

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION


Sherri Hahn,	:
	:
Complainant	:
	:
v.	: PHRC Case No. 200303174
	:
	:
West Easton Athletic Association, Inc.,	:
	:
Respondent	:

STIPULATIONS REGARDING PROCEDURAL PREREQUISITES

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 Sherri Hahn (hereinafter "Hahn").
2. The Respondent herein is West Easton Athletic Association, Inc. (hereinafter "Respondent").
3. Hahn is a competent adult female.
4. Respondent, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
5. On or about June 10, 2003, Hahn filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Respondent at PHRC No. 200303174. A copy of the complaint will be included as a docket entry in this case at time of hearing.
6. On or about February 3, 2004, Respondent filed an answer to the complaint at PHRC No. 200303174. A copy of the answer will be included as a docket entry in this case at time of hearing.
7. In correspondence dated July 6, 2005, Commission staff notified Hahn and the Respondent that probable cause existed to credit the employment allegations found in the complaint.

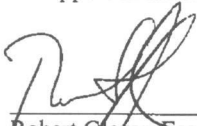
8. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matters in dispute among the parties by conference, conciliation and persuasion.
9. The remedies being sought at the public hearing relate solely to the employment allegations of the complainant.
10. In correspondence dated September 20, 2006, the Commission notified Hahn and the Respondent that a public hearing had been approved for case no. 200303174.
11. All procedural prerequisites for the Commission to convene a public hearing have been met.



Ronald W. Chadwell, Esquire
PHRC Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

2/15/08

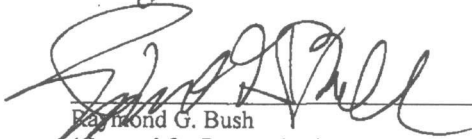
Date



Robert Glazer, Esquire
(Counsel for Complainant)

2/17/08

Date



Raymond G. Bush
(Counsel for Respondent)

2/15/08

Date

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION


Shirley Spencer, :
 :
 Complainant :
 :
 v. : PHRC Case No. 200303175
 :
 :
 West Easton Athletic Association, Inc., :
 :
 Respondent :

STIPULATIONS REGARDING PROCEDURAL PREREQUISITES

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

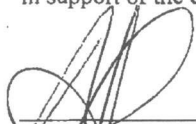
1. The Complainant herein is Shirley Spencer (hereinafter "Spencer").
2. The Respondent herein is West Easton Athletic Association, Inc. (hereinafter "Respondent").
3. Spencer is a competent adult female.
4. Respondent, at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
5. On or about June 10, 2003, Spencer filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Respondent at PHRC No. 200303175. A copy of the complaint will be included as a docket entry in this case at time of hearing.
6. On or about February 3, 2004, Respondent filed an answer to the complaint at PHRC No. 200303175. A copy of the answer will be included as a docket entry in this case at time of hearing.
7. In correspondence dated July 5, 2005, Commission staff notified Spencer and the Respondent that probable cause existed to credit the employment allegations found in the complaint.

8. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matters in dispute among the parties by conference, conciliation and persuasion.
9. The remedies being sought at the public hearing relate solely to the employment allegations of the complainant.
10. In correspondence dated September 20, 2006, the Commission notified Spencer and the Respondent that a public hearing had been approved for case no. 200303175.
11. All procedural prerequisites for the Commission to convene a public hearing have been met.




Ronald W. Chadwell, Esquire
PHRC Assistant Chief Counsel
(Counsel for the Commission
in support of the complaint)

02/15/08
Date



Robert Glazer, Esquire
(Counsel for Complainant)

2/5/08
Date



Raymond G. Bush
(Counsel for Respondent)

2/5/08
Date

FINDINGS OF FACT *

1. The Respondent, West Easton Athletic Association, Inc., (hereinafter "Athletic Association"), is a social club located at 402 5th Street, West Easton, Pennsylvania.
(N.T. 39, 40)
2. The principal objective and purpose of the Athletic Association is to provide a place for club members to gather socially and to promote athletics within the community. (N.T. 253, 254; C.E. 1)
3. The Athletic Association has a Pennsylvania liquor license and serves to members and guests, food that is prepared in the club's kitchen. (N.T. 40, 256)
4. In and about 2003, the Athletic Association had over 1,000 members. (N.T. 42)
5. According to the Athletic Association's Constitution and Bylaws that were effective in 2003, males over 21 years of age could become regular members while females could only become social members. (N.T. 44, 47, 49, 50, 69, 169; C.E. 1)
6. The Officers of the Athletic Association included: President, Vice President, Recording Secretary; Financial Secretary; and Treasurer. (C.E. 1)
7. The Athletic Association also had a Board of Directors that consisted of 5 members.
(N.T. 89; C.E. 1)
8. Pursuant to Article IV, Section 6 of the Athletic Association's Constitution and Bylaws, the Board of Directors has the authority to hire and fire any employees and to fix their salaries and wages. (N.T. 56, 71, 88; C.E. 1)

