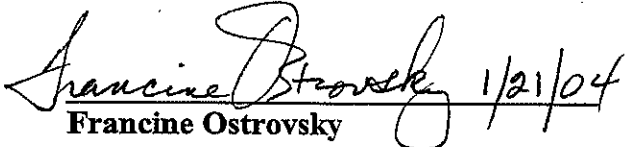



verified answer, we hereby determine that, effective January 31, 2003, the Respondent permanently laid off the Complainant from his position as a Behavior Technician because of his sex and his race.”

11. On September 23, 2003, the parties attended a conciliation conference conducted by PHRC staff, but conciliation was not successful.
12. Because conciliation has failed, the procedural prerequisites for a public hearing have been exhausted.
13. On December 9, 2003, Permanent Hearing Examiner Carl H. Summerson notified the parties that the case was placed on the Public Hearing docket at the PHRC monthly meeting on November 24, 2003.


Francine Ostrovsky
Assistant Chief Counsel
PA Human Relations Commission
(for Complainant)


Michael A. Davis, Esquire
VP General Counsel, Wordsworth
(for Respondent)

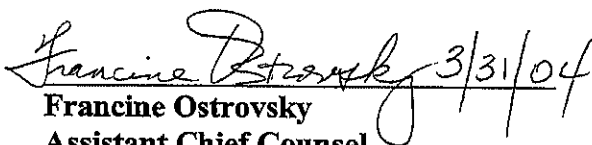
COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION


JOHNNIE V. LASSITER, JR., :
 :
 Complainant :
 :
 v. : PHRC Case No. 200207153
 : EEOC Charge No. 17FA362224
WORDSWORTH ACADEMY, :
 :
 Respondent :

ADDITIONAL STIPULATIONS

The parties hereby stipulate that the following facts are true and that no proof thereof shall be required at public hearing. The parties reserve the right to assert that these stipulated facts are not relevant and/or should not be afforded weight. These stipulations supplement those entered into on January 21, 2004.

14. Complainant and staff employed in his classification at Wordsworth-Harrisburg campus worked a 10-month school term consisting of 188 days.
15. Staff working a 10-month contract do not receive vacation days but do accrue sick days at the rate of .7 per month for a total of 7 days per school term.
16. For the 2003-2004 school term, Respondent entered into 10-month employment agreements with five individuals to perform duties at Wordsworth-Harrisburg Campus similar to those Complainant had performed under his 2002-2003 employment agreement.
17. If Respondent had continued to employ Complainant for the 2003-2004 school term, his compensation for 10-months of work would have been \$22,660.00.


Francine Ostrovsky
Assistant Chief Counsel
PA Human Relations Commission
(for Complainant)


Michael A. Davis, Esquire
VP General Counsel, Wordsworth
(for Respondent)

FINDINGS OF FACT *

1. The Complainant herein is Johnnie V. Lassiter, Jr. (hereinafter "Lassiter"), an adult who resides at 3610 Brookridge Terrace, Apt. 2, Harrisburg, PA. (N.T. 12)
2. The Respondent herein is Wordsworth Academy (hereinafter "Wordsworth").
3. Initially, on November 11, 2001, Wordsworth hired Lassiter as a Behavior Technician. (N.T. 15, 73; SF 1)
4. Lassiter and Wordsworth entered into an employment agreement for the 10-month 2002-2003 school term. (N.T. 15; CE1)
5. Under this employment contract, Lassiter's salary would be \$22,660.00, payable in 26 bi-weekly installments. (N.T.17; CE1)
6. For the 2003-2004 school term, the job title Behavior Technician was changed to Student Counselor. (N.T. 80)
7. Had Lassiter not been terminated in the 2002-2003 school term, he would have become a Student Counselor in the 2003-2004 school term. (N.T. 88)
8. The 2003-2004 compensation for a Student Counselor remained \$22,660.00. (S.F. 17)
9. Beginning very soon after his termination, Lassiter made efforts to obtain alternative employment. (N.T. 20-66)
10. Lassiter registered with Career Link, spoke to friends about possible employment, reviewed the want-ads in the local newspaper, and submitted numerous employment applications. (N.T. 36, 41, 45, 49, 53-54)
11. During the period April 13, 2003 to May 19, 2003, Lassiter was employed by Cornell Abraxas as a Case Manager. (N.T. 34-36, 55-57)

