

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LORI LEICHTENBERGER
Complainant

v.

AMERICAN LEGION POST 135
Respondent

PHRC CASE NO. 200400199

STIPULATIONS OF FACT

JOINT STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS OFFICE**

**LORI LEICHTENBERGER, :
COMPLAINANT, :**

CASE NO. 200400199

**AMERICAN LEGION :
POST 135, :
RESPONDENT :**

STIPULATIONS OF FACT

The following facts regarding earnings are admitted by all parties to the above captioned matter and no further proof thereof shall be required at hearing:


1. The Complainant herein is Lori Leichenberger, an adult female, residing in Sheffield, PA, Warren County, Pennsylvania (hereinafter Complainant).
2. The Respondent herein is American Legion post 135, which is located at 414 Pennsylvania Avenue West, Warren, PA and at all times relevant hereto, having four (4) or more employees. Respondent is an "employer" within the meaning of the Pennsylvania Human Relations Act.
3. On or about July 19, 2004 Complainant filed a verified Complaint with the Pennsylvania Human Relations Commission (hereinafter PHRC) alleging discharge to due to retaliation.
4. On September 15, 2004, Respondent filed an Answer to the Complaint denying the allegations that the discharge was in retaliation for a previous PHRC filing Case No. 200305406 or participation in a PHRC proceeding
5. In 2006, following investigation into Complainant's allegations, PHRC staff made a finding of probable cause to credit the allegations of discrimination based on retaliation. Notwithstanding such findings, Respondent continues to deny the allegations of discrimination.

6. Respondent was notified of the finding of probable cause to credit the allegations of sex discrimination and was invited to enter into conciliation.
7. Efforts to resolve the complaint of sex discrimination by means of conference, conciliation and persuasion were unsuccessful and on October 24, 2005, the PHRC approved a public hearing and the parties were so notified.

STIPULATED TO:



Diane Blancett-Maddock
Assistant Chief Counsel
PA Human Relations Commission
Counsel for the Commission



James Blackman
Counsel for Respondent

COMMONWEALTH OF PENNSYLVANIA
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LORI LEICHTENBERGER,
COMPLAINANT,

CASE NO. 200400199

AMERICAN LEGION
POST 135,
RESPONDENT

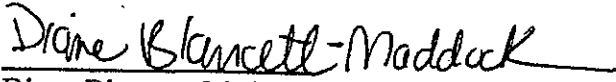
JOINT STIPULATIONS OF FACT

The following facts regarding earnings are admitted by all parties to the above captioned matter and no further proof thereof shall be required at hearing:

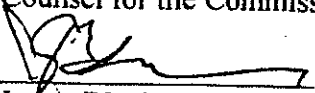
1. Complainant, Lori Leichtenberger, filed a PHRC complaint at Case No. 200305406 which was served on Respondent, American Legion post 135 on or about June 28, 2004.
2. Complainant, Lori Leichtenberger, attended and testified at a PHRC fact-finding conference held on June 15, 2004 in the case of Nichols v American Legion post 135 at Case No. 200305612.
3. Complainant, Lori Leichtenberger was terminated by letter dated July 6, 2004 effective July 7, 2004.
4. In 2003, Complainant, Lori Leichtenberger earned \$23, 235.00 working for Respondent, American Legion.
5. In 2004, Complainant, Lori Leichtenberger earned \$11,618 working for Respondent, American Legion and received \$ 5704 in unemployment compensation..
6. In 2005, Complainant Lori Leichtenberger earned \$ 715.80 working for HCF of Warren and \$ 186.00 working for Colonial Inn.