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

N.T.	Notes of Testimony
C.E.	Complainant's Exhibit
R.E.	Respondent's Exhibit

9. A Board of Director's action involving the hiring or firing of an employee could be vetoed by 2/3rds of members attending a meeting and voting by written ballot. (C.E. 1)
10. In 2003, the Athletic Association had approximately 12 to 15 employees. (N.T. 42, 90)
11. Social members were permitted to be employees and in 2003, a number of the Athletic Association's employees were female. (N.T. 69, 70, 214)
12. Complainant, Sherri Hahn, (hereinafter "Hahn"), first became an employee of the Athletic Association in or about 1997. (N.T. 93)
13. Hahn began as a Short Order Cook working in the kitchen and later also began to bartend. (N.T. 58, 94, 125)
14. Hahn first came to the Athletic Association not to seek employment but to only support a friend of hers who was looking for a job as a waitress. (N.T. 92)
15. Hahn was encouraged to also work there and to just try it for a few weeks. (N.T. 123)
16. Hahn's principal job was as a supervisor at A & H Sportswear. (N.T. 91)
17. Hahn's date of birth is August 21, 1948. (N.T. 121)
18. When she was first hired, Hahn was given a social membership in the Athletic Association. (N.T. 94)
19. When she worked as a Short Order Cook or Bartender, Hahn was paid hourly plus tips. (N.T. 94)
20. Complainant, Shirley Spencer, a life member in the Athletic Association first became a social member in the 1950's. (N.T. 169, 215)
21. Shirley Spencer's date of birth is June 9, 1932. (N.T. 168)
22. In 2003, Article VI, Section 1 of the Athletic Association's Constitution and Bylaws stated that "Any one member shall be eligible to one office only of the Association including the position of Steward or Assistant Steward." (C.E. 1)

23. In or about 2001, Sam Heard, (hereinafter "Heard"), the Athletic Association's Steward and then head of the Board of Directors, approached Shirley Spencer and asked her if she would perform his Steward duties for a few months while he was going to be out having open-heart surgery.

(N.T. 96, 171, 174, 205)

24. When Heard approached Shirley Spencer, she expressed concern that some members might be mad that a woman was doing Steward duties. (N.T. 175, 177)

25. As Shirley Spencer had never done any of the duties of the Steward, Heard taught her to ready the facility to open each day at noon, to order supplies and do the books, to check the cash register, to count the finances and receipts, and to arrange bands to play on the weekends. (N.T. 55, 172, 173)

26. Shirley Spencer agreed to do a personal favor to Heard and began performing these duties in Heard's absence for no pay. (N.T. 83, 177-178, 209)

27. After his surgery, Heard did return for a short while but then went out again to have foot surgery. (N.T. 177)

28. Shirley Spencer asked Heard how much longer he would be out and Heard then approached Hahn to ask her to assist Shirley Spencer. (N.T. 178)

29. Heard asked Hahn if she would train to work the register, do small games of chance, and to ready the bar for the next day. (N.T. 96, 127, 130, 131, 155)

30. Hahn agreed to assist Shirley Spencer and at first she worked in the capacity of Shirley Spencer's assistant as an unpaid volunteer. (N.T. 98, 130)

31. At this point, Hahn was working three jobs for the Athletic Association: Kitchen, Bartending, and assisting Shirley Spencer. (N.T. 102, 133)

32. When Heard did not return to his duties, Shirley Spencer asked to be compensated. (N.T. 210)

33. In or about January 2003, the then Board of Directors termed the position Shirley Spencer held as Temporary Bar Manager, and Hahn's position as Temporary Assistant Bar Manager. (N.T. 263, 330)
34. In or about January 2003, Shirley Spencer began to be paid the salary of \$200.00 per week to perform the duties of Temporary Bar Manager, and Hahn began to be paid the salary of \$100.00 per week to perform the duties of Temporary Assistant Bar Manager. (N.T. 57, 59, 68, 100, 101, 134, 181)
35. In November 2002, Lance Day, (hereinafter "Day"), ran for the position of President of the Athletic Association. (N.T. 245)
36. Day was elected as the Athletic Association's President for a one year term to begin in January 2003. (N.T. 63, 246)
37. In January 2003, members of the Board of Directors included: William Hutnik, Sr., Chairperson of the Board, Robert Christian, Tony Curto, and Frank Spencer, Shirley Spencer's husband. (N.T. 258, 280)
38. On February 24, 2003, there was a regular meeting of the Athletic Association. (C.E. 3)
39. Women were not permitted to attend or participate in Athletic Association meetings. (N.T. 103, 182)
40. At the February 24, 2003 meeting, Day attempted to order the voiding of the appointments of Shirley Spencer and Hahn. (C.E. 3)
41. When the Board of Directors voted at the meeting on the question of Shirley Spencer and Hahn, three Board members voted to keep them. (N.T. 299, 321)
42. After the majority of the Board of Directors voted in favor of keeping Shirley Spencer and Hahn, the members present at the meeting were allowed to vote and Day's order to void the appointments of Shirley Spencer and Hahn was approved. (N.T. 270, 322)

