 281)

42. Harassment is defined in the policy, as follows:

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; degrading jokes and display or circulation in the workplace of written or graphic material that designates or shows hostility or aversion toward an individual or group; including through e-mail. (N.T. I, 284)

43. Ms. Shields indicated in her testimony that harassment complaints need not be in writing, but may be made orally. (N.T. I, 287)

44. In addition, the policy dictates what an employee should do if the employee feels complaining to a supervisor is not appropriate:

Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other Infinity designated representatives. (N.T. I, 285)

45. Ms. Shields had several conversations with the Complainant regarding his concerns over the book, New Dress for Success. (N.T. I, 288)

46. Ms. Shields was aware of the Complainant's feeling that the book contained offensive passages. (N.T. I, 289)

58. The Complainant had pending accounts when he resigned his employment. (N.T. I, 140-145)

59. After Complainant's resignation, he was depressed, frustrated and angry. (N.T. I, 78)

60. The Complainant attended an out treatment program at the University of Pennsylvania. (N.T. I, 80)

61. After attending the program, the Complainant felt reassured that he had done the right thing in resigning his employment with Respondent. (N.T. I, 81)

62. Prior to January 2002, the Complainant collected unemployment compensation. (N.T. I, 82)

63. The Complainant, prior to January 2002, submitted his resume to various websites on the Internet. (N.T. I, 82)

64. In January 2002, the Complainant worked for Phillip Insurance Brokers. (N.T. I, 83)

65. In 2002, the Complainant earned \$8,000, which consisted of commission payments. (N.T. I, 83)

66. Presently, the Complainant is employed by ExpenseWatch. (N.T. I, 84; C.E. 27)

67. Dr. Elijah Anderson is a professor of sociology at the University of Pennsylvania. (N.T. I, 202)

68. Dr. Anderson has been employed at the University of Pennsylvania for approximately twenty-seven years. (N.T. I, 202)

79. The Complainant advised Dr. Anderson that he sought medical treatment regarding his emotional and mental state after resigning from Respondent Infinity. (N.T. I, 231)

80. The Complainant also advised Dr. Anderson that he felt stereotyped as a black man at his workplace. (N.T. I, 236)

81. The Complainant was encouraged, at the workplace, to participate in the use of ethnic slurs, but he chose not to. (N.T. I, 236)

82. The Complainant testified that he was the object of ridicule in that he drew attention to his size, the way he dressed, the way he spoke and the fact that he drove a nice car. (N.T. I, 237)

83. The Complainant indicated to Dr. Anderson that Mr. Zurzolo had presented the book to the account executives because the group needed it. (N.T. I, 238)

84. Zurzolo felt that there were some shortcomings with sales and the book would be helpful to that end. (N.T. I, 238)

85. The Complainant told Dr. Anderson he was greatly offended by the book. (N.T. I, 238-239)

86. There were attempts to communicate with the Complainant, but the Complainant did not want to speak with his supervisor because he [Complainant] felt it was a hostile work environment. (N.T. I, 240)

87. Dr. Anderson's opinion was that the actions and the inactions of the corporate decision makers of the Complainant's employer subjected him to a hostile work environment. (N.T. I, 242-243)



98. Furthermore, Zurzolo never expressed any displeasure with Mr. Snodgrass, even though he [Snodgrass] admitted he read the book when he first purchased it. (N.T. II, 78)

99. As sports sales manager, Mr. Snodgrass was familiar with the payment structure for account executives in May 2001. (N.T. II, 58)

100. When the Complainant left Respondent Infinity, Mr. Snodgrass took over a number of the Complainant's accounts. (N.T. II, 62)

101. These accounts included: Jiffy Lube (\$20,000), Eagle Limousine (\$20,000 and \$6,000) and Nucar Hummer (\$80,000). (N.T. II, 62)

102. The Complainant also had a Penske account (\$98,000), which was closed by Mr. Snodgrass. (N.T. II, 64)

103. All of the above accounts had a twenty percent commission. (N.T. II, 60-64)

104. At all times relevant to the instant complaint, Peter Kleiner (hereinafter "Kleiner") was the General Sales Manager for the WYSP and the Philadelphia Eagles Radio Network. (N.T. II, 104)

105. Mr. Zurzolo was supervised by Kleiner. (N.T. II, 142)

106. Kleiner was aware that the Complainant was upset about the contents of the book. (N.T. II, 128)

107. Kleiner testified that, "If Mr. Brooks felt it was offensive, then therefore it was offensive." (N.T. II, 147)

108. Kleiner and Sandy Shields were the individuals who collected the books that were distributed at the sales meeting. (N.T. II, 129)

119. Those four Account Executives were: Hopeck, Snodgrass, Peterson and Reynolds. (N.T. II, 192)

120. After comparing the earning capacity to what the Complainant actually earned since 2001, the difference in back pay is approximately \$286,262. (N.T. II, 194, 201)

121. In his estimation of front pay, Mr. Verzilli used the same earning capacity of \$130,000 minus the Complainant's interim earnings of \$29,532. (N.T. II, 196)

122. Mr. Verzilli's testimony limited the front pay at five years, based on the Complainant's age, education and similar employment. (N.T. II, 196)

123. In his calculation of front pay, Mr. Verzilli presented a value range to represent a discount rate for present value minus the wage growth rate. (N.T. II, 196)

124. Assuming a discount rate of 2.5%, the difference in front pay is \$328,000.

- b. the harassment was severe or pervasive;
- c. the harassment detrimentally affected the Complainant;
- d. the harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition;
- e. the harasser was a supervisory employee or agent;

9. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.

10. A case of constructive discharge constitutes a tangible employment action.

11. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign.

12. The Complainant has established the existence of a constructive discharge.

13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.

conclusion of the public hearing, and after receipt of the hearing transcript, the parties filed post-hearing briefs in support of their positions.

Section 5(a) of the Pennsylvania Human Relations Act provides, *inter alia*, that is an unlawful discriminatory practice:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination. More specifically, the Complainant asserts that the instant case is a mixed motive case wherein there is evidence that a discriminatory factor played a motivating part of the Respondent's action. The United States Supreme Court has considered this issue in a number of cases. In Price Waterhouse v. Hopkins, 490 U.S. 228(1989), the Court determined that if there is evidence that a discriminatory motive partially influenced a decision, then the burden shifted to the respondent to establish that it would have taken the same actions absent the motivating factor. However a more recent case, Desert Palace, Inc. v. Costa, 91 FEP Cases 1569 (U.S. 2003) bears on this issue. In Desert Palace, the Court provided that a complainant could show that an unlawful discriminatory consideration was a motivating factor through circumstantial or direct evidence. Consequently, we must consider whether the

produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination.

We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3<sup>rd</sup> Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3<sup>rd</sup> Cir. 1990).

In the matter before the Commission, the parties have stipulated that the Complainant is African American and the record reflects that the Complainant suffered intentional discrimination because of his race. The record reveals that the Complainant, the only African American account executive, was handed a book that contained derogatory and stereotypical statements with regard to African Americans. The book contained references to "anti-establishment blacks," "ghettos," and "ghetto black." It also advised that black salesmen should "dress very white." (C.E. 3)

Zurzolo referring to himself using ethnic slurs, Zurzolo indicating his wish to have sex with the Complainant's fiancée and Zurzolo's habit of "palming" the head of Respondent's African American receptionist. Accordingly, the Complainant has shown that the Respondent's conduct meets this prong of the *prima facie* case.

The next element of the *prima facie* case is whether the harassment detrimentally affected the Complainant. In the instant case, the Complainant, through his own testimony and that of Dr. Anderson, has shown that he was detrimentally affected by the harassment, negating his ability to work. The Complainant creditably testified that he was depressed, very angry and frustrated (N.T. I, 78). He also testified that he was unable to sleep and was enrolled in an out-treatment program at the University of Pennsylvania. Dr. Anderson testified that the Complainant was "quite provoked by the whole thing and was quite disturbed, agitated mentally," (N.T. I, 231). There is no question that the Complainant meets this element of the *prima facie* case.

The next step is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. More specifically, whether a reasonable African American would find the conduct hostile or abusive to the extent that it would cause a constructive discharge. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). There was substantial testimony at the public hearing from the Complainant and Dr. Anderson regarding the Complainant's feeling about his workplace. The Complainant felt that the longer he worked for the Respondent, the more he came to find that he was working in a hostile work environment, given the use of ethnic slurs at the

burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. After reviewing the racially offensive conduct at the workplace, it is understood that the Complainant felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3<sup>rd</sup> Cir. 2001). The Complainant credibly testified that he did not know to whom he should turn to because he felt he could not trust anyone at the office (N.T. I, 68). He further explained that he was unsure whether the views expressed in the book were the views of everyone in the office because it was tolerated and accepted (N.T. I, 68). Furthermore, he felt it was useless to complain to Zurzolo since he was the person who distributed the book. When the Complainant contacted Sandy Shields, he did not receive any action from her. The Complainant felt he had to resign because no one had taken his complaint seriously and no one from Corporate Headquarters had spoken with him. Lastly, Dr. Anderson testified that it was reasonable for the Complainant to feel he had no choice but to resign his position. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the

Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides, in pertinent part:

(f)(1) 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic



reasonably expect to receive from his job and what he earned after his constructive discharge. (N.T. 2, 186)

More specifically, Mr. Verzilli reasonably estimated regarding back pay that the Complainant would have earned at a rate of \$130,000 from May 2001 to the present. This estimation was based on the actual earnings of four Account Executives: Hopeck, Snodgrass, Peterson and Reynolds (N.T. II, 192). This figure was compared to what the Complainant actually earned since 2001. The difference in back pay is \$286,262. (N.T. II, 194)

In his calculation of front pay, Mr. Verzilli used the earning capacity of \$130,000 per year minus the Complainant's interim earnings of \$29,532 per year (N.T. II, 196). The Complainant's front pay award should be limited to a five-year period. Mr. Verzilli's expert testimony included a range of values to reflect a discount rate for present value minus the wage growth rate (N.T. II, 1999). Upon review of the record, and using a discount rate of 2.5%, the Complainant should be awarded \$328,000 for the difference in front pay. Accordingly, the total figure for economic damages (back pay and front pay) is \$614,262.

Dr. Brian P. Sullivan testified on behalf of the Respondent in regarding to the issue of economic damages. A review of Dr. Sullivan's testimony indicates that he utilized information that was not entirely correct and he used a study based on assumptions not related to the instant case. Accordingly, Mr. Verzilli's testimony on this issue was found to be more credible.

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

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Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**RECOMMENDATION OF THE HEARING PANEL**

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Hearing Panel that the Complainant has proven discrimination in violation of the PHRA. Accordingly, it is the Recommendation of the Hearing Panel that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN BROOKS,

Complainant

v.

VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,

Respondents


Docket No. E99572D  
PHRC Case No. 200027223

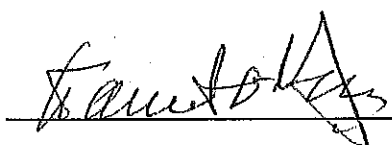
**FINAL ORDER**

AND NOW, this 28<sup>th</sup> day of February, 2005, 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 and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

6. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:   
Stephen A Glassman, Chairperson

ATTEST:   
Daniel D. Yun, Secretary

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SHAWN BROOKS,**

Complainant

v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
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**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

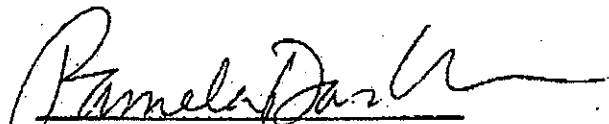
5. On or about September 7, 2001, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.

6. On or about February 1, 2002, Respondent filed an Amended Answer in response to the complaint. A copy of the Amended Answer will be included as a docket entry in this case at the time of hearing.


7. In correspondence dated November 28, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause 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.


9. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

  
Pamela Darville  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complainant)

6-28-02  
Date

  
Judith Harris, Esquire  
(Counsel for the Respondent)

6/28/02  
Date

  
Jeffrey Campolongo, Esquire  
(Counsel for the Complainant)

6/28/02  
Date

8. The Complainant stopped working for Respondent Infinity on May 15, 2001. (N.T. I, 28)

9. During the course of his employment with Respondent Infinity, the Complainant was offered stock options. (N.T. I, 32, C.E. 15)

10. The Complainant's immediate supervisor was Joseph Zurzolo. (N.T. I, 33)

11. Zurzolo was supervised by Peter Kleiner, who, in turn, was supervised by Ken Stevens. (N.T. I, 33)

12. Zurzolo scheduled a meeting for account executives to discuss sales and dress code issues. (N.T. I, 33-34)

13. The meeting took place on Wednesday, May 9, 2001. (N.T. I, 34)

14. At the meeting, Zurzolo distributed the book, "New Dress for Success." (N.T. I, 34, C.E. 3)

15. Zurzolo also stated to the account executives at the meeting, "Per human resources, use it." (N.T. I, 34, 106; C.E. 3)

16. The Complainant took the book home that evening and read it. (N.T. I, 34)

17. The Complainant had a negative reaction to the book and felt that there were specific passages that were particularly offensive. (N.T. I, 34-54).

18. The passages from the book that were offensive to the Complainant were (N.T. I, 36-54):

**a. WHEN BLACKS AND HISPANICS SELL TO WHITES (AND VICE  
VERSA)**

- vii. If you are from a Hispanic background and you wish to sell to American business, the best outfit for you to wear is a medium range or dark gray two or three-piece suit and a very conservative tie, preferably blue and maroon silk foulard. Men from Hispanic backgrounds also have to be careful that their hair is very neatly trimmed and very conservative. (C.E. 3, pp. 211-212).
- viii. If you are white selling to blacks, you will fare much better if you dress in non-establishment patterns. Black America is essentially divided into two camps, establishment and anti-establishment, and the divisions are not dictated by income alone. (C.E. 3, p. 212).
- ix. Almost all members of Northern ghettos who are in the lower socioeconomic groups are understandably anti-establishment. When selling to them, you can wear nothing that carries an establishment touch. It does not matter what you are selling; cars, insurance, bonds, gold. You must not wear the traditional suit, shirt and tie uniform. Women are much better at selling to blacks because they are considered to be outside the establishment. (C.E. 3, p. 212);
- x. White salesman selling to anti-establishment blacks do better if they wear mustaches and they do even better with beards. If you must wear a suit, the best suit is a conservative two-piece model, but you should avoid dark blue since it has a very negative association for blacks. Turtleneck sweaters work very well, but if you must wear a tie, it should obviously be non-authoritative or non-establishment. (C.E. 3, p. 212);
- xi. The black establishment includes all blacks who have made it along with almost all Southern, rural blacks, no matter what their position. Southern blacks do not consider themselves disenfranchised and their reactions to clothing are the same as the reaction of their more successful counterparts. If you are white and selling to this group, it is almost essential that you wear a shirt and tie, but it is absolutely essential that no article of your clothing represent you as a member of the establishment. Pinstripe suits, Ivy League and club ties, white shirts, all are out. Any color shirt but white, and any nondescript tie are acceptable. A paisley tie is most likely to elicit the greatest trust. (C.E. 3, p. 212);



- xvi. Mexican-Americans react negatively to anyone coming from outside the area, including other Mexicans wearing what is described as Mexican bullfighters red. (C.E. 3, p. 214).

