

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

KELLY KAPUSTA,
Complainant

v,

LIQUITEK, LLC,
Respondent

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PHRC CASE NO. 200701315

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. On or about September 5, 2007, Complainant, Kelly Kapusta, (hereinafter "Kapusta"), filed a formal PHRC Complaint against Liquitek, LLC, in which Kapusta alleged that Liquitek, LLC allowed her work environment to become offensive due to sexual harassment, retaliated against her when she complained about the sexual harassment, and then constructively discharged her because of her sex, female. (O.D. 1).
2. Under a cover letter dated December 27, 2007, the PHRC's Pittsburgh regional office filed a Petition for a Rule to Show Cause. (O.D. 1).
3. On January 2, 2008, PHRC Motions Commissioner Rev. Dr. James Earl Garmon, Sr. issued a Rule to Show Cause which, in effect, notified Liquitek, LLC that it had until February 4, 2008 to file an answer to Kapusta's complaint. (O.D. 2).
4. Liquitek, LLC neither filed an answer to Kapusta's complaint nor responded to the January 2, 2008, Rule to Show Cause. (O.D. 3).
5. On February 6, 2008, Motions Commissioner Garmon recommended to the full PHRC that Liquitek, LLC be found liable for Kapusta's allegations. (O.D. 3).
6. By Order dated February 26, 2008, the PHRC found Liquitek, LLC liable for the sexual harassment, retaliation and constructively discharge of Kapusta. (O.D. 3).

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

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

7. A public hearing on the issue of appropriate damages was held on July 31, 2008 in Zelienople, Pennsylvania.
8. Kapusta began working for Liquitek, LLC on or about February 2006. (N.T. 16).
9. While employed at Liquitek, LLC, Kapusta was paid \$400.00 per week. (N.T. 16, 18).
10. On March 16, 2007, Kapusta left the employ of Liquitek, LLC. (N.T. 16).
11. After Kapusta left the employ of Liquitek, LLC, she began employment with Associated Ceramics on May 25, 2007. (N.T. 16).
12. Kapusta's wages at Associated Ceramics began at \$2,600.00 per month, more than she was earning as an employee of Liquitek, LLC. (N.T. 16).

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 16 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, Liquitek, LLC's failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for Kapusta on the issue of liability.
6. Section 4(b) of the PHRA generally defines an "employer" as any person employing four or more persons within the Commonwealth.
7. The PHRA's four employee threshold requirement is a substantive element of Kapusta's claim rather than a jurisdictional prerequisite.
8. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arose on a complaint filed by Kelly Kapusta, against Liquitek, LLC. Kapusta's complaint alleged that her work environment was made offensive due to sexual harassment, that she was retaliated against when she complained about the sexual harassment and that she was constructively terminated because of her sex, female. Kapusta's complaint states claims under Sections 5(a) and 5(d) of the Pennsylvania Human Relations Act ("PHRA").

Kapusta's verified complaint was filed on or about August 28, 2007, and was subsequently amended on or about September 5, 2007. By correspondence dated December 27, 2007, the Pennsylvania Human Relations Commission ("PHRC") Pittsburgh regional office petitioned Motions Commissioner Garmon for a Rule to Show Cause, indicating that Liquitek, LLC had not answered Kapusta's complaint. The petition declared that Liquitek, LLC had been served with Kapusta's complaint on October 15, 2007. The petition further indicated that by correspondence dated November 15, 2007, efforts had been made to obtain an answer from Liquitek, LLC.

On January 2, 2008, a Rule to Show Cause was issued, directing Liquitek, LLC to respond on or before February 4, 2008. After no response was filed, on February 6, 2008, Motions Commissioner Garmon recommended a finding of liability to the full PHRC. On February 26, 2008, the full PHRC determined that Liquitek, LLC sexually harassed Kapusta, retaliated against her when she complained of the sexual harassment, and constructively terminated her because of her sex, female.

After the finding of liability in this case, conciliation efforts were attempted unsuccessfully. 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 July 31, 2008, in Zelienople, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Diane Blancett-Maddock, PHRC Assistant Chief Counsel. Kapusta was represented by Lawrence P. Lutz, Esquire, and Liquitek, LLC was represented by Miranda E. Nickles, Esquire.