43. During this process, Day noted that both Shirley Spencer and Hahn are females and that women are not permitted to be Stewards and that the positions being held by the women were non-existent positions. (N.T. 63, 258)
44. Following the voiding of the positions, three members of the Board submitted their resignations: William Hutnik, Sr., Robert Christian, and Frank Spencer. (84, 140, 223-224, 258-259, 280; C.E. 3)
45. After the meeting, Day yelled over to Shirley Spencer, who was in the back of the room, that he wanted her to get out of the building immediately. (N.T. 185, 186-187, 290)
46. Shirley Spencer asked Day why he had done this and Day replied that she was a woman doing a man's job and that he wanted her out of the building. (N.T. 188, 239)
47. Shirley Spencer replied that she would not leave until Day put his reasons in writing to her. (N.T. 188)
48. Robert Christian had also requested that Shirley Spencer be given a written explanation from Day regarding why her appointment to the position of Acting Bar Manager had been voided. (C.E. 3)
49. Day signed the following notice that was presented to Shirley Spencer:
- The employment of Shirley Spencer and Sherri Hahn is in violation of the constitution art. IV SEC. 1 and art. XVII sec. 1 They are performing the duties of the steward and ass. Steward witch (sic) is a job only to be performed by a active member. Steward as defined in Websters dictionary is the manager. It is there fore (sic) directed by the president that Shirley Spencer be termanated (sic) immedeatly (sic) and only permitted in the Club during hours of operation when the club is open for business. (sic) It is also directed that Sherri Hahn be restricted to meal preparation and serving food which she was hired for to take effect at club closing today.
- (N.T. 289; C.E. 3)
50. The Secretary of the Athletic Association also showed Hahn Day's letter. (N.T. 107)

51. Another Officer of the Athletic Association, Bob Rutan, came over to speak with Hahn, at which time, Hahn indicated her understanding that she could no longer bartend. (N.T. 160)
52. Rutan then told Hahn that the letter just meant that she could not be the Assistant Bar Manager any longer, to which Hahn insisted that she had to stay in the kitchen. (N.T. 160)
53. Rutan then told Hahn, "No, no, that's not true." (N.T. 160)
54. At the end of her shift on February 24, 2003, Hahn removed some personal effects from the Athletic Association and quit. (N.T. 108, 138-139)
55. That same night, three other female employees also quit: Joan Auerbach, Kate Schaffer, and Helen Hunsberger. (N.T. 110)
56. After Shirley Spencer was removed as the Bar Manager on February 24, 2003, the new Board of Directors named a new Steward, James Nagy. (N.T. 65, 273, 289)
57. Subsequent to February 24, 2003, Hahn remained a member of the Athletic Association through 2007, during which time she had visited the club several times. (N.T. 111, 141, 164).
58. Shirley Spencer also continues to be a member of the Athletic Association. (N.T. 215)
59. In May 2006, the Athletic Association amended its Constitution and Bylaws, effectively eliminating the distinction between active member and social member which had the effect of allowing women to be full members of the Athletic Association. (N.T. 53-54; C.E. 2)
60. In 2003, Shirley Spencer received \$1,800.00 in salary from the Athletic Association for her performing the duties of Bar Manager. (C.E. 7)
61. In 2003, Hahn received \$900.00 in salary from the Athletic Association for performing the duties of Assistant Bar Manager. (N.T. 100, 134)