* The foregoing "Stipulations" and "Additional Stipulations" are hereby incorporated herein as if fully set forth. 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 Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
S.F. Stipulation of Fact

12. Lassiter was unable to continue working for Cornell Abraxas because he had neither a high school diploma nor a GED. (N.T. 56-57)
13. Lassiter earned \$2,404.00 working for Cornell Abraxas. (N.T. 34-35, C.E. 7)
14. During the period August 14, 2003 to August 29, 2003, Lassiter was a driver trainee at Capital Area Transit. (N.T. 33)
15. Lassiter only worked a 25 hour week at Capital Area Transit and his rate of pay was \$5.15 per hour. (N.T. 33)
16. Lassiter earned \$466.95 working for Capital Area Transit. (N.T. 33, C.E. 6)
17. During the period September 3, 2003 to January 3, 2004, Lassiter worked as an Order Selector for Super Value. (N.T. 25-28, 61)
18. Lassiter's work for Super Value included selecting products stored in a freezer. (N.T. 25, 61)
19. In October 2002, Lassiter had sustained a knee injury that was aggravated by working in the freezer at Super Value. (N.T. 30, 61)
20. Lassiter earned \$4,066.29 working for Super Value. (N.T. 26, 38; C.E. 4-5)
21. On January 18, 2004, Lassiter began working for Support Solutions, a temporary employment agency. (N.T. 20-23, 38-39)
22. As of April 1, 2004, Lassiter remains an employee of Support Solutions. (N.T. 20, 38-39)
23. Lassiter has earned \$3,880.80 working for Support Solutions. (N.T. 22-23, 26; C.E. 5)

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, the Respondent's failure to file a properly verified answer or to respond to a Rule to show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arose on a complaint filed by Johnnie V. Lassiter, Jr. against the Wordsworth Academy. Lassiter's complaint at PHRC Case No. 200207153 alleged that on January 27, 2003, Lassiter was terminated because of his sex, male, and his race, black. Lassiter's complaint states a claim under Sections 5(a) of the Pennsylvania Human Relations Act ("PHRA").

Lassiter's verified complaint was filed on or about March 3, 2003. By correspondence dated June 19, 2003, the Pennsylvania Human Relations Commission ("PHRC"), Harrisburg Regional Office, petitioned Motions Commissioner Waters for a Rule to Show Cause, indicating that Wordsworth had not properly answered Lassiter's complaint. The petition indicated that, by correspondence dated June 4, 2003, Wordsworth was notified that its failure to properly answer Lassiter's complaint could result in a judgment being entered for Lassiter.

On June 20, 2003, a Rule to Show Cause was issued, directing Wordsworth to respond on or before July 18, 2003. After no response was filed, on July 28, 2003, Motions Commissioner Waters recommended a finding of liability to the full PHRC. On August 26, 2003, the full PHRC determined that on January 27, 2003, Lassiter was terminated because of his sex and race.

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

The public hearing on the issue of appropriate damages was held April 1, 2004 in Harrisburg, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Francine Ostrovsky, PHRC Assistant Chief Counsel, oversaw the state's interest in the complaint. Michael Davis, Esquire, represented Wordsworth.

Since liability had been found after Wordsworth failed to file a properly verified answer, the only question at the public hearing was what damages Lassiter could establish. 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..."

When the Public Hearing began, Lassiter indicated that he was seeking lost back pay and reinstatement only. Indeed, there was no attempt to present evidence on either compensation for lost work associated with the complaint or certifiable travel expenses. Interestingly, during the Public Hearing, Lassiter effectively withdrew his request for reinstatement. This left the only issue for resolution to be what back pay losses Lassiter could establish.

