COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO, Complainant	:	
v.	:	DOCKET NO. E-93153-H
ASSETS PROTECTION, INC., Respondent	:	

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COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. E-93153H
	:	
ASSETS PROTECTION, INC.,	:	
	:	
Respondent	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. Raymond Maturo (hereinafter "Complainant") is an adult, male.

2. Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act.

3. Assets Protection, Inc. (hereinafter "Respondent") is an employer that, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth.

4. On or about January 12, 1997, the Complainant was hired by the Respondent and assigned to the Methodist Hospital facility.

5. According to the Respondent's policies and its job description, the Complainant's daily duty assignments encompassed numerous major life activities, including: standing, sitting, walking, bending, and lifting.

6. Beginning on or about May 10, 1999 and continuing until September 7, 1999, the Complainant was unable to work due to health reasons.

7. On or about June 20, 1999, Dr. Melanie Jewell, M.D., the Complainant's treating physician, informed the Respondent that the Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis, and renal insufficiency.

8. Upon the Complainant's return to work in September 1999, he was assigned to George F. Kempf Supply Co. in the capacity of a security guard.

9. The Respondent replaced the Complainant with Carmen Garafalo, Steve Cardillo, Frank Fantazzi, and Ken Castellane, none of whom have a disability or were regarded as having a disability.

10. On or about October 5, 1999, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-91561D. A copy of the complaint will be included as a docket entry in this case at time of hearing.

11. On or about March 29, 2000, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.

12. In correspondence dated May 15, 2000, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint at docket number E-91561D.

13. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

14. In correspondence dated June 27, 2000, Commission staff notified the Complainant and Respondent that a public hearing had been approved in the complaint.

Charles L. Nier, III
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

9/14/00
Date

Raymond Maturo
(Complainant)

9-14-00
Date

Andrei Kuti
(Respondent, Office Manager)

9-14-2000
Date

FINDINGS OF FACT

1. The Complainant herein is Raymond Maturo (hereinafter "Complainant"). (S.F. #1).

2. The Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2).

3. The Respondent herein is Assets Protection, Inc. (hereinafter "Respondent"). (S.F. #3).

4. The Respondent is a professional service oriented firm providing a wide range of security related products and services, including patrol and guard services. (C.E. #1).

5. The Respondent at all times relevant to the instant case, employed four or more persons within the Commonwealth of Pennsylvania (S.F. #3).

6. The Complainant was originally hired by Capper Security and was assigned to the Methodist Hospital facility. (N.T. 27).

7. Subsequently, the Respondent in this matter acquired Capper Security. (N.T. 27).

The foregoing stipulations of fact are 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:

NT	Notes of Testimony
CE	Complainant's Exhibit
SF	Stipulations of Fact

8. On or about January 12, 1997, the Complainant was hired by Respondent and remained assigned to Methodist Hospital. (S.F. #4).

9. The Complainant was employed as a Sergeant working approximately 32-33 hours a week at a pay rate of $7.20 an hour (C.E. #3, N.T. 28)

10. The Complainant worked the 12:00 a.m. to 8:00 a.m. shift and supervised two security guards. (N.T. 34).

11. George Hatton was employed by Methodist Hospital as Director of Security. (N.T. 74).

12. Mr. Hatton communicated with Respondent on a frequent basis regarding Respondent's security services at the hospital. (N.T. 74, 83).

13. The Complainant's daily duties encompassed numerous major life activities such as; standing, sitting walking, bending and lifting. (S.F. #5).

14. The Complainant never received any negative comments, verbal warnings or written warnings regarding his performance on the job. (N.T. 39).

15. From May 10, 999 until September 7, 1999, the Complainant was not able to work for medical reasons. (S.F. #6).

16. The Complainant underwent several procedures, between May and August, relating to a heart condition including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. (N.T. 39-41).

17. Dr. Melanie Jewell was the Complainant's treating physician for his heart condition. (C.E. #16).

18. While on leave, Complainant contacted both Respondent and George Hatton as to his health status and return to work status. (N.T. 41-42).

19. Complainant's wife communicated with Respondent regarding Complainant's health and return to work status. (N.T. 42)

20. The Respondent sent Complainant an undated letter requesting that his physician provide documentation of the Complainant's health status and return to work status. (N.T. 42-43).

21. Dr. Jewell, on June 20, 1999, provided the Respondent with the requested information, stating that Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis and renal insufficiency. (C.E. #5 S.F. #7).

22. Dr. Jewell also stated that his return to work date was uncertain and could better assessed by October 1, 1999. (C. E. #5 § S.F. #7).