62. In the period from January 1, 2003 until February 24, 2003, Hahn also received wages from the Athletic Association of \$668.00 for her other duties in the kitchen and bartending. (N.T.121; C.E. 5)
63. After February 24, 2003, Hahn continued working her principal job with A & H Sportswear. (N.T. 123)
64. Hahn also worked approximately one to two days per month at another private club in the area, Castle Club, where she earned \$6.50 per hour. (N.T. 111, 113, 141)
65. Additionally, Hahn twice worked as a bartender at parties held by a local Doctor where she earned \$12.00 per hour. (N.T. 111, 113, 141)
66. In or about 2004, Hahn also applied for the job of Manager at Castle Club, but she was not hired. (N.T. 112, 113, 142)
67. Otherwise, Hahn did not apply to work anywhere else after leaving the Athletic Association on February 24, 2003. (N.T. 114, 143)
68. Shirley Spencer has been on Social Security since she turned 65 in 1998 and her health is not good as she suffers from leukemia. (N.T. 198, 227, 228, 230)
69. Shirley Spencer did not look for alternate employment after February 24, 2003. (N.T. 219)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over both Hahn and Shirley Spencer, the Athletic Association and the subject matter of both Hahn's and Shirley Spencer's complaints under the Pennsylvania Human Relations Act ("PHRA").
2. The parties have fully complied with the procedural prerequisites to a consolidated Public Hearing in these matters.
3. Hahn and Shirley Spencer are individuals within the meaning of Section 5(a) of the PHRA.
4. The Athletic Association is an employer within the meaning of the PHRA.
5. The complaints filed in these cases satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discriminating against individuals because of their sex.
7. Hahn and Shirley Spencer have both presented direct evidence that their employment as Assistant Bar Manager and Bar Manager was terminated because they are females.
8. The Athletic Association has failed to prove by a preponderance of the evidence that either Hahn or Shirley Spencer would have been terminated absent the impermissible factor that they are females.
9. The PHRC has broad discretion in fashioning an award after a finding of discrimination.

OPINION

These cases arise on complaints filed by Sherri Hahn, (hereinafter "Hahn"), and Shirley Spencer, against West Easton Athletic Association, Inc., (hereinafter the "Athletic Association") on or about May 27, 2003, at PHRC Case Nos. 200303174 and 200303175. In Hahn's complaint, she alleges that on February 24, 2003, the Athletic Association terminated her from her position as Acting Assistant Bar Manager because of her sex, female. Hahn's claim alleges that the Athletic Association 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"). In Shirley Spencer's complaint, she alleges that on February 24, 2003, the Athletic Association terminated her from her position as Acting Bar Manager because of her sex, female, also alleging that this violated the PHRA.

Pennsylvania Human Relations Commission, (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit both Hahn's and Shirley Spencer's allegations of unlawful discrimination. The PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. However, these efforts were unsuccessful, and these cases were approved for Public Hearing. A consolidated Public Hearing was held on February 5, 2008, before a three member panel of Commissioners consisting of M. Joel Bolstein, Panel Chairperson; Timothy Cuevas, Panel Member; and Daniel L. Woodall, Jr., Panel Member. Robert Glazer, Esquire, presented the case on behalf of both Hahn and Shirley Spencer. Raymond G. Bush, Esquire appeared on behalf of the Athletic Association. PHRC staff attorney William Fewell represented the state's interest in the complaint. Following the consolidated Public Hearing, the parties were afforded the right to file post-hearing

briefs. The post-hearing brief on behalf of the Hahn and Shirley Spencer was received on March 31, 2008. Neither the Athletic Association nor the PHRC regional office filed post-hearing briefs.

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

It shall be an unlawful discriminatory practice... for any employer because of the sex... of any individual... to discharge from employment such individual... if the individual... is the best able and most competent to perform the services required...

As the Public Hearing began, the Athletic Association presented a Motion to Dismiss asserting that the Athletic Association is a private club, thereby not an employer under an exception created by the PHRA. The Athletic Association's Motion was taken under advisement and is hereby denied.

Section 4(b) of the PHRA generally defines an employer to include "...any person employing four or more persons within the Commonwealth, but except as hereinafter provided, does not include ... fraternal...associations, except such ... associations supported, in whole or in part, by governmental appropriations." This section goes on to declare, "[t]he term 'employer' with respect to discriminatory practices based on... sex...includes... fraternal...associations employing four or more persons within the Commonwealth."

Here, it is clear that the Athletic Association is a fraternal association and by the language of the PHRA, is an employer for the purposes of an alleged discriminatory practice based on the sex of a Complainant. This is precisely the case in these two complaints. Each Complainant has alleged a sex-based termination from employment. Section 4(b) does exempt practices such as membership selection in a fraternal association, however, the PHRA clearly declares that on questions of discrimination with regard to employees of a fraternal association, sex-based decisions are not exempt from the PHRA's coverage.

Turning to the appropriate analytical approach in these two cases, generally, there are two approaches to use in disparate treatment allegations. See Holmes v. Bevilacqua, 794 F.2d 142, 41 FEP Cases 43 (4th Cir. 1986). The first, oft cited, analytical model involves those instances in which a Complainant relies on a judicially created inference to support the claim of intentional discrimination. See McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973). Under this model, a Complainant attempts to set forth a *prima facie* case and upon doing so, benefits from a rebuttable presumption of discrimination. At that point, the burden of production shifts to a Respondent to articulate a legitimate, nondiscriminatory reason for the action. Should a Respondent carry this light burden, the Complainant must then prove that the reason offered is pretextual and that the true reason was motivated by discrimination.