Normally, after liability has been found, the only remaining question at the public hearing is what damages, if any, are appropriate. In a July 22, 2008, *Motion to Reconsider Judgment on Liability, Permit Answer to the Amended Complaint, and Stay Public Hearing* filed by Liquitek, LLC, Liquitek, among other things, LLC attempted to raise the issue of whether Liquitek, LLC is an employer under the meaning of the PHRA. In an Interlocutory Order dated July 23, 2008, the parties were informed that evidence on this issue, as well as the question of appropriate damages, would be permitted at the Public Hearing as the issue of the number of employees was considered "jurisdictional". However, since issuance of that Interlocutory Order, the question of whether Liquitek is an employer under the meaning of the PHRA is a "jurisdictional" question has been reconsidered. After careful consideration of this issue, it is hereby determined that the PHRA's threshold question under Section 5(b) regarding the number of employees required to be an "employer" under the PHRA is not a jurisdictional question, but rather, a substantive element of a claim. As such, Liquitek, LLC cannot now claim there is no merit to Kapusta's claims since the PHRC found Liquitek, LLC liable for its failure to answer Kapusta's complaint.

Section 5(a)(2) of the PHRA provides in pertinent part, "[t]he term **"employer"** includes...any person employing four or more persons within the Commonwealth..." Clearly, issues of subject matter jurisdiction may be raised at any stage of a

proceeding, see Mastrocola v. SEPTA, 941 A.2d 81 (Pa. Cmwlth. 2008). The question here is whether the question is a jurisdictional question or a question on the merits of Kapusta's claim.

In the case of Nesbit v. Gears Unlimited, 92 FEP Cases 1249 (3rd Cir. 2003), the Court of Appeals wrestled with the question surrounding the number of employees required before an entity can be an employer under Title VII. In that case, the court observed that there is a split of authority among courts of appeals around the nation. The Second, and Seventh Circuits have concluded that the number of employees is generally a substantive element a Complainant in a Title VII claim must prove. See Da Silva v. Kinsho Int'l Corp., 229 F.3d 358, 364-365, 83 FEP Cases 1714 (2nd Cir. 2000) and Johnson v. Apna Ghar. Inc., 330 F.3d 999, 1001-02, 91 FEP Cases 1593 (7th Cir. 2003) *petition for cert. filed*, 72 U.S.L.W. 3021 (U.S. Sept. 2, 2003). Additionally, in the context of the ADA, the D.C. Circuit Court has held that the fifteen-employee threshold is an element of the merits. EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621, 623-25, 6 AD Cases 1720 (D.C. Cir 1997). By contrast, the Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits declare that the number of employee threshold is jurisdictional. Nesbit at 1252.

The Nesbit court observed that subject matter jurisdiction is an adjudicative body's statutory or constitutional power to adjudicate a particular case, citing Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998). In the Steel Co. case, the U.S. Supreme Court observed that adjudicative bodies normally should not conflate subject matter jurisdiction with elements of an action's merits. Id at 90-93. Further, the Nesbit court noted that the Section of Title VII that defines an "employer" is just that, a "definitional section", not a mandated jurisdictional provision. Nesbit at 1255.

Similarly, the four employee requirement to be an employer under the PHRA is found in the PHRA's definitional section, not in a declaration of jurisdiction. In summary, the 3rd Circuit has declared that the question of whether an entity is an employer because of the number of employees it has is not a jurisdictional question, but is instead a substantive question to be established by a Complainant.

Section 12(a) of the PHRA clearly mandates that the PHRA be construed liberally for the accomplishment of the purposes of the act. Adhering to this fundamental guidance and applying the analysis of cases like Nesbit, we conclude that the question of whether Liquitek, LLC had the requisite number of employees to qualify Liquitek, LLC as an "employer" under the PHRA is a question that goes to merit. As such, when Liquitek, LLC failed to answer the Complainant's case and was found liable for Kapusta's allegations, all merit questions were found against Liquitek, LLC, including the question of whether there was sufficient employees to qualify Liquitek, LLC as an employer under the PHRA. If Liquitek, LLC wanted to have this merit based question addressed, it should have answered Kapusta's PHRC complaint.

With this initial question resolved against Liquitek, LLC, we turn to the question of appropriate damages. Under Section 9(f)(1) of the PHRA, the PHRC is empowered to order the 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, compensation for loss of work in matters involving the complaint...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..."