23. On or about August 20, 1999, Dr. Jewell provided a second letter which fully explained Complainant's medical status and released Complainant to full duty effective September 7, 1999. (N. T. 44-45).

24. The Complainant provided this letter to George Hatton who in turn provided it to Don Herr, a Respondent employee. (N.T. 44-46).

25. After recovery and rehabilitation, the Complainant was better able to perform major life activities than he was before the procedures. (C.E. #16 at 29-30).

26. Complainant was better able to perform the essential functions of his job after the medical procedures. (C.E. #16).

27. On September 7, 1999, the Complainant had made a full recovery and was prepared to fulfill his job duties. (N.T. 28).

28. Upon his return to work on September 7, 1999, the Complainant was temporarily assigned for one week to Methodist Nursing Home. (N.T. 47).

29. He worked for 16 hours at a pay rate of $5.40, earning $86.40. (N.T. 47).

30. Later in September, the Complainant was assigned to George F. Kempf Supply Co., and demoted to the rank of security guard. (N.T. 47-48; S.F. #8).

31. The Respondent then reduced Complainant's hours to 24 per week at a pay rate of $6.00 an hour from his previous status of 32-33 hours a week at a pay rate of $7.20 an hour. N.T. 48-49)

32. The Complainant was employed in that capacity from September 7, 1999 until December 15, 1999. (N.T. 48-49).

33. The Complainant earned $288.00 bi-weekly during that time period. (C.E. #8).

34. On or about July 5, 1999, all security officers at Methodist Hospital were given a raise of .20 cents per hour. (N.T. 110).

35. When an employee is out, the Respondent's practice is to "revamp the shift", and when the employee returns, revert back to the original shift. (N.T. 99).

36. In regard to the Complainant, Robert Lubkay, Respondent President testified that it was possible that the Respondent simply adjusted employee's schedules during Complainant's leave. (N.T. 96-99).

37. When the Complainant returned to work, the Respondent did not

follow its normal practice of reverting the shift back to the original status. (S.F. #8).

38. As of September 7, 1999, all guard personnel at Methodist Hospital were hired before Complainant's leave. (N.T. 96).

39. Mr. Lubkay made the subjective determination that the Complainant could not perform the essential functions of his job. (C.E. #10, #15).

40. Mr. Lubkay is not a physician and did not have any medical training. (N.T. 86).

41. The Respondent did not retain a physician on staff or as a consultant. (N.T. 116).

42. The Respondent did not rely on any opinions in determining that the Complainant was unable to perform the essential functions of the job. (N.T. 83).

43. Mr. Lubkay insisted since he owns the company, he is the one who makes the decisions. (N.T. 83).

44. The Respondent had an affirmative action policy which had not been updated for "twelve or thirteen years". (N.T. 108).

45. The policy, as indicated by Mr. Lubkay, did not mention the Pennsylvania Human Relations Act or the Americans with Disabilities Act. (N.T. 102, 108).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter 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. The Complainant is an individual within the meaning of Section 5(a) of the PHRA.

4. The Respondent is an employer within the meaning of Section 5(a) of the PHRA.

5. The complaint filed in this case satisfies the Section 9 filing requirements found in the PHRA.

6. Section 5(a) of the PHRA, inter alia, prohibits employers from discriminating against individuals in the terms and conditions of their employment because of their disability.

7. The Complainant has established a *prima facie* of disability discrimination by showing:

1) he is a member of a protected class;
2) he was qualified to perform the essential functions of the job; and
3) he was demoted and his hours were reduced;
4) circumstances gives rise to an inference of discrimination.

8. The Respondent articulated several legitimate non-discriminatory reasons for its actions.

9. The Complainant has shown that the articulated reasons are not credible.

10. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him in the terms and conditions of his employment because of his disability in violation of Section 5(a) of the PHRA.

11. Whenever the Commissioner 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 purpose of the PHRA.

12. The Commission may also issue a back pay award.

OPINION

On or about October 5, 1999, Raymond Maturo (hereinafter "Complainant") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Assets Protection, Inc. (hereinafter "Respondent"), Docket No. E-93153-H. In the complaint, the Complainant alleged that the Respondent unlawfully discriminated against him by demoting him and/or refusing to assign him to work as a supervisor, because of his disability, Heart Cardiovascular Impairment and/or because the Respondent regarded him as disabled. On or about March 29, 2000, an answer to the complaint was filed.

On May 15, 2000, Commission Staff advised the Respondent that the investigation had resulted in a finding of probable cause to credit the allegations found in the complaint. Subsequent to that determination of probable cause, Commission staff attempted to resolve the matter in dispute by conference, conciliation and persuasion, but were unable to do so. Commission staff, by correspondence dated June 27, 2000, notified the parties that the Commission had approved the convening of a public hearing.

