

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

**KAREN GREEN,**  
**Complainant**

**v.**

**NORTH PHILADELPHIA**  
**HEALTH SYSTEM,**  
**Respondent**

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**PHRC CASE NO. 200200633**

**STIPULATIONS OF FACT**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

COMMONWEALTH OF PENNSYLVANIA  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KAREN GREEN, :  
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 Complainant :  
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 v. : Docket No. 200200633  
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 :  
 NORTH PHILADELPHIA :  
 HEALTH SYSTEM, :  
 :  
 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. Karen Green (hereinafter "Complainant") is an adult who holds a sincere religious belief that submission to photographs is forbidden by the Bible.
2. North Philadelphia Health System (hereinafter, "Respondent"), at all times relevant to the case at hand, employed four or more persons within the Commonwealth.
3. On or about June 2002, Complainant applied for a position as a Registered Nurse with the Respondent.
4. Subsequently, Complainant was interviewed for the position by Sharon Corey, Respondent Nurse Recruiter.
5. On or about June 14, 2002, the Respondent offered the Complainant a full-time Registered Nurse position with its Nursing Department with a base rate of \$27.20 per hour.
6. On or about July 8, 2002, Complainant commenced her employment with the Respondent.

7. Complainant was asked to submit to a photograph for identification purposes, which would be placed on her employee identification badge.

8. In response to this request, Complainant informed Respondent's Assistant Vice-President, Ollie Young, that she could not submit to a photograph because of her religious beliefs.

9. On or about July 9, 2002, Ms. Young informed Complainant that unless she submitted to a photograph for identification purposes, that she could not continue her employment with the Respondent.

10. Complainant informed Ms. Young that her religious beliefs prevented her from submitting to a photograph.

11. Ms. Young informed Complainant that Respondent's attorney had advised her that Complainant could not work for Respondent without a photograph identification.

12. On or about July 9, 2002, Respondent terminated Complainant from employment because she refused to submit to a photograph for identification purposes.

13. On or about July 15, 2002, Paul Bartolomeo, Jr., Complainant's attorney, contacted Ms. Young, via correspondence, and explained that Complainant was willing to submit to any reasonable alternative method of identification. A copy of the letter will be included as a docket entry in this case at time of hearing.

14. On or about August 5, 2002, Mr. Bartolomeo contacted Howard Trubman, Respondent's attorney, via correspondence suggesting a number of possible identification measures which could be used as a reasonable accommodation for Complainant's religious beliefs. A copy of the letter will be included as a docket entry in this case at time of hearing.

15. On or about August 20, 2002, Mr. Trubman, via correspondence, stated that Respondent would not be able to offer an accommodation to Complainant in order for her to avoid photographic identification and did not suggest or provide any other alternative reasonable accommodation to the Complainant's religious beliefs. A copy of the letter will be included as a docket entry in this case at time of hearing.

16. On or about August 2, 2002, Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number 200200633. A copy of the complaint will be included as a docket entry in this case at time of hearing.

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

18. In correspondence dated July 29, 2004, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that the Commission believed that probable cause existed to credit the allegations found in the complaint.

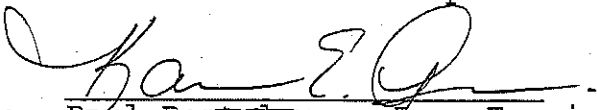
19. Subsequent to the determination of probable cause, Commission staff and the parties attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but were unable to do so.

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



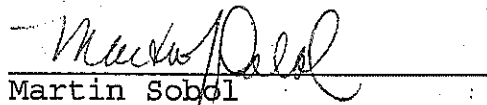
Charles L. Nier, III  
Assistant Chief Counsel  
(Counsel for the Commission  
on behalf of the Complainant)

4/27/05  
Date



Paul Bartolomeo, Jr., Esquire  
(Counsel for the Complainant)

4/27/05  
Date



Martin Sobol  
(Counsel for the Respondent)