• **SOME ADVICE FOR MINORITIES**

- xvii. A group of black executives in Chicago hired me to do a report on the best image for upwardly mobile blacks in corporate America. It was one of the most interesting studies I have ever done. We found that Blacks had not only to dress more expensively than their white counterparts if they wanted to have an equal impact. (C.E. 3, p. 233).
- xviii. We also discovered that it was more important for blacks to put their clothing together well and to choose clothing that was finely tailored because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites. We also found they should avoid any of the obvious signs of being chic – Italian suits, designer attaché cases and so on – because those announced that although they had the money to spend on them, they had not quite moved into the executive class. I titled my report, Dress White. (C.E. 3, p. 233).
- xviii. About a week after I sent it to the committee that had hired me, one of the fellows on the committee whom I considered a friend called me and said, "John, we're printing out your report, but we've changed it." I became incensed and said, "How dare you change it. It didn't need to be changed." He tried to explain, but I said, "Before you print anything with my name on it, I want to see it," and hung up the telephone. I knew if I rushed, I would catch the two o'clock flight to Chicago. And I did catch it, just barely. When I arrived at my friend's office, he turned to his associates and said, "He actually came." I shouted, "Let me see the report," and he, with a smile, said, "There's a copy on my desk." After reading it twice, I told him that I could find no changes. He told me to read the cover. On the cover, he had written one word: in red ink the title now read, "Dress *Very* White." (C.E. 3, p.234).
- xix. The man I once again considered my friend apologized for making me fly to Chicago, but explained that it was not his fault that I had jumped to conclusions. He said that the black executives who hired me knew the game, and that they

being identified by his success rather than his background. But clothing can help. For 16 years, I have been giving the following advice to my black and Hispanic clients: Dress conservatively; wear those garments that are considered upper-middle-class symbols – pinstripe suits, end-on-end blue shirts, Ivy League ties; wear and carry only those accessories that convey the same message. (C.E. 3, p. 235);

xxiv. In speaking before some groups of black executives, I been criticized for attempting to make Uncle Toms out of them. My only answer is that my black clients include officers of several of America's major corporations and representatives of foreign governments. They are hardly Uncle Toms. I stick to my advice. If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (C.E. 3, p. 235-236).

xxv. This requirement of dress is not one that is imposed on you strictly because you are of a minority race; it is imposed on anyone who wishes to go up the corporate ladder. If you have to work harder at it than the white man next to you – well, so does the very short man who has a larger man at the desk next to him. Consciously manipulating your dress for success is not giving in; it is a recognition by the man who is doing it that he deserves a crack at the upper echelons of business and he's going to play the same game everyone else is playing, even if he has to play a little harder. (C.E. 3, p. 236).

• **FOR LAWYERS: HOW TO DRESS UP YOUR CASE AND WIN JUDGES AND JURIES**

xxvi. In most suburban societies, you will find a varied but white population, and you will therefore generally face a white jury mixed with socio-economic backgrounds. In this area, I suggest dark blue suits, white shirts, rep ties and very structured appearances. This is the uniform that the lower-middle-class members of the jury expect. When dealing with lower-middle-class whites on a suburban jury, never wear a gray suit. I know this is the suit that most lawyers wear, but that's because they don't know not to. (C.E. 3, pp. 297-298).

one essential rule before such juries is to wear nothing that indicates that you are more sophisticated than they, nothing that indicates that you are better than they, and absolutely nothing that associates with big-city clothing. Whenever one of the richest and most successful lawyers in Chicago must try a case in southern Illinois, he drives down in a pickup truck and dresses very much as if he is more familiar with the truck than with a courtroom. (C.E. 3, p. 299).

19. The Complainant, after reading the book, did not complain to Zurzolo, his supervisor. (N.T. I, 55)

20. The Complainant testified that he did not trust Zurzolo (N.T. I, 55)

21. The Complainant felt that Zurzolo had offended him on a number of occasions. (N.T. I, 55)

22. During the Complainant's employment, Zurzolo made a comment to the Complainant about, "having to go with [the Complainant's] fiancée. (N.T. I, 57-58)

23. The Complainant perceived this comment to mean Zurzolo wanted to have sex with Complainant's fiancée. (N.T. I, 57-58)

24. The Complainant felt that Zurzolo made this comment because he [Complainant] worked for him. (N.T. I, 58)

25. The Complainant testified that he did not tell anyone in the office because he did not trust anyone in the office. (N.T. I, 68)

26. The Complainant further indicated that he did not know if the views of Zurzolo were the views of others in the office. (N.T. I, 68)

27. The Complainant felt that those views were tolerated and accepted in the office. (N.T. I, 68)

39. Sandra Shields, at all times relevant to the complainant, was the Business Manager, Office Manager and Human Relations Director for Infinity Broadcasting. (N.T. I, 276)

40. Ms. Shields was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place as of May, 2001. (N.T. I, 278-279)

41. The policy states:

Infinity Broadcasting Corporation will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran status, marital status, or height or weight. (N.T. I, 281)

42. Harassment is defined in the policy, as follows:

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; degrading jokes and display or circulation in the workplace of written or graphic material that designates or shows hostility or aversion toward an individual or group; including through e-mail. (N.T. I, 284)

43. Ms. Shields indicated in her testimony that harassment complaints need not be in writing, but may be made orally. (N.T. I, 287)

44. In addition, the policy dictates what an employee should do if the employee feels complaining to a supervisor is not appropriate:

Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other Infinity designated representatives. (N.T. I, 285)

45. Ms. Shields had several conversations with the Complainant regarding his concerns over the book, New Dress for Success. (N.T. I, 288)

46. Ms. Shields was aware of the Complainant's feeling that the book contained offensive passages. (N.T. I, 289)

58. The Complainant had pending accounts when he resigned his employment. (N.T. I, 140-145)

59. After Complainant's resignation, he was depressed, frustrated and angry. (N.T. I, 78)

60. The Complainant attended an out treatment program at the University of Pennsylvania. (N.T. I, 80)

61. After attending the program, the Complainant felt reassured that he had done the right thing in resigning his employment with Respondent. (N.T. I, 81)

62. Prior to January 2002, the Complainant collected unemployment compensation. (N.T. I, 82)

63. The Complainant, prior to January 2002, submitted his resume to various websites on the Internet. (N.T. I, 82)

64. In January 2002, the Complainant worked for Phillip Insurance Brokers. (N.T. I, 83)

65. In 2002, the Complainant earned \$8,000, which consisted of commission payments. (N.T. I, 83)

66. Presently, the Complainant is employed by ExpenseWatch. (N.T. I, 84; C.E. 27)

67. Dr. Elijah Anderson is a professor of sociology at the University of Pennsylvania. (N.T. I, 202)

68. Dr. Anderson has been employed at the University of Pennsylvania for approximately twenty-seven years. (N.T. I, 202)

79. The Complainant advised Dr. Anderson that he sought medical treatment regarding his emotional and mental state after resigning from Respondent Infinity. (N.T. I, 231)

80. The Complainant also advised Dr. Anderson that he felt stereotyped as a black man at his workplace. (N.T. I, 236)

81. The Complainant was encouraged, at the workplace, to participate in the use of ethnic slurs, but he chose not to. (N.T. I, 236)

82. The Complainant testified that he was the object of ridicule in that he drew attention to his size, the way he dressed, the way he spoke and the fact that he drove a nice car. (N.T. I, 237)

83. The Complainant indicated to Dr. Anderson that Mr. Zurzolo had presented the book to the account executives because the group needed it. (N.T. I, 238)

84. Zurzolo felt that there were some shortcomings with sales and the book would be helpful to that end. (N.T. I, 238)

85. The Complainant told Dr. Anderson he was greatly offended by the book. (N.T. I, 238-239)

86. There were attempts to communicate with the Complainant, but the Complainant did not want to speak with his supervisor because he [Complainant] felt it was a hostile work environment. (N.T. I, 240)

87. Dr. Anderson's opinion was that the actions and the inactions of the corporate decision makers of the Complainant's employer subjected him to a hostile work environment. (N.T. I, 242-243)

98. Furthermore, Zurzolo never expressed any displeasure with Mr. Snodgrass, even though he [Snodgrass] admitted he read the book when he first purchased it. (N.T. II, 78)

99. As sports sales manager, Mr. Snodgrass was familiar with the payment structure for account executives in May 2001. (N.T. II, 58)

100. When the Complainant left Respondent Infinity, Mr. Snodgrass took over a number of the Complainant's accounts. (N.T. II, 62)

101. These accounts included: Jiffy Lube (\$20,000), Eagle Limousine (\$20,000 and \$6,000) and Nucar Hummer (\$80,000). (N.T. II, 62)

102. The Complainant also had a Penske account (\$98,000), which was closed by Mr. Snodgrass. (N.T. II, 64)

103. All of the above accounts had a twenty percent commission. (N.T. II, 60-64)

104. At all times relevant to the instant complaint, Peter Kleiner (hereinafter "Kleiner") was the General Sales Manager for the WYSP and the Philadelphia Eagles Radio Network. (N.T. II, 104)

105. Mr. Zurzolo was supervised by Kleiner. (N.T. II, 142)

106. Kleiner was aware that the Complainant was upset about the contents of the book. (N.T. II, 128)

107. Kleiner testified that, "If Mr. Brooks felt it was offensive, then therefore it was offensive." (N.T. II, 147)

108. Kleiner and Sandy Shields were the individuals who collected the books that were distributed at the sales meeting. (N.T. II, 129)

119. Those four Account Executives were: Hopeck, Snodgrass, Peterson and Reynolds. (N.T. II, 192)

120. After comparing the earning capacity to what the Complainant actually earned since 2001, the difference in back pay is approximately \$286,262. (N.T. II, 194, 201)

121. In his estimation of front pay, Mr. Verzilli used the same earning capacity of \$130,000 minus the Complainant's interim earnings of \$29,532. (N.T. II, 196)

122. Mr. Verzilli's testimony limited the front pay at five years, based on the Complainant's age, education and similar employment. (N.T. II, 196)

123. In his calculation of front pay, Mr. Verzilli presented a value range to represent a discount rate for present value minus the wage growth rate. (N.T. II, 196)

124. Assuming a discount rate of 2.5%, the difference in front pay is \$328,000.



- b. the harassment was severe or pervasive;
- c. the harassment detrimentally affected the Complainant;
- d. the harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition;
- e. the harasser was a supervisory employee or agent;

9. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.

10. A case of constructive discharge constitutes a tangible employment action.

11. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign.

12. The Complainant has established the existence of a constructive discharge.

13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.

conclusion of the public hearing, and after receipt of the hearing transcript, the parties filed post-hearing briefs in support of their positions.

Section 5(a) of the Pennsylvania Human Relations Act provides, *inter alia*, that is an unlawful discriminatory practice:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination. More specifically, the Complainant asserts that the instant case is a mixed motive case wherein there is evidence that a discriminatory factor played a motivating part of the Respondent's action. The United States Supreme Court has considered this issue in a number of cases. In Price Waterhouse v. Hopkins, 490 U.S. 228(1989), the Court determined that if there is evidence that a discriminatory motive partially influenced a decision, then the burden shifted to the respondent to establish that it would have taken the same actions absent the motivating factor. However a more recent case, Desert Palace, Inc. v. Costa, 91 FEP Cases 1569 (U.S. 2003) bears on this issue. In Desert Palace, the Court provided that a complainant could show that an unlawful discriminatory consideration was a motivating factor through circumstantial or direct evidence. Consequently, we must consider whether the

produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination.

We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3<sup>rd</sup> Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3<sup>rd</sup> Cir. 1990).

In the matter before the Commission, the parties have stipulated that the Complainant is African American and the record reflects that the Complainant suffered intentional discrimination because of his race. The record reveals that the Complainant, the only African American account executive, was handed a book that contained derogatory and stereotypical statements with regard to African Americans. The book contained references to "anti-establishment blacks," "ghettos," and "ghetto black." It also advised that black salesmen should "dress very white." (C.E. 3)

Zurzolo referring to himself using ethnic slurs, Zurzolo indicating his wish to have sex with the Complainant's fiancée and Zurzolo's habit of "palming" the head of Respondent's African American receptionist. Accordingly, the Complainant has shown that the Respondent's conduct meets this prong of the *prima facie* case.

The next element of the *prima facie* case is whether the harassment detrimentally affected the Complainant. In the instant case, the Complainant, through his own testimony and that of Dr. Anderson, has shown that he was detrimentally affected by the harassment, negating his ability to work. The Complainant creditably testified that he was depressed, very angry and frustrated (N.T. I, 78). He also testified that he was unable to sleep and was enrolled in an out-treatment program at the University of Pennsylvania. Dr. Anderson testified that the Complainant was "quite provoked by the whole thing and was quite disturbed, agitated mentally," (N.T. I, 231). There is no question that the Complainant meets this element of the *prima facie* case.

The next step is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. More specifically, whether a reasonable African American would find the conduct hostile or abusive to the extent that it would cause a constructive discharge. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). There was substantial testimony at the public hearing from the Complainant and Dr. Anderson regarding the Complainant's feeling about his workplace. The Complainant felt that the longer he worked for the Respondent, the more he came to find that he was working in a hostile work environment, given the use of ethnic slurs at the

burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. After reviewing the racially offensive conduct at the workplace, it is understood that the Complainant felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3<sup>rd</sup> Cir. 2001). The Complainant credibly testified that he did not know to whom he should turn to because he felt he could not trust anyone at the office (N.T. I, 68). He further explained that he was unsure whether the views expressed in the book were the views of everyone in the office because it was tolerated and accepted (N.T. I, 68). Furthermore, he felt it was useless to complain to Zurzolo since he was the person who distributed the book. When the Complainant contacted Sandy Shields, he did not receive any action from her. The Complainant felt he had to resign because no one had taken his complaint seriously and no one from Corporate Headquarters had spoken with him. Lastly, Dr. Anderson testified that it was reasonable for the Complainant to feel he had no choice but to resign his position. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the

Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides, in pertinent part:

(f)(1) 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic

reasonably expect to receive from his job and what he earned after his constructive discharge. (N.T. 2, 186)

More specifically, Mr. Verzilli reasonably estimated regarding back pay that the Complainant would have earned at a rate of \$130,000 from May 2001 to the present. This estimation was based on the actual earnings of four Account Executives: Hopeck, Snodgrass, Peterson and Reynolds (N.T. II, 192). This figure was compared to what the Complainant actually earned since 2001. The difference in back pay is \$286,262. (N.T. II, 194)

In his calculation of front pay, Mr. Verzilli used the earning capacity of \$130,000 per year minus the Complainant's interim earnings of \$29,532 per year (N.T. II, 196). The Complainant's front pay award should be limited to a five-year period. Mr. Verzilli's expert testimony included a range of values to reflect a discount rate for present value minus the wage growth rate (N.T. II, 1999). Upon review of the record, and using a discount rate of 2.5%, the Complainant should be awarded \$328,000 for the difference in front pay. Accordingly, the total figure for economic damages (back pay and front pay) is \$614,262.