Generally, Wordsworth's post-hearing brief submits that under circumstances Wordsworth argues are present, an award of lost back pay would not serve the purposes of the PHRA. Specifically, Wordsworth argues that Lassiter's "pre-injury

status" was based on Lassiter's falsification of his credentials when he initially applied for work at Wordsworth.

During the Public Hearing, under cross examination, Lassiter revealed that he has neither a high school diploma nor a GED. Wordsworth argues that since Lassiter has neither a high school diploma nor a GED, he lacked the necessary qualifications to work in the position from which he was terminated. Wordsworth's post-hearing brief submits that had Lassiter not falsified his application to Wordsworth, Wordsworth would never have employed him. Further, Wordsworth contends that Lassiter would have been terminated immediately had Wordsworth learned prior to April 1, 2003 that Lassiter had neither a high school diploma nor a GED.

One of Wordsworth's major problems with the attempt to pursue such an argument is that Wordsworth failed to present evidence at the public hearing that there was a requirement that an applicant for the position Lassiter held have either a high school diploma or a GED. Instead, Wordsworth attempts to present such information through its post-hearing brief. Clearly, once the record was closed on April 1, 2004, additional substantive evidence could not be presented absent the reopening of the record. Here, this simply has not occurred.

Additionally, even if the evidence Wordsworth seeks to bring in the back door were allowed, Wordsworth's argument that a back pay award is inappropriate is misplaced. The U.S. Supreme Court addressed the issue of after-acquired evidence in the case of McKennon v. Nashville Banner Publishing Co., 115 S.Ct. 879, 66 FEP 1192 (1995). The facts in McKennon reveal wrongdoing that would have led to

termination on legitimate grounds had the employer known about it. While recognizing that such a circumstance presents a more difficult issue with respect to determination of appropriate remedial measures, on the back pay issue, the McKennon court declared, “[o]nce an employer learns about employee wrongdoing that would lead to a legitimate discharge, we cannot require the employer to ignore the information, even if it is acquired during the course of discovery in a suit against the employer and even if the information might have gone undiscovered absent the suit. The beginning point in the trial court’s formulation of a remedy should be calculation of back pay from the date of the unlawful discharge to the date the new information was discovered.”

Applying this general principle to the present case, even if Wordsworth could establish that Lassiter falsified his application and that this was a sufficient reason to terminate Lassiter, clearly, Wordsworth lacked actual knowledge of the purported wrongdoing until April 1, 2004, when Lassiter was cross examined. In any event, the obligation to pay lost wages would not end until that moment.

Here, Lassiter does not seek lost wages after April 1, 2004. Accordingly, Wordsworth’s argument that there should be no award for back pay is rejected.

Accordingly, the only aspect we must consider regarding making Lassiter whole is the issue of the extent of financial losses suffered. When complainants prove an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co., Inc., 684 F2d 1355, 29 FEP 1259 (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 720 (3rd Cir. 1988).

In this case, Lassiter submits that he should be completely reimbursed for lost wages based upon established contractual wage rates through April 1, 2004, adjusted by subtracting his interim earnings.

Lassiter asserts that he 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 mitigation. See Jackson v. Wakulla Springs & Lodge, 33 FEP 1301, 1314 (N.D. Fla. 1983); Sellers v. Delgado Community College, 839 F.2d 1132 (5th Cir. 1988); Syvock v. Milw. Boiler Mfg. Co., 27 FEP 610, 619 (7th Cir. 1981); Main Human Rights Comm. v. City of Auburn, 31 FEP 1014, 1020 (Maine Supreme Judicial Ct. 1981); and Michigan Dept. of Civil Rights v. Horizon Tub Fabricating, Inc., 42 EPD ¶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 Lassiter mitigated his damages, the evidence shows that once he was terminated, within a matter of days, Lassiter registered with Career Link, made job inquiries to his friends and began to review the want-ads in the local

newspaper. Lassiter testified that he sent numerous resumes and applied for work at numerous places including Square D's, Blockbuster, Giant, Fed-Ex and Frito Lay.