4/27/05  
Date

## FINDINGS OF FACT \*

1. The Complainant in this case is Karen Green (hereinafter "Green"), an adult who holds a sincere religious belief that the Bible prohibits willfully submitting to being photographed. (N.T. 61-62; S.F. 1)
2. The Respondent is North Philadelphia Health System (hereinafter "NPHS"), a small community hospital that is open to the public. (N.T. 34)
3. NPHS operates from two locations – Girard Medical Center, a facility that is approximately 75 years old and located at 8<sup>th</sup> and Girard Streets, Philadelphia, and St. Josephs, a facility that is over 150 years old, located at 16<sup>th</sup> and Girard Streets. (N.T. 33, 88, 89)
4. The Girard Medical Center is a continuing care hospital operating a medical/surgical ICU unit, a large behavioral health department, a large methadone clinic, outpatient services, treatment offered to forensic patients from the prison system, and living space for drug and alcohol dependent individuals. (N.T. 88)
5. St. Josephs is a traditional acute care facility operating an emergency room/ICU, a medical/surgical unit, a traditional care unit, two drug units, an acute detoxification unit, and an acute rehabilitation unit. (N.T. 88)
6. Approximately 94% of NPHS's patients are subsidized in some form. (N.T. 89)
7. Both of NPHS's facilities have security guards that man security desks, patrol the facilities, and patrol the areas around the facilities. (N.T. 34, 60, 91, 92, 129)
8. The St. Josephs facility accommodates approximately 150 patients. (N.T. 119)
9. NPHS has approximately 1200 employees, of which approximately 200 to 230 are nurses. (N.T. 92, 119)
10. At the St. Joseph facility, approximately 40 nurses are assigned to a shift. (N.T. 129)

11. One or two security officers continually man the front desk at St. Joseph's. (N.T. 129)
12. At the entrances of NPHS's facilities there are security cameras. (N.T. 110)
13. All NPHS employees are issued identification badges that contain the employee's photograph. (N.T. 89, 98-99)
14. It is the policy of NPHS that when an employee comes to work without their identification badge, they are either made to sign in and then directed to human resources to get an identification badge or simply detained at the security desk until a supervisor comes to identify the employee and once identified, the employee without an identification badge is allowed in. (N.T. 107, 108, 109)
15. Individuals wanting to visit patients are not required to show photo identification, they are simply asked the room number of the person they wish to visit and given a pass and allowed to proceed into the hospital. (34, 35, 51, 55, 120)
16. Green has been a Registered Nurse for 25 years. (N.T. 30)
17. Green has worked at Saint Agnes Hospital, Hahnemann Hospital, Episcopal Hospital, Women's Hospital and although some of these facilities require employees to have photo IDs, all who required photo IDs have given Green a reasonable accommodation of her religious belief by providing Green with identification that does not include her photograph. (N.T. 30, 31)
18. After 9/11, the Pennsylvania Department of Transportation began to deny renewals of driver's licenses unless a photograph of the driver was on the new licenses. (N.T. 69)
19. Green's church, the Original Ethiopian Israelites, provided the Department of Transportation with a letter seeking exemption of their church members from the requirement to have a photograph on a driver's license. (N..26, 29)

20. The Department of Transportation granted members of Green's church, including Green, the requested exemption. (N.T. 69)
21. In June 2002, Green learned of an opening at NPHS for a Registered Nurse, and after sending in her resume, was called for an interview. (N.T. 33, 35)
22. On June 6, 2002, Green was interviewed by Sharon Corey, NCHS's Nurse Recruiter (hereinafter "Corey"). (N.T. 90)
23. At the preliminary interview with Corey, Green, because the issue was important to Green, brought up the issue of not taking pictures for religious reasons. (N.T. 37, 40, 100, 132; C.E. 21)
24. Green asked Corey if not taking a photograph would be a problem to which Corey replied, "it shouldn't be." (N.T. 37)
25. By letter dated June 14, 2002, Green was offered a full-time Registered Nurse position at NPHS's St. Josephs' facility working Sunday, Monday, and Tuesday 7:00 p.m. until 7:00 a.m. (N.T. 37-38, 95, 112)
26. Green's position would entail working strictly at the St. Josephs facility. (N.T. 113)
27. On July 8, 2002, Green reported to NPHS's 8<sup>th</sup> Street facility for orientation. (N.T. 38)
28. The orientation's final agenda item was ID card processing. (N.T. 40)
29. Anticipating that there might be a question about not wanting a picture taken, Green brought a statement from her pastor and documentation regarding her religious belief and gave these items to NPHS's Assistant Vice President, Ollie Young (hereinafter "Young"), along with stating to Young that she could not submit to a photograph for religious reasons. (N.T. 41, 98)
30. NPHS's Director of Nursing informed Green that she would be given a temporary



identification badge and that the matter would be further discussed with NPHS's legal office. (N.T. 41)

31. Green was issued a temporary identification badge. (N.T. 41-42; C.E. 9)

32. The following day, Green reported to the St. Josephs facility where she had no problems with the security officers at the front desk. (N.T. 42-43)

33. Green was admitted into the St. Josephs facility and proceeded to a designated area for continued orientation. (N.T. 42-43)