The second general model involves cases in which a Complainant presents persuasive direct evidence of a discriminatory motive to support the claim of intentional discrimination. Allison v. PHRC, 716 A.2d 689 (Pa. Commonwealth Ct. 1998); See also Bialock v. Metal Traders, Inc., 775 F.2d 703, 39 FEP Cases 140 (6th Cir. 1985). Direct evidence cases progress without the aid of rebuttable presumptions, in fact, where direct evidence is presented, the McDonnell Douglas analysis is inapplicable. New Corey Creek Apartments, Inc. and Charles Wood, Manager v. PHRC, 865 A.2d 277 (Pa. Commonwealth Ct. 2004); See also Wilson v. City of Aliceville, 39 FEP Cases (11th Cir. 1986) (citing Miles v. M.N.C. Corp., 750 F.2d 867, 875, 36 FEP Cases 1289 (11th Cir. 1985)).

Given the evidence presented in these cases, analysis under only the direct evidence model is all that is necessary. Here, both Hahn and Shirley Spencer have established that their sex was the sole reason they were terminated on February 24, 2003.

Overwhelming evidence reveals that Hahn's and Shirley Spencer's sex motivated the decision to remove them from their positions.

The post-hearing brief on behalf of Hahn and Shirley Spencer points to several circumstances that reveal an unambiguous sex-based motivation for Hahn and Shirley Spencer's removal from their positions. First, several provisions of the then applicable Constitution and Bylaws of the Athletic Association had been interpreted to say that only a full member, *ie* a male, could hold the position of Steward of the Athletic Association. Clearly, until May 2006, there were two classifications of members: full members who could only be males, and social members who could only be females. Lance Day, the President of the Athletic Association at the time of the termination of Hahn and Shirley Spencer, unquestionably interpreted the Athletic Association's Constitution and Bylaws in such a way as to become the sole motivation behind his effort to void a past Board of Director's appointment of Hahn as Assistant Bar Manager and Shirley Spencer as Bar Manager.

While the Constitution and Bylaws applicable to the Athletic Association did create two classifications of membership, the precise provisions in the Constitution and Bylaws in question simply said that "any male over twenty one (21) years of age ... may apply for membership," (Article III, Section 1), and "any male wishing to become a member... shall pay the initiation fee required and fill out and sign an application blank..." (Article XII, Section 1) and "any female wishing to become a social member ... shall pay the initiation fee required and fill out and sign an application blank..." (Article XII, Section 2). With regard to the position of Steward, all the Constitution and Bylaws said was that "any one member shall be eligible to one office only...including the position of Steward or Assistant Steward." (Article VI, Section 1)

The provision that references the position of Steward does not say that either a Steward or Assistant Steward had to be male. All the provision says is that the Steward must be a "member". Clearly, women were members of the Athletic Association, it is just that their membership was social. They were still members.

Day's reading of the Constitution and Bylaws was extremely restrictive and caused him to think that only a male could hold the position of Steward or Assistant Steward. His letter dated February 24, 2003, offering an explanation for why he initiated action that facilitated the voiding of both Hahn's and Shirley Spencer's positions makes clear that he added an extra word to the applicable Constitution and Bylaw provisions. Day added the word "active" member to reach the restrictive interpretation even though that word is not found in the Constitution and Bylaws. Indeed, during his testimony, Day admitted that gender was a consideration motivating his actions. (N.T. 291)

Indeed, the entire process used to remove Hahn and Shirley Spencer is contrary to applicable provisions of the Constitution and Bylaws of the Athletic Association. Article IV, Section 6 of the Constitution and Bylaws declares that "...[t]he Board of Directors shall have the authority to hire and discharge any employees...and shall have the authority to fix salaries and wages for the same. This authority shall be exercised and shall be absolute unless the action of the Board of Directors in such hiring and discharging of employees ... shall be vetoed by at least two-thirds of the members attending any meeting at which such veto action is taken. Any votes upon this question must be by written ballot...." Further, Article XI, Section 1 of the Constitution and Bylaws sets the time for Association meetings as the third Monday of every month. Article XI, Section 2 indicated that seven members can make a written request that the President call a special meeting for a specific purpose and that such a meeting be held only for that limited purpose.