Dr. Brian P. Sullivan testified on behalf of the Respondent in regarding to the issue of economic damages. A review of Dr. Sullivan's testimony indicates that he utilized information that was not entirely correct and he used a study based on assumptions not related to the instant case. Accordingly, Mr. Verzilli's testimony on this issue was found to be more credible.

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

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Docket No. E99572D  
PHRC Case No. 200027223

**RECOMMENDATION OF THE HEARING PANEL**

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Hearing Panel that the Complainant has proven discrimination in violation of the PHRA. Accordingly, it is the Recommendation of the Hearing Panel that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.



COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN BROOKS,

Complainant

v.

VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**FINAL ORDER**

AND NOW, this 28<sup>th</sup> day of February, 2005, 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 and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

6. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

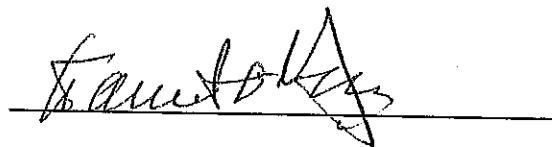
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:



Stephen A Glassman, Chairperson

ATTEST:



Daniel D. Yun, Secretary

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SHAWN BROOKS,**

Complainant

v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN BROOKS,

Complainant

v.

Docket No. E-99572D

VIACOM INC.,  
INFINITY BROADCASTING CORPORATION,  
JOSEPH ZURZOLO,  
PETER KLEINER,  
KEN STEVENS

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 Shawn Brooks, an adult male, (hereinafter "Complainant").
2. The Respondent herein is Viacom, et al, (hereinafter "Respondent").
3. The Respondent at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about May 16, 2001, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at docket number E-99572D. A copy of the complaint will be included as a docket entry in this case at time of hearing.

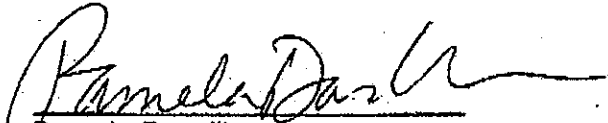
5. On or about September 7, 2001, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.

6. On or about February 1, 2002, Respondent filed an Amended Answer in response to the complaint. A copy of the Amended Answer will be included as a docket entry in this case at the time of hearing.

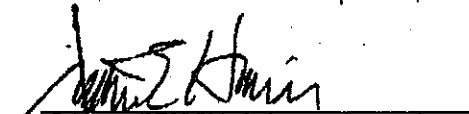
7. In correspondence dated November 28, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint.

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.

9. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

  
\_\_\_\_\_  
Pamela Darville  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complaint)

6-28-02  
Date

  
\_\_\_\_\_  
Judith Harris, Esquire  
(Counsel for the Respondent)

6/28/02  
Date

  
\_\_\_\_\_  
Jeffrey Campolongo, Esquire  
(Counsel for the Complainant)

6/28/02  
Date

## FINDINGS OF FACT

1. Shawn Brooks (hereinafter "Complainant") began his employment with Infinity Broadcasting Corporation (hereinafter "Respondent") in September of 2000. (N.T. I, 26)

2. The Complainant was employed as an account executive for Philadelphia Eagles radio. (N.T. I, 26)

3. As an account executive, the Complainant marketed the Philadelphia Eagles radio product, which was selling sports. (N.T. I, 27)

4. While the Complainant was employed by the Respondent, there were approximately twenty-five account executives. (N.T. I, 32)

5. The Complainant was the only African American account executive. (N.T. I, 33)

6. The Complainant's yearly salary with the Respondent was \$30,000 with \$2,500.00 a month "draw." (N.T. I, 28)

7. A "draw" represents dollars that are given to an account executive in regards to selling Eagles products or advertising sales. (N.T. I, 29)

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

N.T. I Notes of Testimony from November 6, 2003 Hearing  
N.T. II Notes of Testimony from November 7, 2003 Hearing  
S.F. Stipulations of Facts  
C.E. Complainant's Exhibit  
R.E. Respondent's Exhibit

8. The Complainant stopped working for Respondent Infinity on May 15, 2001. (N.T. I, 28)

9. During the course of his employment with Respondent Infinity, the Complainant was offered stock options. (N.T. I, 32, C.E. 15)

10. The Complainant's immediate supervisor was Joseph Zurzolo. (N.T. I, 33)

11. Zurzolo was supervised by Peter Kleiner, who, in turn, was supervised by Ken Stevens. (N.T. I, 33)

12. Zurzolo scheduled a meeting for account executives to discuss sales and dress code issues. (N.T. I, 33-34)

13. The meeting took place on Wednesday, May 9, 2001. (N.T. I, 34)

14. At the meeting, Zurzolo distributed the book, "New Dress for Success." (N.T. I, 34, C.E. 3)

15. Zurzolo also stated to the account executives at the meeting, "Per human resources, use it." (N.T. I, 34, 106; C.E. 3)

16. The Complainant took the book home that evening and read it. (N.T. I, 34)

17. The Complainant had a negative reaction to the book and felt that there were specific passages that were particularly offensive. (N.T. I, 34-54).

18. The passages from the book that were offensive to the Complainant were (N.T. I, 36-54):

**a. WHEN BLACKS AND HISPANICS SELL TO WHITES (AND VICE  
VERSA)**

- i. Blacks in business should never wear Afro haircuts. Men who do so are less highly thought of by whites and blacks. Most men should not wear facial hair of any kind, particularly beards. The response of facial hair is almost always negative in corporation situations. (C.E. 3, p. 198);
- ii. When selling to White Middle America, and this includes anyone who is White, and not in the ghetto or in a sub group such as Appalachian and mountain folks, the following rules always apply: never wear purple or lavender. Never wear loud colors. Never wear bright red, even in a tie. Pink shirts, except for end-on-end or oxford cloth, are taboo unless you know that the people you are trying to sell are wearing them. (C.E. 3, pp. 210-211);
- iii. Do not wear jewelry. Do not have hair that covers your ears. If you are black selling to white Middle America, dress like a white. Wear conservative pinstripe suits, preferably with vests, accompanied by all the establishment symbols, including Ivy League tie. This clothing conveys that you are a member of the establishment and that you are pushing no radical or other feared ideas. (C.E. 3, p. 211);
- iv. Blacks selling to whites should not wear Afro hairstyles or any clothing that is African in association. If you are selling to corporate America, it's very important that you dress, not as well as the white salesman, but better than them. You have to wear suits, shirts and ties that are expensive and more conservative than your white co-workers. (C.E. 3, p. 211).
- v. It is equally important that a black salesman show signs of affluence when selling to whites. If you can afford an expensive wristwatch, buy one. If you can afford a good attaché case, buy one. Under no circumstances carry a chic or fashionable model. Alligator attaché cases and exotic wristwatches will get you in trouble. (C.E. 3, p. 211).
- vi. If you are Hispanic, Mexican, Puerto Rican, Cuban or other Latin American, you should avoid pencil-like moustaches, any articles of clothing that have Hispanic association, anything that is very sharp or precise. Also avoid hair tonic that tends to give a greasy or shiny look to the hair. (C.E. 3, p. 211).



- vii. If you are from a Hispanic background and you wish to sell to American business, the best outfit for you to wear is a medium range or dark gray two or three-piece suit and a very conservative tie, preferably blue and maroon silk foulard. Men from Hispanic backgrounds also have to be careful that their hair is very neatly trimmed and very conservative. (C.E. 3, pp. 211-212).
- viii. If you are white selling to blacks, you will fare much better if you dress in non-establishment patterns. Black America is essentially divided into two camps, establishment and anti-establishment, and the divisions are not dictated by income alone. (C.E. 3, p. 212).
- ix. Almost all members of Northern ghettos who are in the lower socioeconomic groups are understandably anti-establishment. When selling to them, you can wear nothing that carries an establishment touch. It does not matter what you are selling; cars, insurance, bonds, gold. You must not wear the traditional suit, shirt and tie uniform. Women are much better at selling to blacks because they are considered to be outside the establishment. (C.E. 3, p. 212);
- x. White salesman selling to anti-establishment blacks do better if they wear mustaches and they do even better with beards. If you must wear a suit, the best suit is a conservative two-piece model, but you should avoid dark blue since it has a very negative association for blacks. Turtleneck sweaters work very well, but if you must wear a tie, it should obviously be non-authoritative or non-establishment. (C.E. 3, p. 212);
- xi. The black establishment includes all blacks who have made it along with almost all Southern, rural blacks, no matter what their position. Southern blacks do not consider themselves disenfranchised and their reactions to clothing are the same as the reaction of their more successful counterparts. If you are white and selling to this group, it is almost essential that you wear a shirt and tie, but it is absolutely essential that no article of your clothing represent you as a member of the establishment. Pinstripe suits, Ivy League and club ties, white shirts, all are out. Any color shirt but white, and any nondescript tie are acceptable. A paisley tie is most likely to elicit the greatest trust. (C.E. 3, p. 212);

- xii. When selling to middle class blacks, you cannot dress like a ghetto black, and you cannot go so far into the anti-establishment look that you begin to affect beads or the like. The only rule that applies to blacks just as it does to the white establishment in the Midwest and in the South is that poverty does not sell. Blacks will believe who look successful, which proves that everyone has one color-love in common, green. Blacks selling to other Blacks are best served by an entirely different set of dress codes. Conservative, establishment symbols of authority and success are the rules of the day. All blacks, regardless of their own status, react positively to other blacks who have made it. (C.E.3, p. 213);
- xiii. Blacks selling to people of Spanish origin and people of Spanish origin selling to blacks should avoid wearing any items of clothing that are particularly identified with the other group. (C.E. 3, p. 213).

- **HOW TO SELL TO ETHNIC GROUPS**

- xiv. The following rules apply to anyone selling to ethnic groups. When selling to upper-middle-class people of Spanish origin, it is essential that you dress conservatively and nattily. When selling to Jewish customers, do not wear brown. When selling to the basically German population in the Midwest, avoid a clash in the lines of clothing patterns. When selling to Polish groups in the Midwest, avoid a clash of color. I know there are many tasteless jokes about Poles wearing blue and red and green and yellow at the same time, but if I were you, I would never put this joke to a test. (C.E. 3, p. 212).
- xv. Italians register negative reactions to clashes of color and clashes of line. The most conservative clothing sells best to Italians, and the richer-looking, the better. When selling to Orientals there are five rules: First, never wear blue. Second, dress conservatively. Third, avoid Oriental shades of color. Red, for example. Fourth, avoid brown suits and fifth, most important, dress conservatively. Orientals are completely turned off by exotic dress. Americans of Irish extraction react negatively to anyone who is too sharply dressed, too neat or put together too well. They associate such looks with being dishonest. (C.E.3, p. 214).

xvi. Mexican-Americans react negatively to anyone coming from outside the area, including other Mexicans wearing what is described as Mexican bullfighters red. (C.E. 3, p. 214).

• **SOME ADVICE FOR MINORITIES**

xvii. A group of black executives in Chicago hired me to do a report on the best image for upwardly mobile blacks in corporate America. It was one of the most interesting studies I have ever done. We found that Blacks had not only to dress more expensively than their white counterparts if they wanted to have an equal impact. (C.E. 3, p. 233).

xviii. We also discovered that it was more important for blacks to put their clothing together well and to choose clothing that was finely tailored because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites. We also found they should avoid any of the obvious signs of being chic – Italian suits, designer attaché cases and so on – because those announced that although they had the money to spend on them, they had not quite moved into the executive class. I titled my report, Dress White. (C.E. 3, p. 233).

xviii. About a week after I sent it to the committee that had hired me, one of the fellows on the committee whom I considered a friend called me and said, "John, we're printing out your report, but we've changed it." I became incensed and said, "How dare you change it. It didn't need to be changed." He tried to explain, but I said, "Before you print anything with my name on it, I want to see it," and hung up the telephone. I knew if I rushed, I would catch the two o'clock flight to Chicago. And I did catch it, just barely. When I arrived at my friend's office, he turned to his associates and said, "He actually came." I shouted, "Let me see the report," and he, with a smile, said, "There's a copy on my desk." After reading it twice, I told him that I could find no changes. He told me to read the cover. On the cover, he had written one word: in red ink the title now read, "Dress Very White." (C.E. 3, p.234).

xix. The man I once again considered my friend apologized for making me fly to Chicago, but explained that it was not his fault that I had jumped to conclusions. He said that the black executives who hired me knew the game, and that they

knew when they saw the title of the report that I was only trying to catch the attention of the young men who would be getting a copy in the mail; he was afraid that they might read the title and say, "So what else is new?" (C.E. 3, p. 234)

- xx. It is an undeniable fact that the typical upper-middle-class American looks white, Anglo-Saxon and Protestant. He is a medium build, fair complexion with almost no pronounced physical characteristics. He is the model of success; that is if you run a test, most people of all socioeconomic, racial and ethnic backgrounds will identify with him as such. Like it or not, his appearance will normally elicit a positive response from someone viewing him. Anyone not possessing his characteristics will elicit a negative response to some degree regardless of whether that response is conscious or subconscious. (C.E. 3, p. 234);
- xxi. I once had a man come to me who said, "I am a reasonably successful, honest businessman, but everyone thinks I am a gangster." He did have a very harsh, gruff appearance, and since gangsters, and our stereotype of them, tend to come from a lower-middle-class-background and look accordingly, I had the man dress consistently in upper-middle class garments - pinstripe suits with vests, conservative shirts, Ivy League ties. Because his harsh features seemed to scare or intimidate people, I also tried to give him a soft look – as soft a look as possible, avoiding dark colors and strong contrasts and using instead such combinations as a pale gray pinstripe suit with a very pale blue shirt and muted tie. The look was extremely successful for him and from then on his appearance did not detract from his position. (C.E. 3, p. 235);
- xxii. His problem was very similar to that of many executives who come from a Mediterranean background: They look rather harsh by American standards. The best advice I can give to men with such problems is that they stay with very soft colors and textures, wear very traditional styles, and affect the appurtenances of success. (C.E. 3, p.235);
- xxiii. The two groups who have the most problems with their appearances are black men and Hispanic men. It is unfortunate but true that our society has conditioned us to look upon members of both groups as belonging to the lower classes, and no matter how high a minority individual rises in status or achievement, he is going to have some difficulty

being identified by his success rather than his background. But clothing can help. For 16 years, I have been giving the following advice to my black and Hispanic clients: Dress conservatively; wear those garments that are considered upper-middle-class symbols – pinstripe suits, end-on-end blue shirts, Ivy League ties; wear and carry only those accessories that convey the same message. (C.E. 3, p. 235);

- xxiv. In speaking before some groups of black executives, I been criticized for attempting to make Uncle Toms out of them. My only answer is that my black clients include officers of several of America's major corporations and representatives of foreign governments. They are hardly Uncle Toms. I stick to my advice. If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (C.E. 3, p. 235-236).
- xxv. This requirement of dress is not one that is imposed on you strictly because you are of a minority race; it is imposed on anyone who wishes to go up the corporate ladder. If you have to work harder at it than the white man next to you – well, so does the very short man who has a larger man at the desk next to him. Consciously manipulating your dress for success is not giving in; it is a recognition by the man who is doing it that he deserves a crack at the upper echelons of business and he's going to play the same game everyone else is playing, even if he has to play a little harder. (C.E. 3, p. 236).