34. After lunch that day, Green was given the option of either getting her picture taken or leaving the facility. (N.T. 43)

35. Green chose to leave. (N.T. 43)

36. Upon leaving, Green went to NPHS's 8<sup>th</sup> Street facility to speak with Corey and to request documentation regarding why she was asked to leave. (N.T. 43)

37. Corey informed Green that the reason would be prepared and sent to her. However, Green never received a written reason. (N.T. 44)

38. After a few days of not receiving a written reason for her discharge, Green attempted to call Corey but learned that Corey was on a two week vacation. (N.T. 44)

39. Green then called her church's attorney, Paul Bartolomeo (hereinafter "Bartolomeo"). (N.T. 67)

40. By letter dated July 15, 2002, Bartolomeo informed Young that Green was willing to submit to any reasonable alternative method of identification. (N.T. 68; C.E. 17)

41. NPHS's attorney, Howard Trubman (hereinafter "Trubman"), replied by telephone call to Bartolomeo's July 15, 2002 letter asking for suggested alternative procedures as an accommodation of Green's religious belief. (N.T. 70, 71; C.E. 18)

42. By letter dated August 5, 2002, Bartolomeo responded with several suggested accommodations and indicated that Green was willing to take extra steps to insure security at NPHS's facilities. (N.T. 74; C.E. 18)
43. By letter dated August 20, 2002, Trubman informed Bartolomeo that NPHS was not able to offer Green an accommodation. (N.T. 74-75; C.E. 19)
44. Had Green remained a Registered Nurse with NPHS, her base rate of pay would have been \$27.20 per hour. (S.F. 6)
45. Before her termination, Green was scheduled to work 36 hours per week. (N.T. 40)
46. Because of shift differentials, on Monday and Tuesday, Green's rate of pay would have been \$29.45 per hour and on Sunday, \$32.00 per hour. (N.T. 40)
47. As part of Green's compensation package with NPHS, Green would have been given medical, dental, short-term disability, and vision coverage at no charge to Green. (N.T. 39; C.E. 7)
48. Upon her termination from NPHS, Green attempted to secure alternative employment. (N.T. 44)
49. As an interim measure, Green returned to the employment she had held prior to being hired by NPHS, Helping Hand Home Health Service, Inc. (N.T. 44, 45)
50. Green was next employed by Tenet Hospital, which later changed its name to Women's Hospital. (N.T. 46)
51. While with Tenet, aka Women's Hospital, biweekly, Green paid \$39.67 for medical coverage, \$19.75 for dental, \$8.23 for vision, and \$36.36 for short-term disability. (N.T. 46; C.E. 12)
52. On March 11, 2005, Women's Hospital closed and Green lost her job. (N.T. 47-48)

53. Following the loss of her job with Women's Hospital, Green attempted to find work. (N.T. 49-50; C.E. 15)

## Conclusions of Law

1. The Pennsylvania Human Relations Commission has jurisdiction over Green, NPHS and the subject matter of Green's complaint under the Pennsylvania Human Relations Act (hereinafter "PHRA").

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 PHRA.

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

5. To establish a *prima facie* case of religious discrimination Green must prove:

(a) That she has a sincere religious belief that conflicted with an employment requirement.

(b) That Green informed NPHS of her religious practice and...

(c) That Green was terminated because of her inability to comply with the conflicting employment requirement.

6. Green has proven a *prima facie* case of a religious-based termination.

7. Once a *prima facie* case is established, the burden of proof shifts to NPHS to show that either NPHS made good faith efforts to accommodate Green's religion or that NPHS could not do so without incurring undue hardship.

8. NPHS made no efforts to accommodate Green's religious practice.

9. NPHS failed to prove that it could not accommodate Green's religious practice without incurring undue hardship.

10. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission shall issue a cease and desist order and it may order such affirmative action as in its judgment will effectuate the purposes of the PHRA.

## OPINION

This case arises on a complaint filed by Karen Green (hereinafter "Green") against North Philadelphia Health System (hereinafter "NPHS") on or about August 2, 2002, at PHRC Case No. 200200633. In her complaint, Green alleged that NPHS failed to offer her a reasonable accommodation after she alerted it to a conflict between NPHS's requirement that employee identification badges contain a photograph of the employee and her sincerely held religious practice which prohibits submitting to photographs. Green's complaint further alleged that NPHS terminated her because of her religion. Green's claims allege that NPHS violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit Green's allegations of discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. However, those efforts were unsuccessful, and this case was approved for Public Hearing. The Public Hearing was held on April 27, 2005, in Philadelphia, Pennsylvania, before a three member panel of Commissioners. Raquel Otero de Yiengst was the Hearing Panel Chairperson, and the other two panel members were Commissioner M. Joel Bolstein, and Commissioner Dr. Daniel D. Yun. Post-Hearing briefs were submitted by the parties on July 22, 2005.

