

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

HERMAN HERRING,
Complainant

v,

TRIPLE B EQUIPMENT SERVICES, LLC,
Respondent

:
:
:
: PHRC CASE NO. 200605626
: EEOC Charge No. 17F200761719
:
:
:

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. On or about March 21, 2007, Complainant, Herman Herring, (hereinafter "Herring"), filed a PHRC Complaint against Triple B Equipment Services, LLC, (hereinafter "Triple B"), in which Herring alleged that Triple B terminated him from his position as a Mechanic because of Herring's age, 72 years old.
(O.D. 1)
 2. Under cover letter dated April 28, 2008, the PHRC's Philadelphia regional office filed a Petition for a Rule to Show Cause. (O.D. 1)
 3. On May 1, 2008, PHRC Motions Commissioner Daniel L. Woodall, Jr. issued a Rule to Show Cause which, in effect, notified Triple B that it had until June 2, 2008 to file an answer to Herring's complaint. (O.D. 2)
 4. Upon receipt of information that Triple B was not located at the address used to serve the May 1, 2008 Rule to Show Cause, on June 2, 2008, a second Rule to Show Cause was issued advising Triple B that it had until July 2, 2008 to file an answer to Herring's complaint. (O.D. 3)
 5. Triple B neither filed an answer to Herring's complaint nor responded to the June 2, 2008, Rule to Show Cause. (O.D. 4)
 6. On July 8, 2008, Motions Commissioner Woodall recommended to the full PHRC that Triple B be found liable for Herring's allegation. (O.D. 4)
- To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
O.D. Official Docket
C.E. Complainant's Exhibit

7. By Order dated July 21, 2008, the PHRC found Triple B liable for terminating Herring because of his age. (O.D. 4)
8. A public hearing on the issue of what, if any, damages are appropriate was held on February 13, 2009, in Bristol, Pennsylvania.
9. Herring worked for Triple B as a Mechanic for approximately 25 years. (N.T. 12)
10. Herring earned approximately \$37,000.00 per year when employed by Triple B. (N.T. 18-19)
11. Additionally, Triple B provided Herring with a yearly bonus equal to one week's salary. (N.T. 18-19)
12. At no cost to Herring, Triple B also provided medical benefits to Herring for himself and his wife. (N.T. 18-19)
13. On January 17, 2007, Triple B terminated Herring. (N.T. 12)
14. Soon after his termination, Herring began seeking other employment. (N.T. 13)
15. Herring initially attempted to find alternate employment by calling other companies he knew did similar work to the work he performed with Triple B. (N.T. 13)
16. Eventually, Herring formed the impression that there were no openings for positions similar to the work he had done for Triple B. (N.T. 14)
17. At that point, Herring began to look for employment in other fields of work. (N.T. 14)
18. In June 2007, Herring applied to be a bus driver with Laidlaw Transit, Inc. (N.T. 14; C.E. 2)

19. After successfully completing testing and a training program, in November 2007, Herring was offered a bus driving position transporting approximately 5 or 6 children for the remainder of the 2007-2008 school year. (N.T. 16)
20. Herring accepted this position and drove a school bus for approximately 20 hours a week, earning approximately \$10.00 per hour. (N.T. 16)
21. Subsequently, Herring was offered the opportunity to drive a school bus for the 2008-2009 school year. (N.T. 16-17)
22. Herring declined this offer because this bus route would have entailed driving approximately 50 children and making numerous stops. (N.T. 16-17)
23. Instead, Herring continued to look for other employment. (N.T. 17-18)
24. To date, Herring has not been successful finding alternate employment after declining to drive a school bus for the 2008-2009 school year. (N.T. 18)
25. Following his termination on January 17, 2007, Herring incurred the expense for alternate medical insurance for himself and his wife. (N.T. 19-20)
26. Herring obtained Plan B of Medicare at the cost of \$97.00 per month for himself and \$97.00 a month for his wife. (N.T. 19)
27. Additionally, Herring incurred an additional cost for supplemental insurance at the cost of \$107.00 for himself and \$107.00 per month for his wife. (N.T. 19-20)
28. Herring also incurred \$12.00 certifiable travel expenses in connection with pursuit of his allegation. (N.T. 20-21)
29. At some point prior to the Public Hearing, Triple B ceased operations. (N.T. 22, 24)

CONCLUSIONS OF LAW

1. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.
3. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the Pennsylvania Human Relations Commission ("PHRC") may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In this matter, Triple B's failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for Herring on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.
7. The Commission may also order a Respondent to cease and desist from discriminatory practices and to take affirmative action as, in the judgment of the Commission, will effectuate the purposes of the PHRA.

OPINION

This case arose on a complaint filed by Herman Herring, (hereinafter "Herring"), against Triple B Equipment Services, LLC, (hereinafter "Triple B"). Herring's complaint alleged that he was terminated because of his age, 72 years old. Herring's complaint states a claim under Sections 5(a) of the Pennsylvania Human Relations Act ("PHRA").

By correspondence dated April 28, 2008, the Pennsylvania Human Relations Commission ("PHRC") Philadelphia regional office petitioned Motions Commissioner Woodall for a Rule to Show Cause, indicating that Triple B had not answered Herring's complaint. The petition declared that Triple B had been served with Herring's complaint on May 8, 2007. The petition further indicated that by correspondence dated June 28, 2007 and August 21, 2007 efforts had been made to obtain an answer from Triple B.