The U.S. Supreme Court has ruled that back pay is an integral part of civil rights protections. Abermarle Paper Co. v. Moody, 422 U.S. 405 (1975). In this fundamental pronouncement, the court noted the two-fold purpose of civil rights laws: eliminating unlawful employment discrimination and compensating the economic injuries visited upon the victim of discrimination. Albermarle Paper Co. at 417-19. Here in Pennsylvania, the Commonwealth Court has recognized that a back pay award serves not only the purpose of restoring the injured party to her pre-injury status and making her whole, but also serves to discourage discrimination. Consolidated Rail Corporation v. PHRC, 582 A.2d 702 (Cmwlth. Ct. 1990). Citing Williamsburg Community School District v. PHRC, 99 Pa. Commonwealth Ct. 206, 512 A-2d 1339 (1986).

In the Consolidated Rail Corporation case, the Court also acknowledged that the general question of mitigation of damages is a matter which lies within the sound discretion of the Commission, at 708, citing Albert Einstein Medical Center v. PHRC, 87 Pa. Commonwealth Ct. 145, 486 A.2d 575 (1985). Included within this authority given to the Commission is the more specific discretion to resolve questions regarding the duty of a Compliant to mitigate their damages. Albert Einstein Medical Center v. PHRC, 87 Pa. Commonwealth Ct. 145, 486 A.2d 575 (1985).

We first review the evidence regarding Kapusta's damages. When constructively terminated, Kapusta was earning \$10.00 per hour, and on average worked 40 hours a week. This totals \$400.00 per week in lost earnings. After leaving Liquitek, LLC, Kapusta found another job just over 2 months later. Kapusta began working for Associated Ceramics on May 25, 2007 where she began earning wages that exceeded the wages she had been earning at Liquitek, LLC.

Accordingly, Kapusta should be awarded the back pay she lost between March 16, 2007 and May 25, 2007, as follows:

Accordingly, Kapusta should be awarded the back pay she lost between March 16, 2007 and May 25, 2007, as follows:

\$10.00 per hour x 40 hours per week	\$ 400.00
\$400.00 x 10 weeks	\$4,000.00

During the Public Hearing, Liquitek, LLC presented evidence in support of its argument that Kapusta should not be awarded damages because after she left, information came to light that revealed that had she not left, she would have been terminated anyway. Liquitek, LLC argues that when she left, James Getsay, the owner of Liquitek, LLC discovered that Kpausta had not been doing her job properly, was arriving to work late and there were inconsistencies in paperwork for which Kapusta was responsible. After reviewing the evidence in support of this argument, Liquitek, LLC's argument is rejected. For over a year, records were maintained in such a way that Getsay called improper. Had the records been maintained in a way that was in fact improper, Getsay would have discovered such discrepancies much earlier. The company was a small company with each of its operations overseen directly by Getsay. Had there been errors in company records that were of concern to Getsay, something should have been said long before Kapusta left. Liquitek's argument in this regard is wholly rejected.

Finally, 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).

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

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PENNSYLVANIA HUMAN RELATIONS COMMISSION

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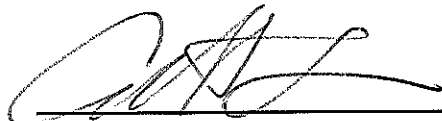
PHRC CASE NO. 200701315

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

August 20, 2008
Date



Carl H. Summerson,
Permanent Hearing Examiner

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PHRC CASE NO. 200701315

FINAL ORDER

AND NOW, this 28th day of October, 2008, after a review of the entire record in this case, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to these complaints and hereby

ORDERS


1. That Liquitek, LLC shall cease and desist from failing to timely file an answer to any future PHRC complaint that may be filed against it.
2. That Liquitek, LLC shall pay to Kapusta within 30 days of the effective date of this Order the lump sum of \$4,000.00, which amount represents back pay lost for the period between March 16, 2007 and May 25, 2007.
3. That Liquitek, LLC shall pay additional interest of six percent per annum on the back pay awards.

4. That within 30 days of the effective date of the Order, Liquitek, LLC shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Diane Blancett-Maddock, Esquire, PHRC Pittsburgh Regional Office, State Office Building, 300 Liberty Avenue, Pittsburgh, Pa. 15222-1210.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Stephen A. Glassman, Chairperson

Attest:


Dr. Daniel D. Yun
Secretary