Section 5(a) of the PHRA provides in relevant part:

It shall be an unlawful discriminatory practice ...for any employer because of the ...religious creed ...of any individual ... to discharge from employment such individual ... or to otherwise discriminate against such individual ... with

respect to compensation, hire, tenure, terms, conditions or privileges of employment ... if the individual ... is the best able and most competent to perform the services required... (43 P.S. 955 (a)).

Generally, a two-part framework is applied to claims of religious discrimination. First, a Complainant must make out a *prima facie* case that a bona fide religious practice conflicts with an employment requirement and was the reason for an adverse employment action. See EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49 (1<sup>st</sup> Cir. 2002). If a Complainant can establish a *prima facie* case, the burden of proof then shifts to the Respondent to show that it offered a reasonable accommodation or, if it did not offer an accommodation, that doing so would have resulted in undue hardship. *Id.* See also Toledo v. Nobel-Sysco, 892 F.2d 1481, 51 FEP 1147, 1150 (10<sup>th</sup> Cir. 1989) *cert denied* 495 U.S. 948 (1990); Vetter v. Farmland Industries, 73 FEP 595, 608 (N.D. Iowa 1995)

Both the Respondent's and PHRC Philadelphia regional office post-hearing briefs agree that there is no dispute that the Complainant is able to establish a *prima facie* case of religious discrimination. We agree.

To establish a *prima facie* case a Complainant must prove (1) that she has a sincere religious belief that conflicted with an employment requirement; (2) that she informed her employer of her religious views and practices; and (3) that she was terminated because of her inability to comply with the conflicting employment requirement. See Gordon v. MCI Telecommunications Corp., 59 FEP 1363 (S.D. N.Y. 1992), and EEOC v. Reads, Inc., 58 FEP 49 (E.D. Pa. 1991). Indeed, Green was forced to choose between a closely held religious belief and keeping her job. Clearly, after applying the foregoing test to the facts present in this matter, the Complainant easily meets these three requirements.

Since a *prima facie* case has been shown, the proof burden shifts to the employer to prove either that the employer made good faith efforts to accommodate the employee's religious beliefs or that the employer could not reasonably do so without incurring "undue hardship". See Philbrook v. Ansonia Bd. of Education, 757 F.2d 476 (2<sup>nd</sup> Cir. 1985), *aff'd and remanded* 479 U.S. 60 (1986); Toledo 51 FEP 1150; and EEOC v. Hacienda Hotel, 881 F.2d 1504 (9<sup>th</sup> Cir. 1989).

Fundamentally, the burden to accommodate an employee's religious practices rests with the employer. See Toledo 51 FEP 1152. Indeed, an employer has the burden to undertake initial steps towards accommodation. Anderson v. General Dynamics Convair Aerospace Div., 589 F.2d 397, 401, 17 FEP 1644 (9<sup>th</sup> Cir. 1978), *cert. denied* 442 U.S. 921 (1979). An employee has no obligation to propose accommodations. Gorden v. MCI Telecommunications Corp., 59 FEP 1363, 1365-1366 (S.D. N.Y. 1992), citing Brenner v. Diagnostic Ctr. Hosp., 671 F.2d 141, 145 (5<sup>th</sup> Cir. 1982).

In NPHS's post-hearing brief, NPHS concedes that it did not attempt to accommodate Green. NPHS asserts that the only issue that is in dispute in this case is whether accommodation of Green's religious belief would have caused NPHS an undue hardship. NPHS also correctly observes that an undue hardship is incurred if the employer's accommodation requires it to assume more than a "*de minimis* cost". Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). Further, NPHS correctly submits that an employer's duty to provide a reasonable accommodation is very slight. Id. However, any proffered hardship must be actual as an employer cannot rely merely on speculation. Smith v. Pyro Mining Co., 827 F.2d 1081, 1086, 44 FEP 1152 (6<sup>th</sup> Cir. 1987). Further, "a claim of undue hardship cannot be supported by merely conceivable or hypothetical hardships...The magnitude as well as the fact of hardship must be



determined by examination of the facts of each case.” Tooley v. Martin-Marietta Corp., 648 F.2d 1239, 1243, 26 FEP 95 (9<sup>th</sup> Cir.), *cert. denied* 454 U.S. 1098 (1981).