STIPULATED TO:



Diane Blancett-Maddock
Assistant Chief Counsel
PA Human Relations Commission
Counsel for the Commission



James Blackman
Counsel for Respondent

FINDINGS OF FACT

1. The Complainant herein is Lori Leichtenberger (hereinafter "Complainant") an adult female who resides in Sheffield, Pennsylvania. (S.F.1)
2. The Respondent herein is American Legion Post 135 (hereinafter "Respondent") located at 414 Pennsylvania Avenue West, Warren, Pennsylvania. (S.F.2)
3. The Complainant filed a PHRC complaint, Case No. 200305406, against the Respondent and said Complaint was served on the Respondent on or about June 28, 2004. (S.F.1)
4. The Complainant attended and participated in a PHRC fact finding conference on June 15, 2004 in the matter of Nichol v. American Legion Post 135, PHRC Case No. 200305612. (J.S.)
5. The Complainant's last day of work was July 7, 2004. (N.T.13)
6. On or about July 19th, 2004, the Complainant filed the instant complaint alleging an unlawful discharge due to retaliation. (S.F.3)
7. The Complainant began employment with the Respondent in 1984 as a bartender. (N.T.12)
8. The Complainant was originally employed as a part time bartender and then became a full time bartender. (N.T.17)

* To the extent that the Opinion that 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
S.F. Stipulations of Fact
J.S.F. Joint Stipulations of Fact
J.E. Joint Exhibit

9. The Complainant's job duties consisted of serving drinks to customers and selling tickets. (N.T.14,16)
10. During their shift each of the bartenders would sell tickets to small games of chance. (N.T.17)
11. A customer would purchase a ticket (or more) from a bartender for a nominal fee and have an opportunity to win a larger sum of money. (N.T.17)
12. The Complainant worked for Respondent from 1984 until 2000 without any disciplinary action taken against her. (N.T.15)
13. The Respondent issued an Employee Warning Notice to the Complainant on November 6, 2000, regarding her attendance. (J. Ex. 3, 1i)
14. The Respondent issued another Employee Warning Notice to the Complainant on January 21, 2002, regarding her attitude. (J.E. 3 1h)
15. The Respondent suspended the Complainant by letter dated July 26, 2002, for "bad mouthing" the Board and business being conducted by the Board. (J.E. 3 1-g)
16. Until her termination on July 7, 2004, the Respondent did not take any other disciplinary action against Complainant in 2004. (N.T. 16, 58)
17. In its Board meeting on July 6, 2004 Respondent "discussed Lori Leichtenberger not following employee handbook regarding the filing of sexual harassment law suit against this Post which we found out about late last month". (J.E.-3, 1-c)
18. The minutes of the July 6th meeting reflected the Respondent's dissatisfaction with the Complainant for neither contacting the Board directly nor directing her co-worker to contact the Board before filing a PHRC complaint. (J.E. 3, 1-d)
19. The Respondent terminated Complainant effective July 7, 2004 for "ticket money irregularities, customers' complaints and overall attitude and work habits". (J.E. 3, 1-d)

20. The Complainant was terminated 22 days after her participation at a PHRC fact-finding conference and 9 days after service of Complainant's own PHRC complaint. (J.S.F 1, 2, 3)
21. In 2003, the Complainant received \$23,235.00 in compensation for working for Respondent. (J.S.F. 4)
22. After the Complainant was terminated from her employment, she actively sought employment. (N.T. 22-25)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") has jurisdiction over the parties under the Pennsylvania Human Relations Act (hereinafter "PHRA")
2. The Commission has jurisdiction over the subject matter of the complaint under the PHRA.
3. The parties and the Commission have fully complied with the procedural prerequisites for a public hearing in this matter.
4. The Complainant is a "person" within the meaning of Section 4(a) of the PHRA.
5. The Respondent is an "employer" within the meaning of Section 4(b) of the PHRA.
6. The complaint filed in this matter satisfies the filing requirements set forth in Section 9 of the PHRA.
7. The Complainant established a *prima facie* case of discriminatory retaliatory discharge by proving that:
 - 1) the Complainant was engaged in a protected activity;
 - 2) the Respondent was aware of the protected activity;
 - 3) subsequent to participating in the protected activity, the Complainant was subjected to an adverse employment action by Respondent; and
 - 4) there is a causal connection between the Complainant's participation and the adverse employment action.
8. The Respondent has met its burden of producing evidence of a legitimate non-discriminatory reason for its action.
9. The Complainant has met her ultimate burden of proving retaliation by showing that the Respondent's proffered explanations are pretextual.
10. The Pennsylvania Human Relations Commission may fashion a remedy which effectuates the purpose of the PHRA.

