COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MEGAN LaBREE Complainant	:	
v.	:	PHRC CASE No. 200604117 EEOC Charge No. 17F200760866
FIDELITY MORTGAGE SERVICES INC., BORIS SILAYEV, ALEX VULAKH and JANICE COONE, Respondents,	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Complainant herein is Megan LaBree (hereinafter "LaBree") an adult female who resides at 5856 Penn Street, Philadelphia, Pa. 19149. (C.E. 1).
2. The Respondents herein are: Fidelity Mortgage Services., Inc., (hereinafter "Fidelity"), Boris Silayev (hereinafter "Silayev"), Alex Vulakh (hereinafter "Vulakh"); and Janice Coone (hereinafter "Coone"). (C.E. 2, 4).
3. Fidelity is a home mortgage refinancing company located at 248 Geiger Road, Suite 201, Philadelphia, Pa. 19115. (N. T. 33, 51).
4. Silayev is Fidelity's President. (C. E. 4).
5. Vulakh is Fidelity's Vice President. (C. E. 4).
6. Coone is Fidelity's Processing Manager. (C. E. 4).
7. In November 2006, LaBree saw a newspaper ad seeking a part-time Secretary, Administrative Assistant at Fidelity. (N. T. 31, 32).
8. LaBree called Fidelity and spoke with Coone, who told LaBree that she could come in and fill out an application. (N. T. 32).
9. LaBree filled out an application and on Friday November 17, 2006, was initially interviewed by Coone. (N. T. 32-34).
10. At the time of LaBree's interview, she was almost six months pregnant. (N. T. 34).

*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

11. Approximately a week and a half later, Coone called LaBree asking her if she could start work later that day. (N. T. 34-35).

12. LaBree began working for Fidelity as a Secretary, Administrative Assistant on Wednesday, November 29, 2006. (N. T. 35).

13. LaBree's duties were to include answering the telephone, filing, light typing, and mailroom duties. (N. T. 37-38).

14. LaBree's hours were to be 3:00 p.m., to 8:00 p.m., Monday through Thursday and 3:00 p.m. to 6:30 p.m. on Fridays for a total of 23 ½ hours per week. (N. T. 35).

15. LaBree's wages were to be $10.00 per hour. (N. T. 56).

16. On her first day, while LaBree was working at her desk, Coone came to visit her and asked LaBree if she was pregnant. (N. T. 41).

17. When LaBree confirmed that she was pregnant, Coone asked her what were her plans after she had a baby. (N. T. 41).

18. LaBree told Coone that she planned to continue working, and would return to work a few days after the delivery of her baby. (N. T. 41).

19. Coone said ok, and that she was just making sure because Coone did not want to have to train someone else in a few months. (N. T. 41).

20. Before LaBree came to work on November 30, 2006, she returned a call from Coone who had left a message on her answering machine asking LaBree to call her. (N. T. 42).

21. During the telephone conversation between LaBree and Coone, Coone told LaBree that she did not know LaBree was pregnant, that she had spoken

with Vulakh and that Vulakh and Coone did not think it was a good idea for LaBree to continue working. (N. T. 43).

22. Although LaBree attempted to assure Coone that she could do the job, in effect, Coone just said that they thought it would be good for LaBree not to work at Fidelity while pregnant and asked LaBree for her address so she could send her paycheck. (N. T. 44).

23. Coone also told LaBree that they really liked her personality, it was just that with her being pregnant, they did not think it was going to work out, but that after LaBree had her baby, she could call Fidelity if she wanted to come back. (N. T. 45).

24. At that point LaBree began seeking another job by looking in the newspaper, making calls and filling out applications. (N. T. 45-46).

25. On March 7, 2007, LaBree had a child. (N. T. 46).

26. LaBree testified that after she had a baby she continued to seek employment and that she had been hired as a secretary at Ferrari Hair Replacement Institute, and was to start in two weeks, however, after a time, she never heard form them. (N. T. 47-48).

27. In February 2008, LaBree started an educational program to become a pharmacy technician. (N. T. 48, 63).

28. Classes for LaBree's educational program ended in August 2008, after which there was a 180 hour externship. (N. T. 63).