Courts that have reviewed cases where no attempt at accommodation was made have noted that, “[I]t is possible for an employer to prove undue hardship without actually having undertaken any of the possible accommodations...” Draper v. United States Pipe & Foundry Co., 527 F.2d 515, 520, 11 FEP 1106 (6<sup>th</sup> Cir. 1975). However, employers are on stronger ground when the employer has attempted various accommodations and can point to hardships that actually resulted. Toledo 51 FEP at 1153, and Draper 11 FEP at 1109. Of course, it is conceivable that there will be times when irreconcilable conflicts will prevent even an attempt to accommodate because any such attempt would be futile. Id at 1153. Further, courts recognize that “[A]lthough conceivable, such situations will also be rare...” and because such circumstance are rare, courts have rightly been “skeptical of hypothetical hardships”. Id at 1153; see also, Gordon 59 FEP at 1366.

Accordingly, an employer who has made no efforts to accommodate the religious practice of an employee before taking action against the employee may only prevail if the employer shows that no accommodation could have been made without undue hardship. Id at 1153. Additionally, an employer cannot excuse its failure to accommodate by pointing to deficiencies in suggested accommodations made by an employee. Anderson at 401.

On the question of assessing whether there would be undue hardship, we note that any accommodation entails some hardship on an employer, and also recognize that undue hardship is something greater than hardship and observe that an employer does not sustain its burden of proof merely by showing that an accommodation would be bothersome to administer or disruptive of an operational routine. See Cummins v.

Parker Seal Co., 516 F.2d 544 (6<sup>th</sup> Cir. 1975); Draper 11 FEP at 1109; and Gorden 59 FEP at 1366, citing Smith v. Pyro Mining Co., 827 F.2d 1081, 1085, 44 FEP 1152 (6<sup>th</sup> Cir. 1987). Of particular note, we are mindful that even in this post 9/11 world of real and ever present safety and security concerns, Penn DOT considered the question of drivers licenses without photo ID and has agreed to accommodate Commonwealth residents' religious practices by issuing licenses that do not include the operator's photograph. Additionally, we find considerable weight and significance in the evidence presented that portrays several other area hospitals where Green and other members of her church worked, seemingly having no difficulty accommodating an employee's religious practice of not having their photographs taken. Of course, we recognize that the determination of whether a particular accommodation works an undue hardship on an employer must be made by considering the particular factual context of each case. Protos v. Volkswagen of America, Inc., 797 F.2d 129, 134, 41 FEP 598 (3<sup>rd</sup> Cir.), *cert. denied* 479 U.S. 972 (1986).

Generally, NPHS argues that each of the six accommodations proposed by Bartolomeo in his August 5, 2002 letter to Trubman, present undue hardships that are both economic and non-economic. Bartolomeo proposed the following:

- 1) The currently used identification card could bear the employee's fingerprint instead of a photograph. If not already in place, there could be a centralized identification system, whereby any authorized representative of the hospital could check the authenticity of the print against a master print in the centralized office.
- 2) As an additional means of identification, the identification card could bear a signature, which again could be matched to the central personnel file.
- 3) The identification card could bear a verbal description of physical characteristics, in as much as you would like, so as to provide further means of independent identification.

- 4) Ms. Green could be required to carry with her, or have access to, additional recognized means of identification, such as a Birth Certificate or Driver's License (already exempt from photo identification).
- 5) The hospital could require Ms. Green to report to a designated security officer each day, or on a periodic basis, and/or could be required to sign in and sign out. The employee could be given a confidential PIN number, which would be particularly useful in the event her identification card is lost or stolen.
- 6) The identification card could bear some sort of code (color-code, bar-code, etc.) to prevent duplication.

By letter dated August 20, 2002, Trubman responded to Bartolomeo by indicating that NPHS would not accommodate Green. (C.E. 19) Trubman generally articulated that the safety of both other employees and patients would be compromised if Green was allowed to work without a photo ID. Trubman's letter cited two cases purportedly in support his safety argument: Kalsi v. N.Y.C. Transit Authority, 62 F.Supp 2<sup>nd</sup> 745, 78 FEP 1705 (E.D. N.Y. 1998), aff'd 189 F.3d 461; and Worthy v. Steel Corp., 616 F.2d 698, 701 (3<sup>rd</sup> Cir. 1980). Additionally, Trubman generally stated that to provide an accommodation would pose an undue hardship.