- **FOR LAWYERS: HOW TO DRESS UP YOUR CASE AND WIN JUDGES AND JURIES**

- xxvi. In most suburban societies, you will find a varied but white population, and you will therefore generally face a white jury mixed with socio-economic backgrounds. In this area, I suggest dark blue suits, white shirts, rep ties and very structured appearances. This is the uniform that the lower-middle-class members of the jury expect. When dealing with lower-middle-class whites on a suburban jury, never wear a gray suit. I know this is the suit that most lawyers wear, but that's because they don't know not to. (C.E. 3, pp. 297-298).

- xxvii. According to a Burlington House study, most lower-middle-class whites but suits for one social function: a funeral. Men at the lower socioeconomic level are very unsure of themselves socially, even within their own group, and they have strict rules they live by. The dark blue suit is a symbol of important occasion and important people, and it is the one "good" suit that most lower-middle-class men have. If a lawyer comes into a courtroom wearing a gray suit and say to a jury made up of such men (or their wives) that he is their neighbor, their friend, one of them and that they should therefore believe him, his verbal approach may be perfect, but his visual appearance is a lie. They know that their friends do not wear gray suits on important occasions. If the lawyer wants to tell them, "I am in a position of authority, I am an expert, I know more than you and you should listen to me for that reason," then he may wear the gray suit, even with pinstripes and a vest, but he is taking a very serious risk because he may offend the jury by asserting his superiority. (C.E. 3, p. 298).
- xxviii. Before the suburban black jury the lawyer basically faces middle-class blacks who have worked themselves up and out of the ghetto. They have made it in American society, and they expect to be treated as if they've made it. You should not wear a dark blue suit because to them, it represents old-line, anti-black establishment, which they neither like nor trust. Yet they display the typical, general middle-class prejudice of trusting only older members of the middle class. The best suit to wear is a medium range solid gray. If you have an equal number of lower-middle-class whites and middle-class blacks on a suburban jury, dress for the blacks. The prejudice of the whites against the gray will be less than the prejudice of the blacks against the blue. (C.E. 3, pp. 298-299).
- xxix. The white lawyer working before a black suburban jury is fool hardy if he attest a "Hey, buddy, I'm one of you fellows" approach. It can't work. Therefore, he is much better off if he represents his case as an expert and the gray suit is best preferably combined with a light blue solid shirt and rep tie. Middle-class suburban blacks are quite status conscious, and they are offended by anyone who does not dress as they think he should. (C.E. 3, p. 299)
- xxx. All small-town and rural juries have one major prejudice in common: They detest the smart-ass big city slicker. The

one essential rule before such juries is to wear nothing that indicates that you are more sophisticated than they, nothing that indicates that you are better than they, and absolutely nothing that associates with big-city clothing. Whenever one of the richest and most successful lawyers in Chicago must try a case in southern Illinois, he drives down in a pickup truck and dresses very much as if he is more familiar with the truck than with a courtroom. (C.E. 3, p. 299).

19. The Complainant, after reading the book, did not complain to Zurzolo, his supervisor. (N.T. I, 55)
20. The Complainant testified that he did not trust Zurzolo (N.T. I, 55)
21. The Complainant felt that Zurzolo had offended him on a number of occasions. (N.T. I, 55)
22. During the Complainant's employment, Zurzolo made a comment to the Complainant about, "having to go with [the Complainant's] fiancée. (N.T. I, 57-58)
23. The Complainant perceived this comment to mean Zurzolo wanted to have sex with Complainant's fiancée. (N.T. I, 57-58)
24. The Complainant felt that Zurzolo made this comment because he [Complainant] worked for him. (N.T. I, 58)
25. The Complainant testified that he did not tell anyone in the office because he did not trust anyone in the office. (N.T. I, 68)
26. The Complainant further indicated that he did not know if the views of Zurzolo were the views of others in the office. (N.T. I, 68)
27. The Complainant felt that those views were tolerated and accepted in the office. (N.T. I, 68)

28. Respondent, Zurzolo, on several occasions, would "palm" or put his hand on the head of an older African American receptionist. (N.T. I, 63)

29. The Complainant observed that the receptionist did not approve of Zurzolo's action. (N.T. I, 63)

30. It was the Complainant's feeling that Zurzolo's action in "palming" an African American's head was an intentional racially offensive gesture. (N.T. I, 172)

31. The Complainant did not complain to Kleiner about the contents of the book that he felt were offensive. (N.T. I, 70)

32. The Complainant testified that he did not tell Kleiner because Kleiner and Zurzolo were friends. (N.T. I, 70-71)

33. The Complainant did not speak to Ken Stevens about the contents of the book. (N.T. I, 70-71)

34. On May 10, 2001, the Complainant called Sandy Shields, Human Resource Director, and complained about the content of the book. (N.T. I, 71)

35. The Complainant called Shields after completing a morning meeting with a client. (N.T. I, 71)

36. Ms. Shields told the Complainant that she would find out about the book. (N.T. I, 71, 185)

37. Ms. Shields also told the Complainant that he had a right to be upset and she would call him back. (N.T. I, 71, 185-186)

38. The Complainant testified that, after three telephone consultations, he felt that Shields was not going to resolve the matter. (N.T. I, 197)



39. Sandra Shields, at all times relevant to the complainant, was the Business Manager, Office Manager and Human Relations Director for Infinity Broadcasting. (N.T. I, 276)

40. Ms. Shields was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place as of May, 2001. (N.T. I, 278-279)

41. The policy states:

Infinity Broadcasting Corporation will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran status, marital status, or height or weight. (N.T. I, 281)

42. Harassment is defined in the policy, as follows:

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; degrading jokes and display or circulation in the workplace of written or graphic material that designates or shows hostility or aversion toward an individual or group; including through e-mail. (N.T. I, 284)

43. Ms. Shields indicated in her testimony that harassment complaints need not be in writing, but may be made orally. (N.T. I, 287)

44. In addition, the policy dictates what an employee should do if the employee feels complaining to a supervisor is not appropriate:

Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other Infinity designated representatives. (N.T. I, 285)

45. Ms. Shields had several conversations with the Complainant regarding his concerns over the book, *New Dress for Success*. (N.T. I, 288)

46. Ms. Shields was aware of the Complainant's feeling that the book contained offensive passages. (N.T. I, 289)

47. Ms. Shields read the contents of the books that Complainant found to be offensive. (N.T. I, 294-296)

48. Ms. Shields testified that she understood how an employee like the Complainant would be offended. (N.T. I, 294-296)

49. Ms. Shields never communicated with the corporate office regarding the Complainant's concerns. (N.T. I, 297)

50. Ms. Shields testified that she collected the books from the other account executive the same day the books were distributed. (N.T. I, 329)

51. Subsequent to that meeting on May 9th, the Complainant returned to the office on only one occasion, May 28, 2001. (N.T. I, 194)

52. On May 28, 2001, the Complainant came into the office to turn in his letter of resignation and collect his personal items. (N.T. I, 194)

53. The Complainant testified that none of the supervisors, Zurzolo, Kleiner or Stevens, did anything regarding the book. (N.T. I, 72)

54. The Complainant, after May 9, 2001, received several calls from Zurzolo and Kleiner asking Complainant to call them. (N.T. I, 73)

55. The Complainant did not call either Zurzolo or Kleiner because he did not trust or respect them. (N.T. I, 73)

56. The Complainant testified that he left the employ of the Respondent because the Respondent did not respect African Americans. (N.T. I, 74)

57. The Complainant filed his complaint with the Pennsylvania Human Relations Commission on May 16, 2001. (R.E. 12)

58. The Complainant had pending accounts when he resigned his employment. (N.T. I, 140-145)

59. After Complainant's resignation, he was depressed, frustrated and angry. (N.T. I, 78)

60. The Complainant attended an out treatment program at the University of Pennsylvania. (N.T. I, 80)

61. After attending the program, the Complainant felt reassured that he had done the right thing in resigning his employment with Respondent. (N.T. I, 81)

62. Prior to January 2002, the Complainant collected unemployment compensation. (N.T. I, 82)

63. The Complainant, prior to January 2002, submitted his resume to various websites on the Internet. (N.T. I, 82)

64. In January 2002, the Complainant worked for Phillip Insurance Brokers. (N.T. I, 83)

65. In 2002, the Complainant earned \$8,000, which consisted of commission payments. (N.T. I, 83)

66. Presently, the Complainant is employed by ExpenseWatch. (N.T. I, 84; C.E. 27)

67. Dr. Elijah Anderson is a professor of sociology at the University of Pennsylvania. (N.T. I, 202)

68. Dr. Anderson has been employed at the University of Pennsylvania for approximately twenty-seven years. (N.T. I, 202)

69. Dr. Anderson's educational achievements include: B.A. from Indiana University, M.A. from the University of Chicago in sociology and a Ph.D. from Northwestern University in sociology. (N.T. I, 203)

70. Dr. Anderson specializes in urban sociology, racial and ethnic relations, diversity studies of social psychology, and field methods of social research. (N.T. I, 203-204)

71. Dr. Anderson is a specialist in ethnography. (N.T. I, 204)

72. Ethnography is the systematic study of culture; the study of how we live every day as people. (N.T. I, 204)

73. Dr. Anderson has also done a number of studies of corporations and studies on race, class and change. (N.T. I, 207)

74. Dr. Anderson has published a number of articles, including "The Social Situation of the Black Executive" and "Code of the Street." (N.T. I, 208)

75. Dr. Anderson met with the Complainant on three occasions in January 2003. (N.T. I, 226)

76. Dr. Anderson and the Complainant discussed Complainant's personal and work history and his background. (N.T. I, 226; C.E. 22)

77. Dr. Anderson has done a study on African Americans in white corporate settings. (N.T. I, 210)

78. The Complainant told Dr. Anderson that he was the only black person in his position at Respondent's workplace. (N.T. I, 236)

79. The Complainant advised Dr. Anderson that he sought medical treatment regarding his emotional and mental state after resigning from Respondent Infinity. (N.T. I, 231)

80. The Complainant also advised Dr. Anderson that he felt stereotyped as a black man at his workplace. (N.T. I, 236)

81. The Complainant was encouraged, at the workplace, to participate in the use of ethnic slurs, but he chose not to. (N.T. I, 236)

82. The Complainant testified that he was the object of ridicule in that he drew attention to his size, the way he dressed, the way he spoke and the fact that he drove a nice car. (N.T. I, 237)

83. The Complainant indicated to Dr. Anderson that Mr. Zurzolo had presented the book to the account executives because the group needed it. (N.T. I, 238)

84. Zurzolo felt that there were some shortcomings with sales and the book would be helpful to that end. (N.T. I, 238)

85. The Complainant told Dr. Anderson he was greatly offended by the book. (N.T. I, 238-239)

86. There were attempts to communicate with the Complainant, but the Complainant did not want to speak with his supervisor because he [Complainant] felt it was a hostile work environment. (N.T. I, 240)

87. Dr. Anderson's opinion was that the actions and the inactions of the corporate decision makers of the Complainant's employer subjected him to a hostile work environment. (N.T. I, 242-243)

88. Dr. Anderson testified that, based on Complainant's background, it was a "purely rational thing to do, to cut his losses and basically try to get out of the situation." (N.T. I, 243-244)

89. Dr. Anderson testified that he did not feel that the Complainant was not being overly sensitive in his response to the work environment. (N.T. I, 265)

90. Zurzolo, Sales Manager, was the individual who distributed the book on May 9, 2001. (N.T. II, 15)

91. Zurzolo had the book distributed because he felt one of the account executives, Heather Peterson, was not dressing in an appropriate manner. (N.T. II, 5)

92. Zurzolo had instructed Jeffrey Snodgrass, Sports Sales Manager, to purchase copies of the book. (N.T. II, 7)

93. Zurzolo testified that he did not read the book, but rather he relied on Snodgrass's recommendation. (N.T. II, 20)

94. Another employee, Heidi Kaye, in addition to the Complainant, told Zurzolo she was offended by the contents of the book. (N.T. II, 29)

95. Zurzolo testified that he "absolutely overstepped his bounds by distributing this book," and in retrospect he wished he never gave out the book because, "I could see how someone would be offended by it." (N.T. II, 46)

96. Zurzolo was not formally disciplined for distributing the book. (N.T. II, 32)

97. Even though Snodgrass purchased the books and recommended that the book be used, he was never disciplined. (N.T. II, 57)

98. Furthermore, Zurzolo never expressed any displeasure with Mr. Snodgrass, even though he [Snodgrass] admitted he read the book when he first purchased it. (N.T. II, 78)

99. As sports sales manager, Mr. Snodgrass was familiar with the payment structure for account executives in May 2001. (N.T. II, 58)

100. When the Complainant left Respondent Infinity, Mr. Snodgrass took over a number of the Complainant's accounts. (N.T. II, 62)

101. These accounts included: Jiffy Lube (\$20,000), Eagle Limousine (\$20,000 and \$6,000) and Nucar Hummer (\$80,000). (N.T. II, 62)

102. The Complainant also had a Penske account (\$98,000), which was closed by Mr. Snodgrass. (N.T. II, 64)

103. All of the above accounts had a twenty percent commission. (N.T. II, 60-64)

104. At all times relevant to the instant complaint, Peter Kleiner (hereinafter "Kleiner") was the General Sales Manager for the WYSP and the Philadelphia Eagles Radio Network. (N.T. II, 104)

105. Mr. Zurzolo was supervised by Kleiner. (N.T. II, 142)

106. Kleiner was aware that the Complainant was upset about the contents of the book. (N.T. II, 128)

107. Kleiner testified that, "If Mr. Brooks felt it was offensive, then therefore it was offensive." (N.T. II, 147)

108. Kleiner and Sandy Shields were the individuals who collected the books that were distributed at the sales meeting. (N.T. II, 129)

109. Kleiner had the authority to discipline Zurzolo for his actions in distributing the books. (N.T. II, 135)

110. Kleiner never issued Zurzolo any discipline other than calling him a "f\_\_\_ing idiot." (N.T. II, 131)

111. Kleiner was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place in May 2001. (N.T. 142)

112. Andrew C. Verzilli (hereinafter "Verzilli") testified at the public hearing in regard to economic damages. (N.T. II, 180)

113. Mr. Verzilli's educational background includes a bachelor's degree in business and a master's degree in business administration. (N.T. II, 182)

114. Mr. Verzilli has previously testified as an expert in economics in the Commonwealth of Pennsylvania and in matters before federal courts. (N.T. II, 182)

115. In determining a figure for economic damage, Mr. Verzilli estimated back pay and front pay. (N.T. II, 186)

116. Mr. Verzilli estimated the difference in earning capacity of what the Complainant could reasonably expect to receive from his job and compared that figure to what he earned after the instant matter commenced. (N.T. II, 186)

117. In calculating back pay, Verzilli estimated that the Complainant would have earned \$130,000 per annum. (N.T. II, 192-193)

118. The estimation Verzilli used was based on an average of the actual 2001 earnings of four Account Executives. (N.T. II, 192)



119. Those four Account Executives were: Hopeck, Snodgrass, Peterson and Reynolds. (N.T. II, 192)

120. After comparing the earning capacity to what the Complainant actually earned since 2001, the difference in back pay is approximately \$286,262. (N.T. II, 194, 201)

121. In his estimation of front pay, Mr. Verzilli used the same earning capacity of \$130,000 minus the Complainant's interim earnings of \$29,532. (N.T. II, 196)

122. Mr. Verzilli's testimony limited the front pay at five years, based on the Complainant's age, education and similar employment. (N.T. II, 196)

123. In his calculation of front pay, Mr. Verzilli presented a value range to represent a discount rate for present value minus the wage growth rate. (N.T. II, 196)

124. Assuming a discount rate of 2.5%, the difference in front pay is \$328,000.

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") has jurisdiction over the parties and the subject matter of the complaint under the Pennsylvania Human Relations Act (hereinafter "PHRA" or "Act").