29. LaBree testified that after October 31, 2008, she fully expected to earn more than she made at Fidelity. (N. T.63).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over LaBree, Fidelity, Vulakh, and the subject matter or LaBree'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. LaBree is an individual within the meaning of Section 5 (a) of the PHRA.
4. Fidelity failed to establish that it is not an employer within the meaning of Sections 4 (a) of the PHRA.
5. The number of employees an employer has is a substantive question, not a jurisdictional issue.
6. Pregnancy based discrimination is sex discrimination.
7. LaBree presented direct evidence that she was terminated because she was pregnant.
8. Fidelity failed to show that LaBree would have been discharged absent her pregnancy.
9. As Fidelity's vice president and part owner, Vulakh, aided Fidelity's termination of LaBree by deciding to terminate her when he learned she was pregnant.
10. Whenever the PHRC 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 Megan LaBree (hereinafter "LaBree") against Fidelity Mortgage Services, Inc., (hereinafter "Fidelity"), on or about December 7, 2006, at PHRC Case Number 20060417. Generally LaBree's complaint alleged that Fidelity discriminated against her because of her sex, pregnancy, when on November 30, 2006, Fidelity terminated her. LaBree claims that Fidelity's actions violate 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"). On or about April 17, 2008, LaBree amended her complaint adding Boris Silayev, Alex Vulakh and Janice Coone as named Respondents and alleged each aided or abetted Fidelity's action in violation of § 5(e) of the PHRA.

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit LaBree's allegation of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on May 30, 2008, in Philadelphia Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner.

The Respondents did not appear at the Public Hearing and only a Post-Hearing Brief on behalf of the State's interest in the complaint was filed on August 21, 2008.

The Respondent's failure to appear at the Public Hearing results in a number of issues left unchallenged. For instance, Fidelity had earlier filed a Motion to Dismiss that suggested the PHRC lacks jurisdiction over this case because Fidelity purportedly had only three employees at all relevant times. The June 8, 2008,

Interlocutory Order denying this Motion clarified that the issue of whether Fidelity employed four or more individuals was a disputed fact question. After careful consideration of this issue, it is hereby determined that the question under Section 5(b) of the PHRA regarding the number of employees required to be an "employer" is not a jurisdictional question, but rather, a substantive element of a claim. 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 LaBree'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 International Corporation. 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 on the merits. *See* 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 at Better Environment., 523 U.S. 83, 89 (1998). In the Steel Company, 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 Fidelity had the requisite number of employees to qualify Fidelity as an "employer" under the PHRA is a question that goes to merit. As such, when Fidelity failed to appear at the Public Hearing, this question of "merit" was not challenged. If Fidelity wanted to have this merit based question addressed, it should have appeared at the Public Hearing.

Turning to the general issue arising from the substance of LaBree's allegation, we begin by observing that 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...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))

Courts in Pennsylvania have held that pregnancy-based discrimination constitutes sex discrimination proscribed by § 5(a) the PHRA; Anderson v. Upper Bucks County Area Vocational Technical School, 373 A.2d 126, 130 (Pa. Cmwlth. 1977), *citing* Cerra v. East Strowdsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973). In Cerra, the Pennsylvania Supreme Court held that a regulation requiring an employee to resign at the end of their fifth month of pregnancy violates the PHRA. The Anderson court also cited the case of Unemployment Compensation Board of Review v. Perry, 22 Pa. Cmwlth. 429, 431-32, 349 A.2d 531, 533 (1975), where the court held that an "employer may not discharge the employee for pregnancy without a showing that in her particular case, the pregnancy made her incapable of satisfactorily fulfilling her assigned tasks..."