OPINION

This case arises out of a complaint filed by Lori Leichtenberger (hereinafter "Complainant") against American Legion Post 135 (hereinafter "Respondent"). The complaint was filed with the Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission"), on July 19, 2004. The Complainant alleges that the Respondent unlawfully discriminated against her in retaliation for filing a previous PHRC complaint and for participating in a PHRC fact-finding conference. The Complainant alleges that the Respondent's action violate Section 5(d) of the Pennsylvania Human Relations Act of 1955, P.L. 744, No. 222, 12 amended, 43 P.S. §951 et. Seq. (hereinafter "PHRA").

After the instant matter was investigated, PHRC staff found probable cause to credit the Complainant's allegations. The parties attempted to eliminate the alleged unlawful practice through conference, conciliation and persuasion. These efforts were unsuccessful and the case was approved for public hearing.

A public hearing was held in this mater on August 7, 2007 in Warren, Pennsylvania before Phillip A. Ayers, Permanent Hearing Examiner. Bernard T. Hessley, Esquire represented the Respondent and Diane Blancett-Maddock, Assistant Chief Counsel, represented the state's interest in the complaint. Subsequent to the public hearing, post hearing briefs were submitted by the Complainant and the Respondent. Interestingly, the Respondent's post hearing brief fails to address the retaliation allegation raised in the instant complaint.

Section 5(d) of the PHRA provides in pertinent part:

It shall be an unlawful discriminatory practice . . . [f]or any person, employer, employment agency or labor organization to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge, testified or assisted, in any manner, in any investigation, proceeding or hearing under this act.

In the instant case, the Complainant, in accordance with McDonnell Douglas v. Green, 411 U.S. 792, 5 FEP 965 (1973) has the initial burden of establishing a *prima facie* case of discrimination. As has been often emphasized, the McDonnell-Douglas formula is not rigid. Instead the exact elements of the *prima facie* case are frequently changed, since the elements are not hard and fast rules, but rather an set of standards whose applications to differing factual scenarios requires individualized variations.

In the order to establish a *prima facie* case of retaliation, the Complainant must show:

- 1) she was engaged in a protected activity;
- 2) that the Respondent was aware of it;
- 3) that the Complainant suffered an adverse decision; and
- 4) there is a casual connection between the protected activity and the adverse employment action.

In regards to the first element, the Complainant was engaged in, not one, but two protected activities. The Complainant participated in a fact-finding conference in the matter of Nichols v. American Legion Post 135, (PHRC Case No.200305612) (JS 2). Secondly, the Complainant filed her own complaint (PHRC Case No. 200305408) on May 20, 2004, alleging that the Respondent discriminated against her because of her sex. (JS. 1). Clearly, both of these acts are protected activities within the meaning of Section 5(d) of the PHRA.

Next, it is undisputed that the Respondent was aware of the Complainant's being engaged in the protected activities. The Respondent was served with a copy of Complainant's PHRC complaint on or about June 28, 2004 (JS 1). In addition, the Respondent was present during the Complainant's appearance on behalf of Ms. Nichols at the fact-finding conference. Regarding the third requisite showing of the *prima facie* case,

the Complainant clearly suffered an adverse employment decision when she was terminated from her position on July 7, 2004.