2. The parties and the Commission have fully complied with the procedural prerequisites to a public hearing.

3. The Complainant is an individual within the meaning of Section 5(A) of the Act.

4. The Respondent is an employer within the meaning of Sections 4(a) and 5(a) of the Act.

5. The instant complaint satisfies the filing requirements set forth in Section 9 of the Act.

6. Section 5(a) of the Act, *inter alia*, prohibits employers from unlawfully discriminating against employees regarding the terms, conditions or privileges of employment because of their race.

7. The Complainant established that race was a motivating factor in creating a hostile work environment, which resulted in the Complainant's constructive discharge.

8. In order to establish a *prima facie* case of racial harassment in the instant case, the Complainant must show:

- a. he suffered intentional discrimination because of his protected class status;

- b. the harassment was severe or pervasive;
- c. the harassment detrimentally affected the Complainant;
- d. the harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition;
- e. the harasser was a supervisory employee or agent;

9. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.

10. A case of constructive discharge constitutes a tangible employment action.

11. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign.

12. The Complainant has established the existence of a constructive discharge.

13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.

## OPINION

On or about May 16, 2001, Complainant Shawn Brooks filed a verified complaint with the Pennsylvania Human Relations Commission against Respondents Viacom Incorporated, Infinity Broadcasting Corporation, Joseph Zurzolo, Peter Kleiner and Ken Stevens, at Commission Docket No. E-995720. In the complaint before the Commission, the Complainant alleged that Respondent Viacom, Inc., condoned the distribution of racially offensive statements and stereotypes to its employees, including the Complainant. The Complainant further alleges that these actions created a hostile work environment and caused the Complainant to suffer a constructive discharge. The Complainant further alleges that Respondent's actions violated the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. Section 955(a).

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

The public hearing in this matter was held on November 6 and November 7, 2003 in Philadelphia, Pennsylvania. A three Commissioner panel presided over this matter. The Hearing Commissioners were: Commissioner Sylvia A. Waters, chairperson of the panel, Commissioner Raquel Otero de Yiengst, and Commissioner Daniel A. Yun. Phillip A. Ayers served as Panel Adviser. At the

conclusion of the public hearing, and after receipt of the hearing transcript, the parties filed post-hearing briefs in support of their positions.

Section 5(a) of the Pennsylvania Human Relations Act provides, *inter alia*, that is an unlawful discriminatory practice:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination. More specifically, the Complainant asserts that the instant case is a mixed motive case wherein there is evidence that a discriminatory factor played a motivating part of the Respondent's action. The United States Supreme Court has considered this issue in a number of cases. In Price Waterhouse v. Hopkins, 490 U.S. 228(1989), the Court determined that if there is evidence that a discriminatory motive partially influenced a decision, then the burden shifted to the respondent to establish that it would have taken the same actions absent the motivating factor. However a more recent case, Desert Palace, Inc. v. Costa, 91 FEP Cases 1569 (U.S. 2003) bears on this issue. In Desert Palace, the Court provided that a complainant could show that an unlawful discriminatory consideration was a motivating factor through circumstantial or direct evidence. Consequently, we must consider whether the

race of the Complainant was a motivating factor in creating a hostile work environment that resulted in Complainant's constructive discharge.

In the matter before the Commission, the Complainant presented credible testimony that his race was the motivating factor in creating a hostile work environment. The basic facts of the instant case are largely undisputed. The Complainant's supervisor, Joseph Zurzolo, at a May 9<sup>th</sup> 2001 meeting of account executives, distributed a book entitled "New Dress for Success," (N.T. I, 34). Zurzolo further instructed the account executives, in reference to the book, "use it," (N.T. I, 34, 106). The book contained numerous racially derogatory and stereotypical statements that were offensive and demeaning. Furthermore, the book contained stereotypical statements about other minority groups (N.T. I, 34-54). The Complainant also enumerated several instances of racially offensive conduct by Respondent occurring prior to the distribution of the book. The record before the Commission reflects that race was the motivating factor in creating a hostile work environment.

We now move to the issue of whether the Complainant has established a *prima facie* case of harassment due to his race. Normally we use the analytical model of McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 35 L.Ed. 2d 668 (1973). Under that model, the Complainant bears the initial burden of establishing a *prima facie* case of discrimination. The burden of establishing a *prima facie* case is not an onerous one. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed. 2d 403 (1983). Once a Complainant has met the *prima facie* burden, the Respondent must

produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination.

We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3<sup>rd</sup> Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3<sup>rd</sup> Cir. 1990).

In the matter before the Commission, the parties have stipulated that the Complainant is African American and the record reflects that the Complainant suffered intentional discrimination because of his race. The record reveals that the Complainant, the only African American account executive, was handed a book that contained derogatory and stereotypical statements with regard to African Americans. The book contained references to "anti-establishment blacks," "ghettos," and "ghetto black." It also advised that black salesmen should "dress very white." (C.E. 3)

In addition to the book contents, the Complainant credibly testified to other racially offensive activity at his place of employment. The Complainant testified that he was offended when Zurzolo would use ethnic slurs in talking about himself. He also testified that he was further offended when Zurzolo indicated that he wanted to have sex with the Complainant's fiancée (N.T. I, 56-58). Zurzolo also had a strange habit of "palming" the head of Respondent's African American receptionist (N.T. I, 63). The Complainant also viewed this gesture by Zurzolo as racially offensive (N.T. I, 72). As a result of this behavior, the Complainant has clearly shown that he was subjected to offensive conduct because of his race.

Next, we must determine whether the harassment is severe or pervasive and regular. In determining whether conduct is severe or pervasive and regular, one can look at the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. See Harris v. Forklift Systems, 510 U.S. 17 (1993). The Court further stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all of the circumstances. In the instant case, the record reflects that the racial harassment was severe and pervasive. Clearly, the severe incident is the hostile work environment created by the distribution of the book containing racially offensive and derogatory statements.

The Complainant then credibly testified to the pervasive offensive conduct that he encountered prior to the book's distribution. This conduct included



Zurzolo referring to himself using ethnic slurs, Zurzolo indicating his wish to have sex with the Complainant's fiancée and Zurzolo's habit of "palming" the head of Respondent's African American receptionist. Accordingly, the Complainant has shown that the Respondent's conduct meets this prong of the *prima facie* case.

The next element of the *prima facie* case is whether the harassment detrimentally affected the Complainant. In the instant case, the Complainant, through his own testimony and that of Dr. Anderson, has shown that he was detrimentally affected by the harassment, negating his ability to work. The Complainant creditably testified that he was depressed, very angry and frustrated (N.T. I, 78). He also testified that he was unable to sleep and was enrolled in an out-treatment program at the University of Pennsylvania. Dr. Anderson testified that the Complainant was "quite provoked by the whole thing and was quite disturbed, agitated mentally," (N.T. I, 231). There is no question that the Complainant meets this element of the *prima facie* case.

The next step is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. More specifically, whether a reasonable African American would find the conduct hostile or abusive to the extent that it would cause a constructive discharge. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). There was substantial testimony at the public hearing from the Complainant and Dr. Anderson regarding the Complainant's feeling about his workplace. The Complainant felt that the longer he worked for the Respondent, the more he came to find that he was working in a hostile work environment, given the use of ethnic slurs at the

workplace (N.T. I, 234). Dr. Anderson testified that, in his expert opinion, the Respondent's actions and inactions subjected the Complainant to a hostile work environment (N.T. I, 242-243). Most certainly, it was reasonable for any African American to be detrimentally affected by the actions of the Respondent. The Complainant has met this element of the *prima facie*.

Next, the record reflects that Complainant's direct supervisor was the individual who distributed the book and also engaged in offensive conduct at Respondent's workplace. Accordingly, the Complainant has met the required *prima facie* showing.

The next question is whether the Complainant was constructively discharged. The United States Court of Appeals for the Third Circuit has provided guidance on this specific issue in two major cases: Goss v. Exxon Office Systems Co., 747 F.2d 885, 887 (3<sup>rd</sup> Cir. 1984) and Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432, 445 (3<sup>rd</sup> Cir. 2003). The court in Goss stated:

We hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. Goss at 888

The court in Suders held:

[A] Plaintiff-employee alleging a constructive discharge in violation of Title VII must establish the convergence of two factors: (1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; in that regard, although we cannot say as a matter of law that a single incident of discrimination is sufficient to show constructive discharge, the employee has the

burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. After reviewing the racially offensive conduct at the workplace, it is understood that the Complainant felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3<sup>rd</sup> Cir. 2001). The Complainant credibly testified that he did not know to whom he should turn to because he felt he could not trust anyone at the office (N.T. I, 68). He further explained that he was unsure whether the views expressed in the book were the views of everyone in the office because it was tolerated and accepted (N.T. I, 68). Furthermore, he felt it was useless to complain to Zurzolo since he was the person who distributed the book. When the Complainant contacted Sandy Shields, he did not receive any action from her. The Complainant felt he had to resign because no one had taken his complaint seriously and no one from Corporate Headquarters had spoken with him. Lastly, Dr. Anderson testified that it was reasonable for the Complainant to feel he had no choice but to resign his position. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the

functional equivalent of an actual termination. See Sheridan v. E.I. Dupont de Nemours & Co., 100 F.3d. 1061, 1075 (3<sup>rd</sup> Cir. 1996), cert. denied, 521 U.S. 1129, 138 L. Ed. 2d 1031, 117 S. Ct. 2532 (1997). Also, if the plaintiff proves he or she was constructively discharged, the Third Circuit has held that it is also a tangible adverse employment action. See Durham Life Insurance Co. v. Evans, 166 F.3d, 139 (3<sup>rd</sup> Cir. 1995). It is therefore clear that a constructive discharge is a tangible employment action.

In reviewing cases where race is a motivating factor, the Respondent has a defense if it can show it would have taken the same action in the absence of the motivating factor. In the matter before the Commission, the Respondent asserts that the Complainant did not properly complain to the Respondent and that the contents of the book did not rise to the level of a hostile work environment. However, a review of the record shows that the Respondent's assertions are without merit. The Complainant did complain to Sandy Shields (N.T. II, 288-289). Ms. Shields admitted having several conversations with the Complainant. She told Peter Kleiner, "I think we have a problem here." Ms. Shields did not communicate with the corporate office that the Complainant felt the book was offensive (N.T. I, 290). It is clear that the Complainant's concerns were never taken seriously by Ms. Shields or anyone else at the office. Furthermore, it is interesting to note that Zurzolo was never formally disciplined in any manner. He was not required to attend any training or counseling sessions (N.T. II, 32-33). The Complainant's concerns were simply ignored. Accordingly, the evidence before the Commission clearly shows that the Respondent racially harassed the

Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides, in pertinent part:

(f)(1) 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic

that the calculation of the back pay award need not be exact. Rather, it is only necessary that the method used be reasonable. Uncertainties, in general, should be resolved against a discriminating employer. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5<sup>th</sup> Cir. 1974). Also the Complainant is entitled to an award of interest on the back pay. See Brown v. Transport Corp. v. Cmwlth., Human Relations Commission, 578 A.2d, 555 (1990). Furthermore, in the instant case, the Complainant asserts that he should be awarded front pay. Front pay is, "money awarded for lost compensation during the period between judgment or reinstatement or in lieu of reinstatement." Front pay can be awarded where the remedy of reinstatement is simply not appropriate, because of hostility between the parties. See Carter v. Sedgwick County, 36 F.3d, 952, 65 FEP 1217 (2000). In the instant case, reinstatement is not a viable option. Also, see Kelley v. Airborne Freight Corp., 140 F.3d, 352 (1<sup>st</sup> Cir. 1998). Peter Kleiner testified that, in light of the Complainant's claims, his chances of returning to work for the Respondent were "very dismal" (N.T. 2, 162). In addition, a review of the record indicates a degree of distrust and hostility that would be extremely difficult to overcome. Therefore, the Complainant is entitled to an award of front pay for a period of five years.

In regard to the issues of back pay and front pay, the Complainant presented the testimony of Andrew C. Verzilli, M.B.A. Mr. Verzilli has previously testified in numerous cases regarding financial, economic and statistical information. In order to calculate the damages in the instant case, Mr. Verzilli considered the difference in earning capacity of what the Complainant could

reasonably expect to receive from his job and what he earned after his constructive discharge. (N.T. 2, 186)

More specifically, Mr. Verzilli reasonably estimated regarding back pay that the Complainant would have earned at a rate of \$130,000 from May 2001 to the present. This estimation was based on the actual earnings of four Account Executives: Hopeck, Snodgrass, Peterson and Reynolds (N.T. II, 192). This figure was compared to what the Complainant actually earned since 2001. The difference in back pay is \$286,262. (N.T. II, 194)

In his calculation of front pay, Mr. Verzilli used the earning capacity of \$130,000 per year minus the Complainant's interim earnings of \$29, 532 per year (N.T. II, 196). The Complainant's front pay award should be limited to a five-year period. Mr. Verzilli's expert testimony included a range of values to reflect a discount rate for present value minus the wage growth rate (N.T. II, 1999). Upon review of the record, and using a discount rate of 2.5%, the Complainant should be awarded \$328,000 for the difference in front pay. Accordingly, the total figure for economic damages (back pay and front pay) is \$614,262.