NPHS's post-hearing brief challenges several of the six proposed accommodations on the grounds that they are too costly and therefore would bear more than de minimus hardships. NPHS submits that there would be no extra money to incorporate costly measures to accommodate Green and that 94% of those served by NPHS receive some form of subsidy. NPHS further challenges all of the proposed accommodations by suggesting that to allow Green to be exempt from having a photographed ID would compromise safety.

First, regarding the issue of safety, NPHS submits that security is important to NPHS because of its location in the heart of North Philadelphia, because of its clientele, and because methadone is kept on the property. Additionally, NPHS suggests that the primary responsibility of security personnel is to safeguard patients, staff, and the

facilities. In fact, NPHS's post-hearing brief points to the testimony of Corey who offered the opinion that the reason employees of NPHS wear badges is for the safety of the patients. (N.T. 120) NPHS observed that Corey "surmised" that when a nurse has her photograph on her ID badge, patients are made to feel more comfortable.

Regarding the fact that visitors do not have to show a photo ID but are admitted into the facility after simply stopping at the security desk, indicating which patient they are there to see and signing in, Corey offered that the difference was that visitors neither treated patients, nor handled scalpels, needles or drugs. Additionally, Corey offered that employees with ID badges can gain access to pharmacological areas and areas where medical instruments are kept while visitors cannot.

NPHS principally relies on the Kalsi case in support of the safety argument posed. In Kalsi, a Sikh transit authority subway car inspector sought exemption from wearing a hard hat on religious grounds. Kalsi was denied the exemption and when Kalsi subsequently refused to wear the protective hat, he was terminated. The hard hat policy was found to have been designed to avoid potential head injuries from various hazards inspectors would encounter. In Kalsi, there had been a thorough review of the potential hazards before implementing the hard hat policy. The court found that the job held by Kalsi indisputably had safety hazards and that the transit authority's hard hat policy was justified by a legitimate interest in protecting employees from workplace hazards.

The Kalsi court noted that when a proposed accommodation threatens to compromise safety in the workplace, the employer's burden of establishing an undue burden is light indeed. Kalsi at 1715 Further, safety considerations are highly relevant in determining whether a proposed accommodation would produce an undue hardship. Id at 1715, citing Draper 527 F.2d at 521.

Unlike the real safety hazards found to exist in Kalsi, the purported safety concerns articulated by NPHS in the present case are clearly distinguishable. First, the safety hazard in Kalsi concerned potential physical injury to Kalsi if he were permitted an exemption to the authority's hard hat policy. Here, no similar physical injury exposure is associated with not having a photo on an ID badge. Additionally, in Kalsi, there had been a comprehensive evaluation of the need for hard hats considering the nature of the hazards present in the work place. Here, the evidence that accommodating Green would pose a safety issue was in the form of Corey's testimony only. As a whole, Corey's testimony offered no concrete basis for her conclusive statements that safety would be compromised. Corey's testimony was mostly vague and relied principally on what can best be described as hypothetical speculation. Interestingly, NPHS did not present the testimony of anyone directly associated with its security department. Instead, only Corey, NPHS's Nurse Recruiter whose primary job was to advertise for openings, and interview applicants, testified. Indeed, Corey was not even aware of how many security personnel were employed by NPHS. Corey testimony included the admission by her that she was "not a security expert." (N.T. 110).

Although Corey's testimony concluded that if Green did not have a photo ID, she would be a safety risk, Corey made no attempt to provide a detailed explanation of what security and safety implications would be implicated. Also, Corey did not attempt to connect how having a photo ID would alleviate any specific safety issue. As far as patient comfort, we find that Corey's testimony was clearly speculative. Quite clearly, if a patient ever even noticed that a nurse's ID badge did not have a photo, a supervisor could readily ease such a patient's concerns.

When NPHS suggests that safety would be compromised with respect to access to medical instruments and methadone, Corey admitted that doors to drugs were

locked. Apparently, access to such areas would require more than a photo ID badge. It was clear that getting drugs required a pharmacy request not simply a photo ID.

By all appearances, NPHS facilities are generally open to the public. To obtain a visitor's pass, a visitor needs only to sign in at the security desk. Security does not even require the showing of a photo ID of any sort before a visitor's pass is issued. Clearly, the professed concern for security and safety was fundamentally contradicted by an extremely relaxed visitor policy.

NPHS's policy with regard to when an employee comes to work without their ID badge further illustrates that NPHS's purported concern for safety is a pretext. Whenever an employee comes to work without their photo ID, they are either directed to the human resources department to get a temporary badge or detained at the security desk until a supervisor comes and identifies the employee. Once a supervisor confirms the identity of such an employee, the employee is allowed in. (N.T. 108).