The last element of a *prima facie* showing in a retaliation complaint is the need to show a causal connection between the protected activity and the adverse employment decision. When the participation in the protected activity and the occurrence of the adverse employment action occur within close proximity in time, causation is inferred. Goodwin v. Pittsburgh. 480 F. Supp. 627, (W.D. Pa. 1979), affirmed, 624 F.2d 1090 (3rd Circuit 1980); Robert Wholey Company, Inc. v. PA Human Relations Commission. 606 A.2d 982 (Cmwlth Ct. 1992). In the instant case, within 22 days of the Complainant's participation in a fact-finding conference on June 15, 2004 and within 9 days of the service of her PHRC complaint on June 28, 2004, the Complainant was terminated from her employment on July 7, 2004. The above elements clearly establish a *prima facie* showing of retaliation. Utilizing the allocation of proof analysis, once the *prima facie* case has been established, the burden of production shifts to the Respondent to simply produce evidence of a legitimate non-discriminatory reason for its action.

The Respondent asserts that it terminated the Complainant for several reasons; "ticket money irregularities, customer complaints, overall attitude and work habits". By presenting these reasons, the Respondent has clearly met its burden of producing evidence of legitimate non-discriminatory reasons for its actions.

Now, we must turn to the question of whether the Complainant has shown that the proffered reasons put forth by the Respondent are pretextual. The Respondent called only one witness, Patrick Ross, (hereinafter "Ross"). Post Adjunct/Treasurer Secretary of the Board. Firstly, Ross testified that he had very little personal interaction with the Complainant. He stated "She worked mainly nights, and I was there mainly during the day . . . (N. T. 54). Therefore, Ross, in effect, testified that he had no personal knowledge of

any of the alleged misconduct purportedly committed by the Complainant. Secondly, in response to questions regarding the specific incidents of alleged misconduct, Ross's answers were vague and non specific on all issues. Ross could not give any specific dates of the alleged ticket irregularities or discrepancies regarding amounts of cash to support the Respondent's allegations of misconduct. Also, Ross admitted that no criminal complaint was filed against the Complainant for alleged ticket irregularities while criminal charges were filed against another employee who allegedly had ticket irregularities offense. (N. T. 57). Furthermore, Ross admitted that the Complainant did not receive any discipline in 2004. In fact, the record does not reflect any written discipline or specific reprimands in the year prior to her discharge.

Lastly Ross admitted that the Respondent considered the Complainant's recently filed complaint during the same meeting that the Respondent voted to terminate her. (N. T. 58). This admission was buttressed by the Board minutes (J.E. 3, 1-d). The Respondent's action in terminating the Complainant and the stated rationale are inconsistent. The focus of the Board meeting indicates that there was some concern that the Complainant did not discuss issues with the Board before filing her complaint. However when the Complainant was terminated, the letter reflects other unsupported reasons for her termination. Upon a full review of the record, the Complainant has shown that the Respondent's reasons in this case were pretextual.

Accordingly, the Complainant has met her ultimate burden of proving by a preponderance of evidence that the Respondent unlawfully discriminated against her when it terminated her in retaliation for engaging in protected activities under the PHRA.

Having reached the above finding, we now move to finding the appropriate remedy in the instant case. The Commission has broad discretion in the fashioning of an appropriate remedy.

Section 9 of the Act provides, in pertinent part:

(f)(1) If, upon all the evidence at the hearing, the Commission should find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as decided that this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such a 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, herein, reinstatement or upgrading of employees with or without back pay . . . and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43P. 5. § 959 (f)

The remedy serves two purposes. The first purpose is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. That interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to her status before the discriminatory action and make her whole. Consolidated Rail Corp. v. PA Human Relations Commission, 582 A.2d 702, 708, Pa. Cmwlth Ct. (1990).

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from retaliating against any individual who is engaged in or participating in activities protected under the PHRA. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic that the calculation of the back pay award need not be exact. Rather, it is only necessary that the method used be reasonable. Uncertainties, in general, should be resolved against a discriminating employer. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). Furthermore, the Complainant is entitled to an award of interest on the back pay. Brown Transport Corp. v. Commonwealth of PA, Human Relations Commission, 578 A.2d 555 Pa. Cmwlth Ct.(1990).