Dr. Brian P. Sullivan testified on behalf of the Respondent in regarding to the issue of economic damages. A review of Dr. Sullivan's testimony indicates that he utilized information that was not entirely correct and he used a study based on assumptions not related to the instant case. Accordingly, Mr. Verzilli's testimony on this issue was found to be more credible.

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the

Commission (Consolidated Rail Corp., cited *infra*, 582 A. 2d at 708). Moreover, the burden is on the employer to demonstrate any alleged failure to mitigate. See Cardin v. Westinghouse Electric Corp., 850 F.2d 1996, 1005 (3<sup>rd</sup> Cir. 1988). Also, see generally State Public School Building Authority v. M.M. Anderson Co., 410 A.2d 1329 (Pa. Cmwlth. 1980). The Respondent must show that the Complainant did not exercise reasonable diligence in pursuing employment. However, upon review of the record, the Respondent did not produce any credible evidence that the Complainant failed to mitigate.

An appropriate Order follows:



**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SHAWN BROOKS,**

Complainant

v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**RECOMMENDATION OF THE HEARING PANEL**

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Hearing Panel that the Complainant has proven discrimination in violation of the PHRA. Accordingly, it is the Recommendation of the Hearing Panel that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

If so approved, the Hearing Panel recommends issuance of the attached  
Final Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

2-28-05  
Date

By: Raquel Otero de Yiengst  
Commissioner Raquel Otero de Yiengst

2-28-05  
Date

By: Daniel D. Yun  
Commissioner Daniel D. Yun

**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SHAWN BROOKS,**

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v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**FINAL ORDER**


AND NOW, this 28<sup>th</sup> day of February, 2005, 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 and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

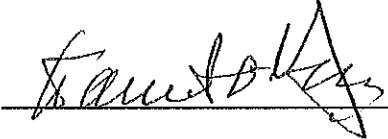
## **ORDERS**

1. The Respondent shall cease and desist from discriminating against individuals because of their race, African American.
2. The Respondent shall pay the Complainant \$286,262, an amount that represents the back pay award in this matter.
3. The Respondent shall pay the Complainant \$328,000, an amount that represents front pay for a period of five years.
4. That within 30 days of the date of this order, the Respondent shall fashion and implement internal policies and procedures to effectively accept and resolve employee complaints of discriminatory treatment. Such policies and procedures shall be subject to review by the PHRC Philadelphia Regional Office. Further, the policies and procedures must include an effective grievance procedure calculated to resolve claims of discrimination and to encourage employees who feel they have been victimized to come forward with their complaints.
5. That within 30 days of the date of this order, the Respondent shall provide appropriate training on work-place harassment and acceptable work-place behavior and shall provide training on the employment provisions of the Pennsylvania Human Relations Act, Pennsylvania Human Relations Commission regulations, Title VII of the U.S. Civil Rights Act, the U.S. Americans with Disabilities Act and the U.S. Age Discrimination in Employment Act. Pennsylvania Human Relations Commission staff shall participate in the training and shall review all training materials before the training is conducted. The training shall be given to all employees at the Respondent's workplace.

6. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:   
Stephen A Glassman, Chairperson

ATTEST:   
Daniel D. Yun, Secretary

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**COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**SHAWN BROOKS,**

Complainant

v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

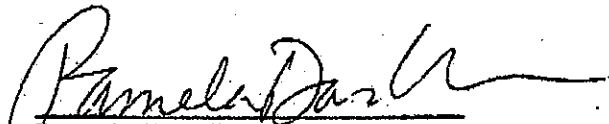
5. On or about September 7, 2001, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.

6. On or about February 1, 2002, Respondent filed an Amended Answer in response to the complaint. A copy of the Amended Answer will be included as a docket entry in this case at the time of hearing.


7. In correspondence dated November 28, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause 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.

9. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

  
\_\_\_\_\_  
Pamela Darville  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complainant)

6-28-02  
Date

  
\_\_\_\_\_  
Judith Harris, Esquire  
(Counsel for the Respondent)

6/28/02  
Date

  
\_\_\_\_\_  
Jeffrey Campolongo, Esquire  
(Counsel for the Complainant)

6/28/02  
Date

8. The Complainant stopped working for Respondent Infinity on May 15, 2001. (N.T. I, 28)

9. During the course of his employment with Respondent Infinity, the Complainant was offered stock options. (N.T. I, 32, C.E. 15)

10. The Complainant's immediate supervisor was Joseph Zurzolo. (N.T. I, 33)

11. Zurzolo was supervised by Peter Kleiner, who, in turn, was supervised by Ken Stevens. (N.T. I, 33)

12. Zurzolo scheduled a meeting for account executives to discuss sales and dress code issues. (N.T. I, 33-34)

13. The meeting took place on Wednesday, May 9, 2001. (N.T. I, 34)

14. At the meeting, Zurzolo distributed the book, "New Dress for Success." (N.T. I, 34, C.E. 3)

15. Zurzolo also stated to the account executives at the meeting, "Per human resources, use it." (N.T. I, 34, 106; C.E. 3)

16. The Complainant took the book home that evening and read it. (N.T. I, 34)

17. The Complainant had a negative reaction to the book and felt that there were specific passages that were particularly offensive. (N.T. I, 34-54).

18. The passages from the book that were offensive to the Complainant were (N.T. I, 36-54):

**a. WHEN BLACKS AND HISPANICS SELL TO WHITES (AND VICE  
VERSA)**



- vii. If you are from a Hispanic background and you wish to sell to American business, the best outfit for you to wear is a medium range or dark gray two or three-piece suit and a very conservative tie, preferably blue and maroon silk foulard. Men from Hispanic backgrounds also have to be careful that their hair is very neatly trimmed and very conservative. (C.E. 3, pp. 211-212).
- viii. If you are white selling to blacks, you will fare much better if you dress in non-establishment patterns. Black America is essentially divided into two camps, establishment and anti-establishment, and the divisions are not dictated by income alone. (C.E. 3, p. 212).
- ix. Almost all members of Northern ghettos who are in the lower socioeconomic groups are understandably anti-establishment. When selling to them, you can wear nothing that carries an establishment touch. It does not matter what you are selling; cars, insurance, bonds, gold. You must not wear the traditional suit, shirt and tie uniform. Women are much better at selling to blacks because they are considered to be outside the establishment. (C.E. 3, p. 212);
- x. White salesman selling to anti-establishment blacks do better if they wear mustaches and they do even better with beards. If you must wear a suit, the best suit is a conservative two-piece model, but you should avoid dark blue since it has a very negative association for blacks. Turtleneck sweaters work very well, but if you must wear a tie, it should obviously be non-authoritative or non-establishment. (C.E. 3, p. 212);
- xi. The black establishment includes all blacks who have made it along with almost all Southern, rural blacks, no matter what their position. Southern blacks do not consider themselves disenfranchised and their reactions to clothing are the same as the reaction of their more successful counterparts. If you are white and selling to this group, it is almost essential that you wear a shirt and tie, but it is absolutely essential that no article of your clothing represent you as a member of the establishment. Pinstripe suits, Ivy League and club ties, white shirts, all are out. Any color shirt but white, and any nondescript tie are acceptable. A paisley tie is most likely to elicit the greatest trust. (C.E. 3, p. 212);

- xvi. Mexican-Americans react negatively to anyone coming from outside the area, including other Mexicans wearing what is described as Mexican bullfighters red. (C.E. 3, p. 214).

• **SOME ADVICE FOR MINORITIES**

- xvii. A group of black executives in Chicago hired me to do a report on the best image for upwardly mobile blacks in corporate America. It was one of the most interesting studies I have ever done. We found that Blacks had not only to dress more expensively than their white counterparts if they wanted to have an equal impact. (C.E. 3, p. 233).
- xviii. We also discovered that it was more important for blacks to put their clothing together well and to choose clothing that was finely tailored because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites. We also found they should avoid any of the obvious signs of being chic – Italian suits, designer attaché cases and so on – because those announced that although they had the money to spend on them, they had not quite moved into the executive class. I titled my report, Dress White. (C.E. 3, p. 233).
- xviii. About a week after I sent it to the committee that had hired me, one of the fellows on the committee whom I considered a friend called me and said, "John, we're printing out your report, but we've changed it." I became incensed and said, "How dare you change it. It didn't need to be changed." He tried to explain, but I said, "Before you print anything with my name on it, I want to see it," and hung up the telephone. I knew if I rushed, I would catch the two o'clock flight to Chicago. And I did catch it, just barely. When I arrived at my friend's office, he turned to his associates and said, "He actually came." I shouted, "Let me see the report," and he, with a smile, said, "There's a copy on my desk." After reading it twice, I told him that I could find no changes. He told me to read the cover. On the cover, he had written one word: in red ink the title now read, "Dress Very White." (C.E. 3, p.234).
- xix. The man I once again considered my friend apologized for making me fly to Chicago, but explained that it was not his fault that I had jumped to conclusions. He said that the black executives who hired me knew the game, and that they

being identified by his success rather than his background. But clothing can help. For 16 years, I have been giving the following advice to my black and Hispanic clients: Dress conservatively; wear those garments that are considered upper-middle-class symbols – pinstripe suits, end-on-end blue shirts, Ivy League ties; wear and carry only those accessories that convey the same message. (C.E. 3, p. 235);

xxiv. In speaking before some groups of black executives, I been criticized for attempting to make Uncle Toms out of them. My only answer is that my black clients include officers of several of America's major corporations and representatives of foreign governments. They are hardly Uncle Toms. I stick to my advice. If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (C.E. 3, p. 235-236).

xxv. This requirement of dress is not one that is imposed on you strictly because you are of a minority race; it is imposed on anyone who wishes to go up the corporate ladder. If you have to work harder at it than the white man next to you – well, so does the very short man who has a larger man at the desk next to him. Consciously manipulating your dress for success is not giving in; it is a recognition by the man who is doing it that he deserves a crack at the upper echelons of business and he's going to play the same game everyone else is playing, even if he has to play a little harder. (C.E. 3, p. 236).

- **FOR LAWYERS: HOW TO DRESS UP YOUR CASE AND WIN JUDGES AND JURIES**

xxvi. In most suburban societies, you will find a varied but white population, and you will therefore generally face a white jury mixed with socio-economic backgrounds. In this area, I suggest dark blue suits, white shirts, rep ties and very structured appearances. This is the uniform that the lower-middle-class members of the jury expect. When dealing with lower-middle-class whites on a suburban jury, never wear a gray suit. I know this is the suit that most lawyers wear, but that's because they don't know not to. (C.E. 3, pp. 297-298).

one essential rule before such juries is to wear nothing that indicates that you are more sophisticated than they, nothing that indicates that you are better than they, and absolutely nothing that associates with big-city clothing. Whenever one of the richest and most successful lawyers in Chicago must try a case in southern Illinois, he drives down in a pickup truck and dresses very much as if he is more familiar with the truck than with a courtroom. (C.E. 3, p. 299).

19. The Complainant, after reading the book, did not complain to Zurzolo, his supervisor. (N.T. I, 55)
20. The Complainant testified that he did not trust Zurzolo (N.T. I, 55)
21. The Complainant felt that Zurzolo had offended him on a number of occasions. (N.T. I, 55)
22. During the Complainant's employment, Zurzolo made a comment to the Complainant about, "having to go with [the Complainant's] fiancée. (N.T. I, 57-58)
23. The Complainant perceived this comment to mean Zurzolo wanted to have sex with Complainant's fiancée. (N.T. I, 57-58)
24. The Complainant felt that Zurzolo made this comment because he [Complainant] worked for him. (N.T. I, 58)
25. The Complainant testified that he did not tell anyone in the office because he did not trust anyone in the office. (N.T. I, 68)
26. The Complainant further indicated that he did not know if the views of Zurzolo were the views of others in the office. (N.T. I, 68)
27. The Complainant felt that those views were tolerated and accepted in the office. (N.T. I, 68)

39. Sandra Shields, at all times relevant to the complainant, was the Business Manager, Office Manager and Human Relations Director for Infinity Broadcasting. (N.T. I, 276)

40. Ms. Shields was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place as of May, 2001. (N.T. I, 278-279)

41. The policy states:

Infinity Broadcasting Corporation will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran status, marital status, or height or weight. (N.T. I, 281)

42. Harassment is defined in the policy, as follows:

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; degrading jokes and display or circulation in the workplace of written or graphic material that designates or shows hostility or aversion toward an individual or group; including through e-mail. (N.T. I, 284)

43. Ms. Shields indicated in her testimony that harassment complaints need not be in writing, but may be made orally. (N.T. I, 287)

44. In addition, the policy dictates what an employee should do if the employee feels complaining to a supervisor is not appropriate:

Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other Infinity designated representatives. (N.T. I, 285)

45. Ms. Shields had several conversations with the Complainant regarding his concerns over the book, New Dress for Success. (N.T. I, 288)

46. Ms. Shields was aware of the Complainant's feeling that the book contained offensive passages. (N.T. I, 289)

58. The Complainant had pending accounts when he resigned his employment. (N.T. I, 140-145)

59. After Complainant's resignation, he was depressed, frustrated and angry. (N.T. I, 78)

60. The Complainant attended an out treatment program at the University of Pennsylvania. (N.T. I, 80)

61. After attending the program, the Complainant felt reassured that he had done the right thing in resigning his employment with Respondent. (N.T. I, 81)

62. Prior to January 2002, the Complainant collected unemployment compensation. (N.T. I, 82)

63. The Complainant, prior to January 2002, submitted his resume to various websites on the Internet. (N.T. I, 82)

64. In January 2002, the Complainant worked for Phillip Insurance Brokers. (N.T. I, 83)

65. In 2002, the Complainant earned \$8,000, which consisted of commission payments. (N.T. I, 83)

66. Presently, the Complainant is employed by ExpenseWatch. (N.T. I, 84; C.E. 27)

67. Dr. Elijah Anderson is a professor of sociology at the University of Pennsylvania. (N.T. I, 202)

68. Dr. Anderson has been employed at the University of Pennsylvania for approximately twenty-seven years. (N.T. I, 202)

79. The Complainant advised Dr. Anderson that he sought medical treatment regarding his emotional and mental state after resigning from Respondent Infinity. (N.T. I, 231)

80. The Complainant also advised Dr. Anderson that he felt stereotyped as a black man at his workplace. (N.T. I, 236)

81. The Complainant was encouraged, at the workplace, to participate in the use of ethnic slurs, but he chose not to. (N.T. I, 236)

82. The Complainant testified that he was the object of ridicule in that he drew attention to his size, the way he dressed, the way he spoke and the fact that he drove a nice car. (N.T. I, 237)

83. The Complainant indicated to Dr. Anderson that Mr. Zurzolo had presented the book to the account executives because the group needed it. (N.T. I, 238)

84. Zurzolo felt that there were some shortcomings with sales and the book would be helpful to that end. (N.T. I, 238)

85. The Complainant told Dr. Anderson he was greatly offended by the book. (N.T. I, 238-239)

86. There were attempts to communicate with the Complainant, but the Complainant did not want to speak with his supervisor because he [Complainant] felt it was a hostile work environment. (N.T. I, 240)