On May 1, 2008, an initial Rule to Show Cause was issued, directing Triple B to respond on or before June 2, 2008. Subsequently, after learning that Triple B was not located at the address where the May 1st Rule to Show Cause was served, a second Rule to Show Cause dated June 2, 2008 was issued. The second Rule to Show Cause directed Triple B to respond on or before July 2, 2008. After no response was filed, on July 8, 2008, Motions Commissioner Woodall recommended a finding of liability to the full PHRC. On July 24, 2008, the full PHRC determined that Triple B unlawfully terminated Herring because of his age.

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

The public hearing on the issue of appropriate damages was held February 13, 2009, in Bristol, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Lisa M. Kaplan, PHRC Assistant Chief Counsel. Triple B failed to attend public hearing.

Since liability had been found after Triple B failed to file an answer, the only question at the public hearing was what damages Herring could establish.

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 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 a 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, 10 FEP Cases 1181 (1975); PHRC v. Alto-Reste Park Cemetery Association., 306 A.2d 881 (Pa. S. Ct. 1973).

The first aspect we must consider regarding making Herring 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 Company, Inc., 684 F2d 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).

In this case, Herring’s claim involves a loss of wages less interim earnings following his termination. Additionally, Herring seeks front pay for an additional period of four years. Had Herring remained at Triple B he would have continued to earn approximately \$37,000.00 per year until operations at Triple B ceased. During the Public Hearing, the precise date Triple B ceased operations was not revealed. Given this, calculations of lost wages will be made up to the date of the Public Hearing. Accordingly, the following calculations reflect lost earnings from the time of Herring termination on January 17, 2007 until February 13, 2009.

\$37,000.00 per year = \$711.54 per week	
2007 – 50 weeks at \$711.54 per week	\$35,577.00
2008 – 52 weeks at \$711.54 per week.....	\$37,000.00
2009 – 6 weeks at \$711.54 per week	<u>\$4,269.24</u>
TOTAL LOST WAGES.....	\$76,846.24

At the Public Hearing, Herring established that, after his termination, he made reasonable attempts to mitigate his damages. The evidence shows that soon after being terminated by Triple B, Herring began seeking alternate work. Eventually, Herring

began to work part-time as a school bus driver. The following lists Herring's mitigation efforts and interim wages:

2007 – Bus Driver for Laidlaw Transit, Inc.....	\$1,000.00
2008 - Bus Driver for Laidlaw Transit, Inc.....	<u>\$7,589.41</u>
TOTAL AMOUNT EARNED IN MITIGATION -	\$8,589.41

Deducting Herring's interim wages from his lost wages, Herring's back pay award should be \$68,256.83.

Herring testified that he also incurred medical expenses for himself and his wife. Herring is entitled to reimbursement for the medical expenses he incurred. On this account, Herring indicates that he incurred a total of \$408.00 per month to cover the medical insurance he had while working for Triple B. There is a total of 25 months between his termination on January 17, 2007 and the Public Hearing on February 13, 2009. Accordingly, the following calculation is made for reimbursable medical expenses.

25 months at \$408.00 per month.....	\$10,200.00
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Next, we turn to Herring's claim for certifiable travel expenses. Herring testified that he made 6 trips by train where he incurred a \$2.00 expense for each trip. Accordingly, he is entitled to \$12.00 for certifiable travel expenses.

Finally, Herring would have asked for reinstatement, however, he testified that Triple B ceased operations. Instead of reinstatement, Herring seeks front pay for a period of four years. On this point, the purpose of back pay compensation is to restore a Complainant to the position he would have been in absent an act of discrimination. The purpose is not to restore a Complainant to a better position than he would have been in. See Tyler v. Union Oil Co. of California, 304 F.3d 379, 89 FEP Cases 1226,

1244 (5th Cir. 2002). Herring's testimony that others with whom he worked lost their jobs when Triple B ceased operations effectively cuts off an award at the point Triple B ceased doing business. See Ordahl v. Forward Technology Industries, Inc., 301 F.Supp.2d 1022, 15 AD Cases 562 (D.C. Minn. 2004); Richardson v. Restaurant Marketing Associates, Inc., 527 F. Supp. 690, 31 FEP Cases 1562 (D.C. N. Cal. 1981); Washington v. Kroger Co., 27 FEP Cases 1739 (8th Cir. 1982); Ewald v. Wornick Family Foods Corp., 68 FEP Cases 815 (Tex. CtApp 1994).

An appropriate order follows:

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, I find that Herman Herring suffered damages. It is, therefore, my recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, I further recommend issuance of the attached Final Order

PENNSYLVANIA HUMAN RELATIONS COMMISSION

March 17, 2009
Date

By:



Carl H. Summerson
Permanent Hearing Examiner

3. That Triple B shall pay additional interest of 6% per annum on the award in paragraph 2 above, calculated from January 17, 2007 until payment is made.
4. That Triple B shall reimburse Herring \$12.00, which represents certifiable travel expenses incurred by Herring in matters involving his complaint.
5. That, within thirty days of the effective date of this Order, Triple B shall report to the PHRC on the manner of his compliance with the terms of this Order by letter addressed to Norman G. Matlock, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 110 North 8th Street, Philadelphia, PA 19107.

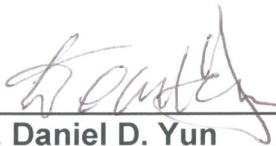
PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



Stephen A. Glassman
Chairperson

Attest:



Dr. Daniel D. Yun
Secretary