In Freeport Area School District v. PHRC. 335 A.2d 873, 877 (Pa. Cmwlth. 1975), the court noted that the issue of pre-natal terminations of active employment is controlled in principle by the Cerra case. Again, in Cerra, the Pa. Supreme Court observed that Mrs. Cerra was terminated solely because of pregnancy. There had been no evidence that the quality of her work would be affected by the pregnancy. Further, the Court stated that "pregnant women are singled out and placed in a class to their disadvantage. They are discharged from their employment on the basis of a physical condition peculiar to their sex. This is sex discrimination, pure and simple." 450 Pa. at 213, 299 A.2d at 280.

Generally, two analytical approaches govern the proof scheme attempted in a case like this. The first, often used model, involves those cases in which a Complainant attempts to rely on a judicially created inference to support the claim of discrimination. McDonell Douglas Corp. v. Green, 411 U.S. 792 (1973). In this model, a Complainant attempts to establish a *prima facie* case and, if they can, they benefit from a rebuttable presumption of discrimination. Next, once the *prima facie* case is made out, the burden of production shifts to a Respondent to attempt to articulate a legitimate non-discriminatory reason for the action. If a Respondent carries this burden, a Complainant must prove that the reason offered is a pretext for discrimination and that a discriminatory intent actually motivated the Respondent.

The second model deals with cases where a Complainant presents direct evidence of a discriminatory motive. *See* Blalock v. Metal Traders, Inc., 775 F.2d 703, 39 FEP Cases 140 (6th Cir. 1985). In direct evidence cases, there is no rebuttable presumption because the Complainant's *prima facie* case consists of evidence of overt discrimination.

In direct evidence cases, the burden of persuasion, not just a production burden, shifts to the Respondent to prove by a preponderance of the evidence that absent the discrimination, the Respondent had a legitimate reason for the action taken and that the same decision would have been made absent the discrimination. See, Bibb's v. Block, 778 F.2d 1318, 1324, 39 FEP Cases 970 (8th Cir. 1985); and Blalock at 717.

Further, when a Complainant can present direct evidence of discrimination, resorting to the McDonnell Douglas frame work is inapplicable. Fields v. Clark University, 43 FEP Cases 1247, 1251 (1st Cir. 1987), *citing* Trans World Airlines, Inc. v. Thurston. 469 U.S. 111, 121 (1985). All that is required is for a Complainant to

show that discrimination was a "but for" cause of discrimination. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 282 n.10 (1976).

In the present case, LaBree has presented credible evidence of intentional discrimination. When Coone learned LaBree was pregnant, Coone, very shortly thereafter spoke with Vulakh who concluded that LaBree should not work for Fidelity while pregnant. Almost immediately, LaBree was told she was terminated. Despite LaBree's repeated attempts to convey that she believed she could perform all assigned tasks, she was terminated.

Clearly, LaBree's pregnancy was the sole reason for the decision to terminate LaBree. Further, Fidelity did not attend the Public Hearing, thus, Fidelity has not come forward with any evidence that the same decision would have been made absent the discriminatory reason.

Section 5(e) of the PHRA states in pertinent part:

> It shall be an unlawful discriminatory practice...[f]or any person... to aid... the doing of any act declared by [Section 5 of the PHRA] to be an unlawful discriminatory practice...

In LaBree's Amended Complaint, she added three individual Respondents: Silayev; Vulakh and Coone. In the Post-Hearing brief on behalf of the State's, interest in the complaint, at note 1 on page 17, there is a declaration that LaBree voluntarily withdraws her Section 5(e) aiding and abetting claim against Silayev and Coone. Accordingly, a Section 5(e) aiding and abetting claim will be analyzed as against Vulakh only.

In the case of Dici v. Commonwealth of Pennsylvania., 91 F.3d 542, 552-53, 71 FEP Cases 801, 809 (3rd Cir. 1996), the Third Circuit found that an individual claim under Section 5(e) of the PHRA was appropriate as against a supervisor whose

discriminatory conduct amounted to an unlawful community of purpose. Here, we find that Vulakh was vice president and part owner of Fidelity, and, in effect, made the decision to terminate LaBree after learning she was pregnant. In making that decision, Vulakh's conduct amounts to the requisite community of purpose to find that he aided Fidelity's unlawful termination of LaBree in violation of Section 5(e).