87. Dr. Anderson's opinion was that the actions and the inactions of the corporate decision makers of the Complainant's employer subjected him to a hostile work environment. (N.T. I, 242-243)

98. Furthermore, Zurzolo never expressed any displeasure with Mr. Snodgrass, even though he [Snodgrass] admitted he read the book when he first purchased it. (N.T. II, 78)

99. As sports sales manager, Mr. Snodgrass was familiar with the payment structure for account executives in May 2001. (N.T. II, 58)

100. When the Complainant left Respondent Infinity, Mr. Snodgrass took over a number of the Complainant's accounts. (N.T. II, 62)

101. These accounts included: Jiffy Lube (\$20,000), Eagle Limousine (\$20,000 and \$6,000) and Nucar Hummer (\$80,000). (N.T. II, 62)

102. The Complainant also had a Penske account (\$98,000), which was closed by Mr. Snodgrass. (N.T. II, 64)

103. All of the above accounts had a twenty percent commission. (N.T. II, 60-64)

104. At all times relevant to the instant complaint, Peter Kleiner (hereinafter "Kleiner") was the General Sales Manager for the WYSP and the Philadelphia Eagles Radio Network. (N.T. II, 104)

105. Mr. Zurzolo was supervised by Kleiner. (N.T. II, 142)

106. Kleiner was aware that the Complainant was upset about the contents of the book. (N.T. II, 128)

107. Kleiner testified that, "If Mr. Brooks felt it was offensive, then therefore it was offensive." (N.T. II, 147)

108. Kleiner and Sandy Shields were the individuals who collected the books that were distributed at the sales meeting. (N.T. II, 129)



119. Those four Account Executives were: Hopeck, Snodgrass, Peterson and Reynolds. (N.T. II, 192)

120. After comparing the earning capacity to what the Complainant actually earned since 2001, the difference in back pay is approximately \$286,262. (N.T. II, 194, 201)

121. In his estimation of front pay, Mr. Verzilli used the same earning capacity of \$130,000 minus the Complainant's interim earnings of \$29,532. (N.T. II, 196)

122. Mr. Verzilli's testimony limited the front pay at five years, based on the Complainant's age, education and similar employment. (N.T. II, 196)

123. In his calculation of front pay, Mr. Verzilli presented a value range to represent a discount rate for present value minus the wage growth rate. (N.T. II, 196)

124. Assuming a discount rate of 2.5%, the difference in front pay is \$328,000.

- b. the harassment was severe or pervasive;
- c. the harassment detrimentally affected the Complainant;
- d. the harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition;
- e. the harasser was a supervisory employee or agent;

9. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.

10. A case of constructive discharge constitutes a tangible employment action.

11. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign.

12. The Complainant has established the existence of a constructive discharge.

13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.

conclusion of the public hearing, and after receipt of the hearing transcript, the parties filed post-hearing briefs in support of their positions.

Section 5(a) of the Pennsylvania Human Relations Act provides, *inter alia*, that is an unlawful discriminatory practice:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination. More specifically, the Complainant asserts that the instant case is a mixed motive case wherein there is evidence that a discriminatory factor played a motivating part of the Respondent's action. The United States Supreme Court has considered this issue in a number of cases. In Price Waterhouse v. Hopkins, 490 U.S. 228(1989), the Court determined that if there is evidence that a discriminatory motive partially influenced a decision, then the burden shifted to the respondent to establish that it would have taken the same actions absent the motivating factor. However a more recent case, Desert Palace, Inc. v. Costa, 91 FEP Cases 1569 (U.S. 2003) bears on this issue. In Desert Palace, the Court provided that a complainant could show that an unlawful discriminatory consideration was a motivating factor through circumstantial or direct evidence. Consequently, we must consider whether the

produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination.

We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3<sup>rd</sup> Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3<sup>rd</sup> Cir. 1990).

In the matter before the Commission, the parties have stipulated that the Complainant is African American and the record reflects that the Complainant suffered intentional discrimination because of his race. The record reveals that the Complainant, the only African American account executive, was handed a book that contained derogatory and stereotypical statements with regard to African Americans. The book contained references to "anti-establishment blacks," "ghettos," and "ghetto black." It also advised that black salesmen should "dress very white." (C.E. 3)

Zurzolo referring to himself using ethnic slurs, Zurzolo indicating his wish to have sex with the Complainant's fiancée and Zurzolo's habit of "palming" the head of Respondent's African American receptionist. Accordingly, the Complainant has shown that the Respondent's conduct meets this prong of the *prima facie* case.

The next element of the *prima facie* case is whether the harassment detrimentally affected the Complainant. In the instant case, the Complainant, through his own testimony and that of Dr. Anderson, has shown that he was detrimentally affected by the harassment, negating his ability to work. The Complainant creditably testified that he was depressed, very angry and frustrated (N.T. I, 78). He also testified that he was unable to sleep and was enrolled in an out-treatment program at the University of Pennsylvania. Dr. Anderson testified that the Complainant was "quite provoked by the whole thing and was quite disturbed, agitated mentally," (N.T. I, 231). There is no question that the Complainant meets this element of the *prima facie* case.

The next step is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. More specifically, whether a reasonable African American would find the conduct hostile or abusive to the extent that it would cause a constructive discharge. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). There was substantial testimony at the public hearing from the Complainant and Dr. Anderson regarding the Complainant's feeling about his workplace. The Complainant felt that the longer he worked for the Respondent, the more he came to find that he was working in a hostile work environment, given the use of ethnic slurs at the

burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. After reviewing the racially offensive conduct at the workplace, it is understood that the Complainant felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3<sup>rd</sup> Cir. 2001). The Complainant credibly testified that he did not know to whom he should turn to because he felt he could not trust anyone at the office (N.T. I, 68). He further explained that he was unsure whether the views expressed in the book were the views of everyone in the office because it was tolerated and accepted (N.T. I, 68). Furthermore, he felt it was useless to complain to Zurzolo since he was the person who distributed the book. When the Complainant contacted Sandy Shields, he did not receive any action from her. The Complainant felt he had to resign because no one had taken his complaint seriously and no one from Corporate Headquarters had spoken with him. Lastly, Dr. Anderson testified that it was reasonable for the Complainant to feel he had no choice but to resign his position. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the

Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides, in pertinent part:

(f)(1) 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic

reasonably expect to receive from his job and what he earned after his constructive discharge. (N.T. 2, 186)

More specifically, Mr. Verzilli reasonably estimated regarding back pay that the Complainant would have earned at a rate of \$130,000 from May 2001 to the present. This estimation was based on the actual earnings of four Account Executives: Hopeck, Snodgrass, Peterson and Reynolds (N.T. II, 192). This figure was compared to what the Complainant actually earned since 2001. The difference in back pay is \$286,262. (N.T. II, 194)

In his calculation of front pay, Mr. Verzilli used the earning capacity of \$130,000 per year minus the Complainant's interim earnings of \$29, 532 per year (N.T. II, 196). The Complainant's front pay award should be limited to a five-year period. Mr. Verzilli's expert testimony included a range of values to reflect a discount rate for present value minus the wage growth rate (N.T. II, 1999). Upon review of the record, and using a discount rate of 2.5%, the Complainant should be awarded \$328,000 for the difference in front pay. Accordingly, the total figure for economic damages (back pay and front pay) is \$614,262.

Dr. Brian P. Sullivan testified on behalf of the Respondent in regarding to the issue of economic damages. A review of Dr. Sullivan's testimony indicates that he utilized information that was not entirely correct and he used a study based on assumptions not related to the instant case. Accordingly, Mr. Verzilli's testimony on this issue was found to be more credible.

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the



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**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**RECOMMENDATION OF THE HEARING PANEL**

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Hearing Panel that the Complainant has proven discrimination in violation of the PHRA. Accordingly, it is the Recommendation of the Hearing Panel that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN BROOKS,

Complainant

v.

VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,

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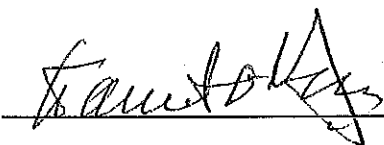
**FINAL ORDER**

AND NOW, this 28<sup>th</sup> day of February, 2005, 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 and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

6. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:   
Stephen A Glassman, Chairperson

ATTEST:   
Daniel D. Yun, Secretary

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

**SHAWN BROOKS,**

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**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

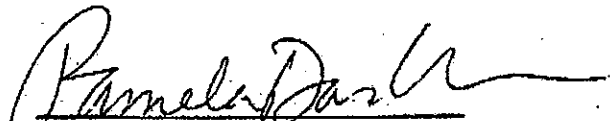
5. On or about September 7, 2001, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.

6. On or about February 1, 2002, Respondent filed an Amended Answer in response to the complaint. A copy of the Amended Answer will be included as a docket entry in this case at the time of hearing.


7. In correspondence dated November 28, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause 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.


9. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

  
Pamela Darville  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complainant)

6-28-02  
Date

  
Judith Harris, Esquire  
(Counsel for the Respondent)

6/28/02  
Date

  
Jeffrey Campolongo, Esquire  
(Counsel for the Complainant)

6/28/02  
Date

8. The Complainant stopped working for Respondent Infinity on May 15, 2001. (N.T. I, 28)

9. During the course of his employment with Respondent Infinity, the Complainant was offered stock options. (N.T. I, 32, C.E. 15)

10. The Complainant's immediate supervisor was Joseph Zurzolo. (N.T. I, 33)

11. Zurzolo was supervised by Peter Kleiner, who, in turn, was supervised by Ken Stevens. (N.T. I, 33)

12. Zurzolo scheduled a meeting for account executives to discuss sales and dress code issues. (N.T. I, 33-34)

13. The meeting took place on Wednesday, May 9, 2001. (N.T. I, 34)

14. At the meeting, Zurzolo distributed the book, "New Dress for Success." (N.T. I, 34, C.E. 3)

15. Zurzolo also stated to the account executives at the meeting, "Per human resources, use it." (N.T. I, 34, 106; C.E. 3)

16. The Complainant took the book home that evening and read it. (N.T. I, 34)

17. The Complainant had a negative reaction to the book and felt that there were specific passages that were particularly offensive. (N.T. I, 34-54).

18. The passages from the book that were offensive to the Complainant were (N.T. I, 36-54):

**a. WHEN BLACKS AND HISPANICS SELL TO WHITES (AND VICE  
VERSA)**

- vii. If you are from a Hispanic background and you wish to sell to American business, the best outfit for you to wear is a medium range or dark gray two or three-piece suit and a very conservative tie, preferably blue and maroon silk foulard. Men from Hispanic backgrounds also have to be careful that their hair is very neatly trimmed and very conservative. (C.E. 3, pp. 211-212).
- viii. If you are white selling to blacks, you will fare much better if you dress in non-establishment patterns. Black America is essentially divided into two camps, establishment and anti-establishment, and the divisions are not dictated by income alone. (C.E. 3, p. 212).
- ix. Almost all members of Northern ghettos who are in the lower socioeconomic groups are understandably anti-establishment. When selling to them, you can wear nothing that carries an establishment touch. It does not matter what you are selling; cars, insurance, bonds, gold. You must not wear the traditional suit, shirt and tie uniform. Women are much better at selling to blacks because they are considered to be outside the establishment. (C.E. 3, p. 212);
- x. White salesman selling to anti-establishment blacks do better if they wear mustaches and they do even better with beards. If you must wear a suit, the best suit is a conservative two-piece model, but you should avoid dark blue since it has a very negative association for blacks. Turtleneck sweaters work very well, but if you must wear a tie, it should obviously be non-authoritative or non-establishment. (C.E. 3, p. 212);
- xi. The black establishment includes all blacks who have made it along with almost all Southern, rural blacks, no matter what their position. Southern blacks do not consider themselves disenfranchised and their reactions to clothing are the same as the reaction of their more successful counterparts. If you are white and selling to this group, it is almost essential that you wear a shirt and tie, but it is absolutely essential that no article of your clothing represent you as a member of the establishment. Pinstripe suits, Ivy League and club ties, white shirts, all are out. Any color shirt but white, and any nondescript tie are acceptable. A paisley tie is most likely to elicit the greatest trust. (C.E. 3, p. 212);

- xvi. Mexican-Americans react negatively to anyone coming from outside the area, including other Mexicans wearing what is described as Mexican bullfighters red. (C.E. 3, p. 214).

- **SOME ADVICE FOR MINORITIES**

- xvii. A group of black executives in Chicago hired me to do a report on the best image for upwardly mobile blacks in corporate America. It was one of the most interesting studies I have ever done. We found that Blacks had not only to dress more expensively than their white counterparts if they wanted to have an equal impact. (C.E. 3, p. 233).
- xviii. We also discovered that it was more important for blacks to put their clothing together well and to choose clothing that was finely tailored because their black skin in a society where racism still persists, aroused a prejudice that they would not be as competent and able as whites. We also found they should avoid any of the obvious signs of being chic – Italian suits, designer attaché cases and so on – because those announced that although they had the money to spend on them, they had not quite moved into the executive class. I titled my report, Dress White. (C.E. 3, p. 233).
- xviii. About a week after I sent it to the committee that had hired me, one of the fellows on the committee whom I considered a friend called me and said, “John, we’re printing out your report, but we’ve changed it.” I became incensed and said, “How dare you change it. It didn’t need to be changed.” He tried to explain, but I said, “Before you print anything with my name on it, I want to see it,” and hung up the telephone. I knew if I rushed, I would catch the two o’clock flight to Chicago. And I did catch it, just barely. When I arrived at my friend’s office, he turned to his associates and said, “He actually came.” I shouted, “Let me see the report,” and he, with a smile, said, “There’s a copy on my desk.” After reading it twice, I told him that I could find no changes. He told me to read the cover. On the cover, he had written one word: in red ink the title now read, “Dress *Very* White.” (C.E. 3, p.234).
- xix. The man I once again considered my friend apologized for making me fly to Chicago, but explained that it was not his fault that I had jumped to conclusions. He said that the black executives who hired me knew the game, and that they



being identified by his success rather than his background. But clothing can help. For 16 years, I have been giving the following advice to my black and Hispanic clients: Dress conservatively; wear those garments that are considered upper-middle-class symbols – pinstripe suits, end-on-end blue shirts, Ivy League ties; wear and carry only those accessories that convey the same message. (C.E. 3, p. 235);

xxiv. In speaking before some groups of black executives, I been criticized for attempting to make Uncle Toms out of them. My only answer is that my black clients include officers of several of America's major corporations and representatives of foreign governments. They are hardly Uncle Toms. I stick to my advice. If you are black or Spanish in America, and if you are moving up the rungs of corporate success, you should adhere to the dress code of the corporation and of the country, even going somewhat overboard in the direction of being conservative. (C.E. 3, p. 235-236).

xxv. This requirement of dress is not one that is imposed on you strictly because you are of a minority race; it is imposed on anyone who wishes to go up the corporate ladder. If you have to work harder at it than the white man next to you – well, so does the very short man who has a larger man at the desk next to him. Consciously manipulating your dress for success is not giving in; it is a recognition by the man who is doing it that he deserves a crack at the upper echelons of business and he's going to play the same game everyone else is playing, even if he has to play a little harder. (C.E. 3, p. 236).