Here, the meeting that resulted in the removal of Hahn and Shirley Spencer occurred on February 24, 2003, the fourth Monday of the month. The minutes of that meeting reflect that the meeting was a "regular" meeting and not a special meeting, thus, a discrepancy exists in the date that the meeting was held. To be a "regular" meeting, the meeting should have occurred on the 17th of February. Next, pursuant to the Constitution and Bylaws, the President does not have the authority to "void" an appointment made by the Board of Directors. Here, Day attempted to order the voiding of a Board appointment of Hahn and Shirley Spencer to the positions of Assistant Bar Manager and Bar Manager. Further, it is apparent that at the February 24, 2003 meeting, the Board of Directors voted three to two to retain both Hahn and Shirley Spencer in their positions. (N.T. 299) Then, rather than the full membership voting consistent with the applicable Constitution and Bylaw provision, a motion was made to accept the voiding of the positions. This procedure was not only irregular, but was entirely inconsistent with the Athletic Association's founding document. When Day says that he was just following the Constitution and Bylaws, it is clear that he was highly selective in what he chose to attempt to follow. He found a way to remove two women from positions they had successfully filled for considerable time.

It is clear that both Hahn and Shirley Spencer had been working in the capacity of Assistant Bar Manager and Bar Manager for well over a year before they were paid. It was only when the Board of Directors authorized salaries in January 2003, that efforts to remove Hahn and Shirley Spencer seemed to begin in earnest.

Considering the record in these consolidated cases as a whole, Hahn and Shirley Spencer have presented near conclusive evidence that they were removed from the positions of Assistant Bar Manager and Bar Manager because they are female. Accordingly, we turn to the question of whether the Athletic Association can prove by a

preponderance of the evidence that the same decisions would have been reached absent the impermissible sex-based consideration.

On this question, Day generally offered that both Hahn and Shirley Spencer were removed because the membership had become unsatisfied with their job performance. (N.T. 297, 298, 307) On this point, Day testified that he had received complaints about Hahn suggesting that she did not pay attention when she tended bar, did not interact with customers and allowed unauthorized individuals to go behind the bar in violation of LCB mandates. (N.T. 264-266) Day also offered that the members felt that neither Hahn nor Shirley Spencer had the requisite physical capabilities and were not qualified to do the jobs. (N.T. 262, 286) Day specifically testified that he had not observed Shirley Spencer doing the Bar Manager function. (N.T. 266)

Regarding the claimed job inadequacies of Hahn, all of the things Day alluded to are duties Hahn would have performed as Bartender, not the duties she was performing as Assistant Bar Manager. Furthermore, both Hahn and Shirley Spencer credibly testified that no one had ever come to either of them with complaints about their job performance while they performed the Assistant Bar Manager and Bar Manager jobs. One need only look at the February 24, 2003 meeting minutes and Day's written justification given to Shirley Spencer to know that not a single word had been mentioned in either place about any job deficiencies. We find that Day was not credible when he suggested that job performance issues led to the removal of Hahn and Shirley Spencer. In this case, Day later testified that he attempted to void the appointments of both Hahn and Shirley Spencer at the February 24, 2003 meeting not because of performance, but because it violated the Constitution and Bylaws for a woman to hold these positions. (N.T. 315)

Yet another event shows that the motivation for the removal of Hahn and Shirley Spencer was the fact that they are females. Day testified that shortly after the November

2002 election where he was elected as the next President effective January 2003, he attended a two day seminar given by the LCB. (N.T. 306) Day also indicated that he took the next Steward to the LCB school, James Nagy. (N.T. 298, 306). The problem here is that Nagy was not made the new Steward until after the February 24, 2003 termination of Hahn and Shirley Spencer. Clearly, Day had designs to remove Hahn and Shirley Spencer even before he took office. Taking Nagy to a school months before the action of the removal of Hahn and Shirley Spencer highlights the focused intent with which Day acted.

Under the circumstance of these consolidated cases, the Athletic Association fails to prove that either Hahn or Shirley Spencer would have been terminated had there not been a sex-based motivation. Accordingly, we turn to consideration of appropriate remedies.

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 had 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 back pay...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 she would have been, absent the discriminatory practice. See Albermarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975); and PHRC v. AltoReste Park Cemetery Assoc., 306 A.2d 881 (Pa. Supreme Ct. 1973).

The first aspect we must consider in order to make Hahn and Shirley Spencer whole is the issue of the extent of financial losses they each suffered. When a Complainant proves an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co., Inc., 684 F.2d 1355, 29 FEP Cases 1259 (11th 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 Cases 720 (3rd Cir. 1988).

Here, both Hahn and Shirley Spencer seek full back pay they lost by being removed from the positions of Assistant Bar Manager and Bar Manger, plus a period of front pay to be determined within the discretion of the Commission. At the time of their terminations, Hahn was earning \$100.00 per week as the Assistant Bar Manager and Shirley Spencer was earning \$200.00 per week as the Bar Manager. The period between February 24, 2003 and the date of the Public Hearing of this case on February 5, 2008 is just short of five years or approximately 255 weeks. This means that during that 255 week period, had Hahn and Shirley Spencer continued to work as Assistant Bar Manager and Bar Manager, Hahn would have earned \$25,500.00, and Shirley Spencer would have earned \$51,000.00.