Finally, when Green refused to have her picture taken as the last agenda item of her orientation, she was given a temporary badge. On Green's second day of work, she then used that temporary ID badge at the front desk and without incident or problem of any kind, Green was admitted to work at the St. Joseph's facility. It was not until later in the day that Green was given the ultimatum to either submit to being photographed or to go home.

Turning to the question of cost, NPHS argues that many of the suggested accommodations offered by Bartolomeo would require expending money NPHS does not have. Nowhere in the record can evidence be found regarding even an estimate of any costs associated with any proposed accommodations. Indeed, NPHS has not presented facts necessary to evaluate the potential hardship that would flow from any of the suggested alternatives. While the cost of an alternative need not be ascertained

with exactitude, it still must be “present and real”. See Vetter v. Farmland Industries, 73 FEP 595, 611 (N.D. Iowa 1995).

In this case, even if all the accommodations suggested by Bartolomeo were found to cost amounts deemed to be more than de minimus, NPHS has neglected to consider that the duty to come up with a possible workable accommodation is on NPHS and not on Green. Clearly, Green’s suggestions are not the universe of possible ways Green could have been accommodated. As noted above, an employer cannot simply point to purported deficiencies in an employee’s suggested accommodations. Toledo 59 FEP at 1152. Instead, an employer must fully investigate potential compromises that might allow an employee to keep their job. See EEOC v. Reads, Inc., 58 FEP 49, 58 (E.D. Pa. 1991).

Here, the record demonstrates that NPHS has security cameras located at each entrance. (N.T. 110). It is readily apparent that Green could have been issued an ID badge without her photograph and to insure only Green used that ID badge, a photograph could have been made from the security camera tape and then posted at each security station. Then, on each instance that Green presented herself for admission to St. Josephs, the security officer on duty could simply review the posted photograph of Green to insure her identity. Green clearly testified that this process would not have violated the requirements of her religion. The critical aspect of her religious practice operating in this instance was a prohibition against willingly submitting to having a photo taken. If her image was photographed without her knowledge by a security surveillance camera, such a circumstance would not present a religious conflict to Green.

Instead of taking time to investigate and seek a workable compromise, NPHS simply rejected the six accommodation suggestions made by Bartolomeo. The law

requires more of an employer. The record in this case demonstrates that NPHS could have but did not make reasonable efforts to investigate the issue presented and consider possible sensible and inexpensive existing solutions. NPHS has instead relied on the position that anything that might have been done would pose an undue hardship. On this fundamental point, we find that NPHS has failed to present sufficient evidence that accommodating Green would have either compromised security and safety or that NPHS would have incurred more than de minimus costs.

Since NPHS fails to sustain its burden of proof, consideration of an suitable remedy is appropriate.

Section 9(f) of the PHRA provides in pertinent part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding 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, reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement...with or without backpay...and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice...as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

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

The first aspect we must consider regarding making Green whole is the issue of the extent of financial losses suffered. When complainants prove an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co. Inc., 684 F2d 1355, 29 FEP 1259 (11<sup>th</sup> Cir. 1982). A proper basis for calculating



lost earnings need not be mathematically precise but must simply be a “reasonable means to determine the amount [the complainant] would probably have earned . . . .” PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975), aff’d, 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., 46 FEP 720 (3<sup>rd</sup> Cir. Mar 29, 1988).

In this case, Green submits that she should be completely reimbursed for lost wages based upon established wage rates through the date of this order adjusted by subtracting her interim earnings. Additionally, Green seeks front pay until such time as NPHS offers Green employment or Green rejects such an offer.

Green asserts that she made reasonable attempts at mitigation. Courts consistently hold that it is a respondent’s burden to produce evidence of a lack of diligence in pursuing other employment in mitigation. See Jackson v. Wakulla Spring & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F.2d 1132 (5<sup>th</sup> Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7<sup>th</sup> Cir. 1981); Maine Human Rights Comm. V City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EDP 36,968 (Michigan Court of Appeals 1986). Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort. It is a respondent, not a complainant, who has the burden of establishing that the complainant failed to make an honest, good faith effort to secure employment. Id. At 46,704.

Regarding whether Green mitigated her damages, the evidence shows that shortly after her termination, Green returned to the position she held before being hired by NPHS. Subsequent, in early 2003, Green was hired by Tenet Health. Tenet Health

later became Women's Medical Hospital. However, on or about March 11, 2005, Women's Medical Hospital closed. Of course, this resulted in Green losing her job.

Green testified that upon the loss of her job at Women's Medical Hospital, she renewed mitigation efforts. Indeed, at the time of the public hearing, Green was in the process of arranging interviews for two separate nursing positions.