Lassiter's first job, after being terminated in January 2003, began on April 13, 2003 when Lassiter was hired by Cornell Abraxas as a Case Manager. However, because Lassiter did not have a high school diploma or a GED, he only worked at Cornell Abraxas for a short period of time. In effect, Lassiter was asked to resign from Cornell Abraxis effective May 19, 2003. While employed at Cornell Abraxas, Lassiter earned \$2,404.00

After leaving Cornell Abraxas, Lassiter renewed his effort to seek employment by again speaking with friends, checking newspaper want-ads and submitting applications to various employers.

From August 14, 2003 through August 29, 2003, Lassiter was a driver trainee with Capital Area Transit. This job was part-time for only 25 hours per week and the rate of pay was \$5.15 per hour. Once the training period ended, this job would have remained part-time but the pay would have increased to \$7.85 per hour. For the short period of employment with Capital Area Transit, Lassiter earned \$466.95.

Several days after leaving Capital Area Transit, on or about September 3, 2003, Lassiter began working a 40-hour work week with Super Value, where his hourly rate was \$10.47. Lassiter remained an employee of Super Value until January 3, 2003, where he earned a total of \$4,066.29. Lassiter's job at Super Value aggravated a knee injury he had sustained in October 2002 while a Wordsworth employee, so once again he changed jobs.

On January 18, 2003, Lassiter began employment with Support Solutions, a temporary employment agency. As of April 1, 2004, Lassiter was still employed with Support Solutions. The PHRC Regional Office post-hearing brief argues that, as of the public hearing, Lassiter's earnings with Support Solutions had been approximately \$3,880.80.

Wordsworth's arguments that Lassiter's conduct and job search efforts were neither reasonable nor diligent are rejected. Lassiter's reactions to his circumstances and his efforts to mitigate his damages are found to be reasonable.

Based on the information in the record, the following back pay calculations are made:

Lost Wages

February 1, 2003 – April 1, 2004:

30 bi-weekly periods @ \$871.54 per.....\$26,146.20

Less interim earnings

Cornell Abraxas.....\$2,404.00

Capital Area Transit.....\$466.95

Super Value.....\$4,066.29

Support Solutions.....\$3,880.80

Total Interim Wages.....\$10,818.04

Net Wages Lost\$15,328.16

Finally, the PHRC is authorized to award interest on the back pay award.

See Goetz v. Norristown Area School District, 19 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1975). Until January 1, 2000, interest had been computed using the rate of six

percent. Due to changes in the law, this interest rate has been increased. Here, the interest rate shall be nine percent. (Computation of interest penalties, Act 1982-266 amended).

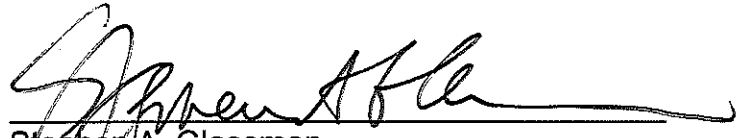
Accordingly, relief is ordered as directed with specificity in the final order that follows.

ORDERS


1. That Wordsworth shall pay to Lassiter within 30 days of the effective date of this Order the lump sum of \$15,328.16, which amount represents back pay lost for a sixty week period after Lassiter's termination on January 27, 2003.
2. That Wordsworth shall pay additional interest of nine percent per annum on the back pay award.
3. That within 30 days of the effective date of the Order, Wordsworth report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Francine Ostrovsky, Esquire, in the Commission's Harrisburg Regional Office, 1101-1125 S. Front Street, 5th Floor, Harrisburg, PA 17104.

PENNSYLVANIA HUMAN RIGHTS COMMISSION

By: _____


Stephen A. Glassman
Chairperson

ATTEST:


Sylvia A. Waters
Secretary