- **FOR LAWYERS: HOW TO DRESS UP YOUR CASE AND WIN JUDGES AND JURIES**

xxvi. In most suburban societies, you will find a varied but white population, and you will therefore generally face a white jury mixed with socio-economic backgrounds. In this area, I suggest dark blue suits, white shirts, rep ties and very structured appearances. This is the uniform that the lower-middle-class members of the jury expect. When dealing with lower-middle-class whites on a suburban jury, never wear a gray suit. I know this is the suit that most lawyers wear, but that's because they don't know not to. (C.E. 3, pp. 297-298).

one essential rule before such juries is to wear nothing that indicates that you are more sophisticated than they, nothing that indicates that you are better than they, and absolutely nothing that associates with big-city clothing. Whenever one of the richest and most successful lawyers in Chicago must try a case in southern Illinois, he drives down in a pickup truck and dresses very much as if he is more familiar with the truck than with a courtroom. (C.E. 3, p. 299).

19. The Complainant, after reading the book, did not complain to Zurzolo, his supervisor. (N.T. I, 55)
20. The Complainant testified that he did not trust Zurzolo (N.T. I, 55)
21. The Complainant felt that Zurzolo had offended him on a number of occasions. (N.T. I, 55)
22. During the Complainant's employment, Zurzolo made a comment to the Complainant about, "having to go with [the Complainant's] fiancée. (N.T. I, 57-58)
23. The Complainant perceived this comment to mean Zurzolo wanted to have sex with Complainant's fiancée. (N.T. I, 57-58)
24. The Complainant felt that Zurzolo made this comment because he [Complainant] worked for him. (N.T. I, 58)
25. The Complainant testified that he did not tell anyone in the office because he did not trust anyone in the office. (N.T. I, 68)
26. The Complainant further indicated that he did not know if the views of Zurzolo were the views of others in the office. (N.T. I, 68)
27. The Complainant felt that those views were tolerated and accepted in the office. (N.T. I, 68)

39. Sandra Shields, at all times relevant to the complainant, was the Business Manager, Office Manager and Human Relations Director for Infinity Broadcasting. (N.T. I, 276)

40. Ms. Shields was aware of Infinity Broadcasting's non-discrimination and anti-harassment policies in place as of May, 2001. (N.T. I, 278-279)

41. The policy states:

Infinity Broadcasting Corporation will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation, disability, veteran status, marital status, or height or weight. (N.T. I, 281)

42. Harassment is defined in the policy, as follows:

Harassing conduct includes, but is not limited to: epithets, slurs or negative stereotyping; threatening, intimidating or hostile acts; degrading jokes and display or circulation in the workplace of written or graphic material that designates or shows hostility or aversion toward an individual or group; including through e-mail. (N.T. I, 284)

43. Ms. Shields indicated in her testimony that harassment complaints need not be in writing, but may be made orally. (N.T. I, 287)

44. In addition, the policy dictates what an employee should do if the employee feels complaining to a supervisor is not appropriate:

Individuals should not feel obligated to file their complaints with their immediate supervisor first before bringing the matter to the attention of one of the other Infinity designated representatives. (N.T. I, 285)

45. Ms. Shields had several conversations with the Complainant regarding his concerns over the book, New Dress for Success. (N.T. I, 288)

46. Ms. Shields was aware of the Complainant's feeling that the book contained offensive passages. (N.T. I, 289)

58. The Complainant had pending accounts when he resigned his employment. (N.T. I, 140-145)

59. After Complainant's resignation, he was depressed, frustrated and angry. (N.T. I, 78)

60. The Complainant attended an out treatment program at the University of Pennsylvania. (N.T. I, 80)

61. After attending the program, the Complainant felt reassured that he had done the right thing in resigning his employment with Respondent. (N.T. I, 81)

62. Prior to January 2002, the Complainant collected unemployment compensation. (N.T. I, 82)

63. The Complainant, prior to January 2002, submitted his resume to various websites on the Internet. (N.T. I, 82)

64. In January 2002, the Complainant worked for Phillip Insurance Brokers. (N.T. I, 83)

65. In 2002, the Complainant earned \$8,000, which consisted of commission payments. (N.T. I, 83)

66. Presently, the Complainant is employed by ExpenseWatch. (N.T. I, 84; C.E. 27)

67. Dr. Elijah Anderson is a professor of sociology at the University of Pennsylvania. (N.T. I, 202)

68. Dr. Anderson has been employed at the University of Pennsylvania for approximately twenty-seven years. (N.T. I, 202)

79. The Complainant advised Dr. Anderson that he sought medical treatment regarding his emotional and mental state after resigning from Respondent Infinity. (N.T. I, 231)

80. The Complainant also advised Dr. Anderson that he felt stereotyped as a black man at his workplace. (N.T. I, 236)

81. The Complainant was encouraged, at the workplace, to participate in the use of ethnic slurs, but he chose not to. (N.T. I, 236)

82. The Complainant testified that he was the object of ridicule in that he drew attention to his size, the way he dressed, the way he spoke and the fact that he drove a nice car. (N.T. I, 237)

83. The Complainant indicated to Dr. Anderson that Mr. Zurzolo had presented the book to the account executives because the group needed it. (N.T. I, 238)

84. Zurzolo felt that there were some shortcomings with sales and the book would be helpful to that end. (N.T. I, 238)

85. The Complainant told Dr. Anderson he was greatly offended by the book. (N.T. I, 238-239)

86. There were attempts to communicate with the Complainant, but the Complainant did not want to speak with his supervisor because he [Complainant] felt it was a hostile work environment. (N.T. I, 240)

87. Dr. Anderson's opinion was that the actions and the inactions of the corporate decision makers of the Complainant's employer subjected him to a hostile work environment. (N.T. I, 242-243)

98. Furthermore, Zurzolo never expressed any displeasure with Mr. Snodgrass, even though he [Snodgrass] admitted he read the book when he first purchased it. (N.T. II, 78)

99. As sports sales manager, Mr. Snodgrass was familiar with the payment structure for account executives in May 2001. (N.T. II, 58)

100. When the Complainant left Respondent Infinity, Mr. Snodgrass took over a number of the Complainant's accounts. (N.T. II, 62)

101. These accounts included: Jiffy Lube (\$20,000), Eagle Limousine (\$20,000 and \$6,000) and Nucar Hummer (\$80,000). (N.T. II, 62)

102. The Complainant also had a Penske account (\$98,000), which was closed by Mr. Snodgrass. (N.T. II, 64)

103. All of the above accounts had a twenty percent commission. (N.T. II, 60-64)

104. At all times relevant to the instant complaint, Peter Kleiner (hereinafter "Kleiner") was the General Sales Manager for the WYSP and the Philadelphia Eagles Radio Network. (N.T. II, 104)

105. Mr. Zurzolo was supervised by Kleiner. (N.T. II, 142)

106. Kleiner was aware that the Complainant was upset about the contents of the book. (N.T. II, 128)

107. Kleiner testified that, "If Mr. Brooks felt it was offensive, then therefore it was offensive." (N.T. II, 147)

108. Kleiner and Sandy Shields were the individuals who collected the books that were distributed at the sales meeting. (N.T. II, 129)

119. Those four Account Executives were: Hopeck, Snodgrass, Peterson and Reynolds. (N.T. II, 192)

120. After comparing the earning capacity to what the Complainant actually earned since 2001, the difference in back pay is approximately \$286,262. (N.T. II, 194, 201)

121. In his estimation of front pay, Mr. Verzilli used the same earning capacity of \$130,000 minus the Complainant's interim earnings of \$29,532. (N.T. II, 196)

122. Mr. Verzilli's testimony limited the front pay at five years, based on the Complainant's age, education and similar employment. (N.T. II, 196)

123. In his calculation of front pay, Mr. Verzilli presented a value range to represent a discount rate for present value minus the wage growth rate. (N.T. II, 196)

124. Assuming a discount rate of 2.5%, the difference in front pay is \$328,000.

- b. the harassment was severe or pervasive;
- c. the harassment detrimentally affected the Complainant;
- d. the harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition;
- e. the harasser was a supervisory employee or agent;

9. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.

10. A case of constructive discharge constitutes a tangible employment action.

11. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's position would resign.

12. The Complainant has established the existence of a constructive discharge.

13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.



conclusion of the public hearing, and after receipt of the hearing transcript, the parties filed post-hearing briefs in support of their positions.

Section 5(a) of the Pennsylvania Human Relations Act provides, *inter alia*, that is an unlawful discriminatory practice:

(a) For any employer because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal because of blindness, deafness or physical handicap of any individual or independent contractor, to refuse to hire or employ or contract with, or to bar or to discharge from employment such individual or independent contractor, or to otherwise discriminate against such individual or independent contractor with respect to compensation, hire, tenure, terms, conditions or privileges of employment or contract, if the individual or independent contractor is the best able and most competent to perform the services required.

In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination. More specifically, the Complainant asserts that the instant case is a mixed motive case wherein there is evidence that a discriminatory factor played a motivating part of the Respondent's action. The United States Supreme Court has considered this issue in a number of cases. In Price Waterhouse v. Hopkins, 490 U.S. 228(1989), the Court determined that if there is evidence that a discriminatory motive partially influenced a decision, then the burden shifted to the respondent to establish that it would have taken the same actions absent the motivating factor. However a more recent case, Desert Palace, Inc. v. Costa, 91 FEP Cases 1569 (U.S. 2003) bears on this issue. In Desert Palace, the Court provided that a complainant could show that an unlawful discriminatory consideration was a motivating factor through circumstantial or direct evidence. Consequently, we must consider whether the

produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination.

We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3<sup>rd</sup> Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3<sup>rd</sup> Cir. 1990).

In the matter before the Commission, the parties have stipulated that the Complainant is African American and the record reflects that the Complainant suffered intentional discrimination because of his race. The record reveals that the Complainant, the only African American account executive, was handed a book that contained derogatory and stereotypical statements with regard to African Americans. The book contained references to "anti-establishment blacks," "ghettos," and "ghetto black." It also advised that black salesmen should "dress very white." (C.E. 3)

Zurzolo referring to himself using ethnic slurs, Zurzolo indicating his wish to have sex with the Complainant's fiancée and Zurzolo's habit of "palming" the head of Respondent's African American receptionist. Accordingly, the Complainant has shown that the Respondent's conduct meets this prong of the *prima facie* case.

The next element of the *prima facie* case is whether the harassment detrimentally affected the Complainant. In the instant case, the Complainant, through his own testimony and that of Dr. Anderson, has shown that he was detrimentally affected by the harassment, negating his ability to work. The Complainant creditably testified that he was depressed, very angry and frustrated (N.T. I, 78). He also testified that he was unable to sleep and was enrolled in an out-treatment program at the University of Pennsylvania. Dr. Anderson testified that the Complainant was "quite provoked by the whole thing and was quite disturbed, agitated mentally," (N.T. I, 231). There is no question that the Complainant meets this element of the *prima facie* case.

The next step is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. More specifically, whether a reasonable African American would find the conduct hostile or abusive to the extent that it would cause a constructive discharge. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998). There was substantial testimony at the public hearing from the Complainant and Dr. Anderson regarding the Complainant's feeling about his workplace. The Complainant felt that the longer he worked for the Respondent, the more he came to find that he was working in a hostile work environment, given the use of ethnic slurs at the

burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. After reviewing the racially offensive conduct at the workplace, it is understood that the Complainant felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3<sup>rd</sup> Cir. 2001). The Complainant credibly testified that he did not know to whom he should turn to because he felt he could not trust anyone at the office (N.T. I, 68). He further explained that he was unsure whether the views expressed in the book were the views of everyone in the office because it was tolerated and accepted (N.T. I, 68). Furthermore, he felt it was useless to complain to Zurzolo since he was the person who distributed the book. When the Complainant contacted Sandy Shields, he did not receive any action from her. The Complainant felt he had to resign because no one had taken his complaint seriously and no one from Corporate Headquarters had spoken with him. Lastly, Dr. Anderson testified that it was reasonable for the Complainant to feel he had no choice but to resign his position. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the

Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides, in pertinent part:

(f)(1) 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic

reasonably expect to receive from his job and what he earned after his constructive discharge. (N.T. 2, 186)

More specifically, Mr. Verzilli reasonably estimated regarding back pay that the Complainant would have earned at a rate of \$130,000 from May 2001 to the present. This estimation was based on the actual earnings of four Account Executives: Hopeck, Snodgrass, Peterson and Reynolds (N.T. II, 192). This figure was compared to what the Complainant actually earned since 2001. The difference in back pay is \$286,262. (N.T. II, 194)

In his calculation of front pay, Mr. Verzilli used the earning capacity of \$130,000 per year minus the Complainant's interim earnings of \$29, 532 per year (N.T. II, 196). The Complainant's front pay award should be limited to a five-year period. Mr. Verzilli's expert testimony included a range of values to reflect a discount rate for present value minus the wage growth rate (N.T. II, 1999). Upon review of the record, and using a discount rate of 2.5%, the Complainant should be awarded \$328,000 for the difference in front pay. Accordingly, the total figure for economic damages (back pay and front pay) is \$614,262.

Dr. Brian P. Sullivan testified on behalf of the Respondent in regarding to the issue of economic damages. A review of Dr. Sullivan's testimony indicates that he utilized information that was not entirely correct and he used a study based on assumptions not related to the instant case. Accordingly, Mr. Verzilli's testimony on this issue was found to be more credible.

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the

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v.

**VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,**

Respondents

Docket No. E99572D  
PHRC Case No. 200027223

**RECOMMENDATION OF THE HEARING PANEL**

Upon consideration of the entire record in the above captioned matter, it is the Recommendation of the Hearing Panel that the Complainant has proven discrimination in violation of the PHRA. Accordingly, it is the Recommendation of the Hearing Panel that the attached Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission.

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHAWN BROOKS,

Complainant

v.

VIACOM, INC., INFINITY BROAD-  
CASTING CORP., JOSEPH ZURZOLO,  
PETER KLEINER & KEN STEVENS  
c/o VIACOM, INC., d/b/a INFINITY  
BROADCASTING CORPORATION,

Respondents

Docket No. E99572D  
PHRC Case No. 200027223


**FINAL ORDER**

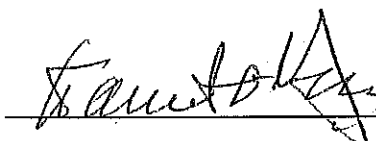
AND NOW, this 28<sup>th</sup> day of February, 2005, after review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves and adopts the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Hearing Panel as its own finding in this matter, and incorporates the Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby



6. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:   
Stephen A Glassman, Chairperson

ATTEST:   
Daniel D. Yun, Secretary