In the matter before the Commission, the relevant time period is from the date of termination until the date of public hearing. Therefore, the time period, for the purpose of back pay, is from July 7, 2004 until she ceased looking for work. A review of the record in

this matter indicates that Complainant was actively looking for work for approximately six months after her termination in 2004. (N. T. 23). The Complainant testified that, in 2005 and 2006, she was not actively seeking employment for approximately two months each year because she was going "back and forth" to Florida to take care of her parents. (N. T. 24). In the calendar year 2007, Complainant testified that she did not look for work. Accordingly Complainant's back pay award is limited to the last six months in 2004 and ten months each in 2005 and 2006. The Complainant shall not be awarded back pay for the calendar year 2007.

The Complainant's yearly pay was \$23,235.00, which computes to \$446.83 per week. The monthly total on this salary is \$1,936.25 per month. The back pay award is as follows:

2004 (Six Months)	\$1,787.32 x 6=	\$11,617.50
2005 (10 Months)	\$1,787.32 x 10=	\$19,362.50
2006 (10 Months)	\$1,787.32 x 10=	<u>\$19,362.50</u>
		\$50,342.50

Next, we move to the question of mitigation of damages. The question of mitigation of damages is a matter that lies within the sole discretion of the Commission. Consolidated Rail Corp., supra. Moreover the burden is on the employer to demonstrate any alleged failure to mitigate. See Carlin v. Westinghouse Electric Corp., 850 F.2d 1996, 1005 (3rd Cir. 1988). The Respondent must show that the Complainant did not exercise reasonable diligence in pursuing employment. However, even though the Respondent did not produce any evidence of mitigation, the record is clear that the Complainant, by 2007, had stopped looking for work. Marks v. Pratlco, 633 F.2d 1122 (5th Cir. 1981). Interestingly the Respondent's post hearing brief fails to address the retaliation allegation raised in the instant complaint.

However, the Complainant's back pay \$901.80 for the income she received from other employment in calendar year 2005 must be deducted. Therefore, the Complainant's back pay award is:

$$\$50,342.50 - 901.80 = \$49,440.70$$

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LORI LEICHTENBERGER
Complainant

v.

AMERICAN LEGION POST 135
Respondent

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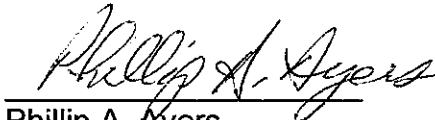
PHRC CASE NO. 200400199

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that the Complainant has proven retaliation in violation of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's Recommendation that the attached Stipulation of Fact, Joint Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



Phillip A. Ayers
Permanent Hearing Examiner

September 4, 2008
Date

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LORI LEICHTENBERGER
Complainant

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v.

AMERICAN LEGION POST 135
Respondent

PHRC CASE NO. 200400199

FINAL ORDER


AND NOW, this 28TH day of October 2008, after a review on 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 Permanent Hearing Examiner. Further, the full Commission adopts said Stipulations of Fact, Joint Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own finding in this matter and incorporates the same into the permanent record of the proceeding, to be served on the parties to the complaint and hereby

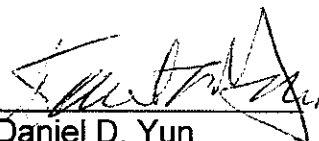
ORDERS

1. The Respondent shall cease and desist from retaliating against any individual who engaged in or participated in activities protected under the PHRA.
2. The Respondent shall pay Complainant within 30 days of the effective date of this Order, the lump sum of \$49,440.70, plus an additional amount of interest of 6% per annum.

3. Within 30 days of the effective date of this Order, Respondent shall report on the manner of compliance with the terms of this Order by letter addressed to: Diane Blancett-Maddock, Assistant Chief Counsel, at the Pittsburgh Regional Office located at 11th Floor, State Office Building, 300 Liberty Avenue, Pittsburgh, Pennsylvania 15222-1210.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Stephen A. Glassman, Chairperson

Attest: 
Daniel D. Yun
Secretary