Given the extent of Green's mitigation efforts we find that she is entitled to a full back pay award less her intern earning. First, the earnings Green would have made encompass the following:

36 hours per week- (Sunday, Monday & Tuesday 12 hours per day)  
 \$29.45 per hour Monday & Tuesday - 24 hours x \$29.45 = \$706.80  
 \$32.00 per hour on Sunday - 12 hours x \$32.00 = \$384.00  
 Weekly salary lost = \$1,090.80

Accordingly, Green's lost wages are as follows:

	From 7-10-02	
2002- (7/10/02 to end of year)	24 weeks	\$26,179.20
2003		\$56,721.60
2004		\$56,721.60
2005 - 42 weeks @\$1090.80	=	\$45,813.60
	Total earnings lost =	\$185,436.00

In mitigation Green earned the following:

Remainder of 2002	\$11,957.75
2003	\$54,051.30
2004	\$45,479.93
Until loss of job in 2005	\$13,509.00
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Intern Wages	\$124,997.98

Accordingly, unless Green had additional intern earnings between the public hearing and the date of this order, her lost wages amount to \$60,438.02. In the event Green earned wages between the date of the public hearing and the present, such earning shall be deducted from the lost wages order that follows. the PHRC is also authorized to award interest on the back pay award. Goetz v. Norristown Area School District, 16 Pa. Cmwlth Ct. 389, 328 A.2d 579 (1975).

Further, it is appropriate that NPHS be ordered to reinstate Green and provide her with an accommodation of her religious practice. Until NPHS either offers Green reinstatement or Green rejects such offer, Green is also entitled to front pay in the amount of \$1,090.80 per week minus any interim earnings Green makes.

Next, Green is entitled to verifiable out-of-pocket expenses. Without contradiction, Green testified that as an NPHS employee she would receive medical, dental, short-term disability, and vision benefits. While an employee of Tenet/Women's Medical Hospital, Green paid \$103.64 per pay period for those benefits. Since Green was employed by Tenet/Women's Medical Hospital for approximately 52 pay periods, Green is entitled to reasonable out-of-pocket expenses of \$5,389.28. Additionally, Green testified that she incurred parking expenses of \$16.00 per instance when she visited the PHRC Philadelphia regional office up to 5 times regarding matters involving her case. Accordingly, Green is entitled to \$72.00 as certifiable travel expenses.

Finally, the PHRC regional office post hearing brief recommends an order requiring training for NPHS managers on their obligations regarding reasonable accommodation of an employee's religious practices.

An appropriate order follows.





2. That NPHS shall pay to Green within 30 days of the effective date of this Order the lump sum of \$60,438.02, which amount represents back pay lost for the period between July 10, 2002 and the date of this Order. In the event that Green has earned wages between the date of the Public Hearing of this matter and the present, the amount so ordered may be reduced by the interim wages earned by Green in that period.

3. That NPHS shall pay additional interest of 6% per annum on the back pay award, calculated from July 10, 2002 until payment is made.

4. That NPHS shall offer Green reinstatement into the next available nursing position.

5. That until either NPHS offers Green reinstatement into a nursing position or Green rejects such an offer, NPHS shall pay Green front pay in the amount of \$1,090.80 per week. In the event Green is working at the date of this order or, if not, subsequently finds alternative work that pays her less than \$1,090.80 per week, the amount of front pay shall be reduced by the wages Green earns.


6. That NPHS shall pay Green within 30 days of the date of this Order, the sum of \$5,389.28, which amount represents reasonable out-of-pocket expenses incurred by Green following her termination.

7. That NPHS shall reimburse Green \$72.00, which represents the certifiable travel expenses incurred by Green in matters involving her complaint.

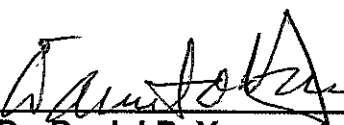
8. That NPHS shall facilitate training of all its management employees that is designed to educate such managers about their responsibility to fully investigate possible alternative reasonable accommodations of employee religious practices and to then offer to accommodate those religious practices so long as such accommodations do not cause an undue hardship.

9. That NPBS shall report the means by which it will comply with this Order, in writing, to Charles L. Nier, III, PHRC Assistant Chief Counsel, within thirty days of the date of this Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

By   
\_\_\_\_\_  
**Stephen A. Glassman**  
**Chairperson**

**ATTEST:**

  
\_\_\_\_\_  
**Dr. Daniel D. Yun**  
**Secretary**