Additionally, Hahn submits that she not only was removed from the Assistant Bar Manager position but that she was also constructively terminated from her other two positions, working in the kitchen and bartending. On this point, Hahn urges a finding that the work environment at the Athletic Association was sufficiently hostile to justify her leaving those jobs as well.

On this point, the evidence presented at the Public Hearing shows that Hahn's integrity had never been impugned, (N.T. 124), women were not negatively deprecated and sexist comments did not pollute the atmosphere. (N.T. 124-125, 222). There was no evidence presented that there had been an ongoing pattern of abusive conduct of any kind. Further, the evidence shows that Hahn remained a member of the Athletic Association and not only attended meetings held there, but also generally frequented the club several times. (N.T. 111, 141, 164).

Clearly, Hahn could have stayed working in the kitchen and the evidence shows that she was also told by a Board member that she also could have continued to work as a Bartender. She had not been formally terminated from these positions. The question that must be resolved is whether Hahn's working conditions in the kitchen and bartending were so intolerable that a reasonable person would have felt compelled to resign. Pa State Police v. Suders, 542 U.S. 129, 93 FEP Cases 1473 (2004). On this question, we find that Hahn's voluntary act of leaving the kitchen job and bartending job was not objectively reasonable under the circumstances and thus does not amount to a constructive termination from those duties. Accordingly, consideration of Hahn's back pay award will be limited to amounts she would have earned had she not been terminated from the position of Assistant Bar Manager.

Turning back to the total lost wages for the 255 week period from February 24, 2003 until the date of the Public Hearing, two additional considerations must be taken into account: any interim wages must be deducted and there is a question of whether reasonable mitigation efforts were made. On the question of interim wages, only Hahn earned any interim wages. In this regard, Hahn testified that twice she bartended at private parties. Hahn testified that she was paid \$12.00 per hour and worked a total of 15 hours doing these bartending jobs. Additionally, Hahn testified that she worked one to two days per month for

another private club earning between \$30.00 to \$35.00 per day. Accordingly, from Hahn's back pay award the following amounts should be deducted as interim wages:

\$12.00 x 15 hours	\$180.00
\$65.00 per month for 60 months.....	<u>\$3,900.00</u>
Total deduction	\$4,080.00

On the question of mitigation, several principles guide our decision in these cases. First, we recognize the general principle that an individual who has been victimized by discrimination has a duty to mitigate their damages. See generally, Robinson v. Septa, 64 FEP Cases 250, 253 (3rd Cir. 1993); and Booker v. Taylor Milk Co., 71 FEP Cases 525, 526 (3rd Cir. 1995). We also recognize that the burden to prove a failure to mitigate rests with the employer. See Anastasio v. Schering Corp., 838 F.2d 701, 707-708, 48 FEP Cases 1651 (3rd Cir. 1988); Gross v. Exxon Office Systems Co., 747 F.2d 885, 889, 36 FEP Cases 344 (3rd Cir. 1984); Scott v. Indiana State Prison, 82 FEP Cases 763, 767 (N.D. Ind. 2000); Robinson at 253; and Booker at 526. Further, to meet this burden, an employer must demonstrate that (1) substantially equivalent work was available, and (2) the Complainant did not exercise reasonable diligence to obtain the employment. See Booker at 526. Another court articulated the employer's burden as requiring a showing that (1) the Complainant failed to exercise reasonable diligence to mitigate damages, and (2) there was a reasonable likelihood that the Complainant might have found comparable work by exercising reasonable diligence. See Wagner v. Dillard Department Stores, 85 FEP Cases 295, 302 (M.D. N.C. 2000), (citing Gaddy v. Abex Corp., 884 F.2d 312, 318, 50 FEP Cases 1333 (7th Cir. 1989)). The Anastasio court indicated that an employer could satisfy the burden to prove a failure to mitigate by proof that the employer had offered the Complainant a job that was substantially equivalent to the position from which the Complainant was terminated or by proving that other substantially equivalent positions were available to the

Complainant and the Complainant failed to use reasonable diligence in attempting to secure such a position. Anastasio, 838 F.2d at 708, citing Wheeler v. Snyder Buick, Inc., 794 F.2d 1228, 1234, 41 FEP Cases 341 (7th Cir. 1986). The Booker court generally outlined what is meant by "substantially equivalent employment" by saying to be substantially equivalent, employment must afford virtually identical promotional opportunities, compensation, job responsibilities and status as the position from which the individual was terminated. Booker at 528.