Accordingly, we turn to consideration of an appropriate award as against Fidelity and Vulakh.

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 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 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 LaBree 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 1259 (11th Cir. 1982). A proper basis for

calculating lost earnings need not to 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. Cmwlth. 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, Corporation. 46 FEP 720 (3rd Cir. 1988).

In this case LaBree, in effect, submits that she should be completely reimbursed for lost wages based upon established wage rates through October 31, 2008, adjusted by subtracting her interim earnings and giving consideration to the fact that LaBree was unavailable for work for a short time when she had her baby.

LaBree 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 (5th Cir. 1988); and Michigan Department 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 LaBree mitigated her damages, LaBree testified that shortly after her termination, she began searching for employment. Of course, on March 7, 2007, LaBree delivered a child and testified that for several days following she suspended her search for alternative employment. Further, LaBree testified that she

found it difficult to find work and that in February 2008, she went back to school in an effort to improve her chances of finding employment. (N. T. 57, 71). While in school, LaBree indicated that she worked approximated 15 hours a week and earned $10.00 per hour.

LaBree offered that by October 31, 2008, she would have fully completed the educational program to become a pharmacy technician and that she fully expected to have a job earning more than her earnings had been at Fidelity.

Because neither Fidelity nor Vulakh appeared at the Public Hearing to challenge the extent of LaBree's diligence in attempting to mitigate her damages, we find that she is entitled to a full back pay award through October 31, 2008, less her interim wages. First, the earnings LaBree would have made at Fidelity encompass the following:

23 ½ hours per week @ $10.00 per hour = $235.00.

Accordingly, LaBree's lost wages are as follows:

2006 – November 30 to the end of the year.....
4 weeks @ $235.00..... $ 940.00.

2007 - 51 weeks (1 week off for temporary disability-having a baby) @ $235.00..... $11,985.00

2008 - January 1, through October 31 –
44 weeks @ $235.00..... $10,340.00

Total earnings lost..... $23,265.00

In mitigation, LaBree earned the following:

2008 - 15 hours a week at $10.00 per hour - $ 150.00

February through October 31
39 Weeks @ $150.00 ..... $ 5,850.00

Total wages minus interim earnings..... $17,415.00

In addition to an award for lost wages, 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).

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MEGAN LaBREE	:	
Complainant	:	
	:	
	:	
v.	:	**PHRC CASE No. 200604117**
	:	**EEOC Charge No. 17F200760866**
	:	
FIDELITY MORTGAGE SERVICES	:	
INC., BORIS SILAYEV,	:	
ALEX VULAKH and JANICE COONE,	:	
Respondents,	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has proven that Fidelity violated §5 (a) of the PHRA, and that Vulakh violated § 5(e) of the PHRA. 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.

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

MEGAN LaBREE	:	
Complainant	:	
	:	
	:	
vi.	:	**PHRC CASE No. 200604117**
	:	**EEOC Charge No. 17F200760866**
	:	
FIDELITY MORTGAGE SERVICES	:	
INC., BORIS SILAYEV,	:	
ALEX VULAKH and JANICE COONE,	:	
Respondents,	:	

FINAL ORDER

AND NOW, this 23rd day of December, 2008, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves 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 as its own finding in this matter and incorporates the Findings of Fact, Conclusions of Law and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That Fidelity cease and desist from discriminating against employees because of their sex.
2. That Respondents, Fidelity, and/or Vulakh, either individually or collectively, shall pay LaBree, within 30 days of the effective date of this

Order, the lump sum of $17,405.00 being the total of her lost wages between her discharge on November 30, 2006 and October 31, 2008.

3. That Fidelity and/or Vulakh either individually or collectively, shall pay LaBree interest of 6% per annum on the back pay award, calculated from November 30, 2006, until such time as payment is made.

4. Within 30 days of the effective date of this Order, Fidelity and Vulakh shall report on the manner of compliance with the terms of this Order by letter addressed to Norman G. Matlock, Esquire, at the Commission's Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Stephen A. Glassman
Chairperson

ATTEST:

By: _____
Dr. Daniel D. Yun, Secretary