Here, the record shows that besides the work she did bartending for private parties and the one to two days a month working at another private club, Hahn also attempted to find replacement employment after she was terminated by applying for a manager's job at the other private club where she worked. Hahn also indicated that she did not attempt to apply for a bartending job at any regular bars. Hahn submits that she felt she would not feel safe working at a bar where she might be required to close up at 2:00 a.m.

Shirley Spencer testified that she did not look for any other job after she was terminated from the Bar Manager position. She also testified that her health is not well in that she suffers from leukemia. Further, she testified that she has been on social security since she turned 65 and other than working for the Athletic Association to help Heard while he was out sick, she did not work otherwise.

Since Hahn and Shirley Spencer successfully worked a considerable time at the Athletic Association doing the duties of Assistant Bar Manager and Bar Manager, there appears to be no reason they could not have continued doing these duties. Looking at the Respondent's burden in these cases, we find that the Respondent failed to present evidence of record that either demonstrates that substantially equivalent work was available or that if such work was available, there was a reasonable likelihood that either of the Complainants would have been hired into such available positions. Clearly, the Respondent

did not offer either Hahn or Shirley Spencer a job after their terminations. Further, we give due consideration to Shirley Spencer's age and health condition, and consider such factors as legitimate excuses for her failure to get another job after she was terminated by the Respondent. See Scofield v. Bolts and Bolts Retail Stores, 21 FEP Cases 1478 (S.D.N.Y. 1979). Accordingly, we determine that the Respondent has failed to meet its burden of proof that either Hahn or Shirley Spencer failed to mitigate their damages. Accordingly, we award both Hahn and Shirley Spencer back pay for the entire 255 week period between February 24, 2003 and the date of the Public Hearing of these cases, minus the interim wages earned by Hahn. Accordingly, we recommend the following back pay awards:

Hahn

\$25,500.00 minus \$4,080.00 \$21,420.00

Shirley Spencer

..... \$51,000.00

In the exercise of our discretion, we decline to recommend any award of front pay in these cases. Further, the PHRC is authorized to award interest on back pay awards. Goetz v. Norristown Area School District, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975).

Finally, consistent with the PHRA's declaration that affirmative action may be awarded as in the judgment of the PHRC will effectuate the purposes of the PHRA, we turn our attention to whether the purposes of the act would be furthered by ordering a training component. Recognizing that the provisions of the Athletic Association's Constitution and Bylaws were revised in May 2006 in such a way as to remove the distinction between male and female members, and that the then President, Day, was the principal actor in the discrimination visited on both Hahn and Spencer, we, never-the-less, recommend that a training component be ordered. Both the Officers and Board members of the Athletic

Association would benefit greatly from an in-depth tutorial regarding the Athletic Association's responsibility to refrain from discrimination.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

SHERRI HAHN, Complainant	:	PHRC CASE NO. 200303174
	:	EEOC CHARGE NO. 17FA460648
and	:	
SHIRLEY SPENCER, Complainant	:	PHRC CASE NO. 200303175
	:	EEOC CHARGE NO. 17FA460652
vii.	:	
WEST EASTON ATHLETIC ASSOCIATION, INC., Respondent	:	

FINAL ORDER

AND NOW, this 22nd day of July, 2008, after a review of the entire record in this matter, the full Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion of the Hearing Panel. Further, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own findings in this matter and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That the Athletic Association shall cease and desist from sex-based discrimination with regard to employment decisions.

2. That the Athletic Association shall pay to Hahn, within 30 days of the effective date of this Order, the lump sum of \$21,420.00, which amount represents back pay lost for the period between February 24, 2003 and February 5, 2008.

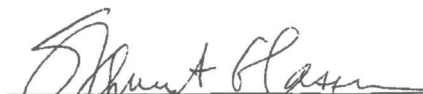
3. That the Athletic Association shall pay to Shirley Spencer, within 30 days of the effective date of this Order, the lump sum of \$51,000.00, which amount represents back pay lost for the period between February 24, 2003 and February 5, 2008.

4. That the Athletic Association shall pay additional interest at the rate of six percent per annum on the back pay awards, calculated from February 24, 2003, until payments are made.

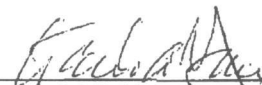
5. That the Athletic Association shall conduct training regarding the employment protections afforded employees by the PHRA and PHRC regulations. PHRC staff shall participate in the training and shall review all training materials before training is conducted. The required training shall be given to all Athletic Association Officers and Board members and shall take place by December 31, 2008.

6. That the Athletic Association shall report on the means by which it will comply with this Order, in writing to William Fewell, Esquire, PHRC Assistant Chief Counsel, within 30 days of the date of this Order.

By:


Stephen A. Glassman, Chairperson

Attest:


Dr. Daniel D. Yun, Secretary