A public hearing was convened on December 20, 2000. Commissioner Sylvia Waters, Panel Chairperson, Commissioner Russell S. Howell, and Commissioner Daniel Yun also served on the hearing panel. Phillip A. Ayers served as Panel Advisor. Robert Lubkay, Respondent President, appeared pro se. The Commission interest in this matter was overseen by Charles L. Nier III, Assistant Chief Counsel. Both Regional Counsel and Respondent filed post hearing briefs in this matter.

Section 5(a) of the PHRA, provides that it shall be an unlawful discriminatory practice:

> (a) For any employer because of the . . . disability, of any individual to or to otherwise discriminate against such individual or independent contractor with respect to compensation, terms, conditions or privileges of employment . . .

In reviewing the Complainant's allegations, we recognize the issue of disparate treatment. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a Pennsylvania Supreme Court case. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 US 792 (1973). The Court's guidance indicates that the Complainant must first establish a *prima facie* case of discrimination. If complainant establishes a *prima facie* case, the burden of production then shifts to the Respondent to "simply . . . produce evidence of a legitimate, non-discriminatory reason . . . for [its action]." If the Respondent meets this production burden, in order to prevail the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 US 248, 256 (1981).

Following the instruction found in Allegheny Housing on the effect of a

prima facie showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The Court stated that:

> *As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes".*

The Complainant is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up". Allegheny Housing, *supra*. At 319.

In this court-designed burden allocation, the Complainant must, of course, first establish a *prima facie* case. However, the *prima facie* showing should not be an onerous burden. In the instant case, a *prima facie* case of disability discrimination can be established by showing that:

(1) the Complainant was a member of a protected class;

(2) the Complainant was qualified to perform the job; and

(3) the Complainant was demoted and his hours were reduced; and

(4) circumstances give rise to an inference of discrimination.

Upon review of the evidence presented in this matter, it is clear that the Complainant has established a *prima facie* care of discrimination based on his

disability. First, the Complainant is a member of a protected class because of his disability, Heart/Cardiovascular Impairment. In the instant case, the parties in this matter executed a document entitled "Stipulations of Fact" on September 14, 2000. This document included the following stipulation:

Complainant has a disability, Heart/Cardiovascular Impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2). Because of this stipulation, the Complainant has certainly established the first element of the *prima facie* case.

Secondly, the Complainant was qualified to perform the essential functions of his job. The Respondent is a firm that provides patrol and guard services to various entities such as Methodist Hospital. The Complainant worked for Respondent as a Sergeant providing security for Methodist Hospital. His duties included: Standing, sitting, walking, bending, and lifting. There is no question that he admirably performed his job functions before his medical condition changed and he was granted a leave of absence. He had received praise for his job performance (N.T. 39). The Complainant had never received any negative evaluations regarding his job performance. The record reflects that from May 10, 1999 until September 7, 1999, the Complainant could not work due to treatment for heart condition. (S.F. #6). In fact, the Complainant required a leave of absence for several medical procedures and a period of rehabilitation.

As Commission Counsel notes, there is a significant body of law recognizing that a leave of absence may constitute a reasonable accommodation under the PHRA and the Americans with Disabilities Act

("ADA"). See Criado v. IBM Corp. 145 F. 3d 437 (1st Cir. 1998) (stating that leave may constitute reasonable accommodation); Schmidt v. Safeway, Inc. 864 F. Supp. 991, 996 (1994) (reasonable accommodation may include leave of absence for treatment).

During the Complainant's leave, he underwent several procedures including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. Dr. Melanie Jewell was the Complainant's physician for his heart condition. Dr. Jewell testified that "most people should be in better shape than they were pre-operatively because they should have better coronary blood flow. "(C.E. at #16)". Dr. Jewell further testified that, after several months of rehabilitation, Complainant was better able to perform the major life activities of walking, climbing, and lifting in September 1999 after the medical procedure as opposed to April 1999 prior to the medical procedure. (C.E. #16 at 29). On August 20, 1999, Dr. Jewell authorized Complainant to return to work on September 7, 1999 at full duty, (N.T. 25-26). Therefore, the Complainant was still qualified to perform the essential function of his job with a reasonable accommodation of a leave of absence. The Complainant has satisfied the second prong of the *prima facie* case.

Thirdly, the Complainant can show that he was demoted and his hours were reduced. Before the Complainant had the medical procedures, he was assigned to Methodist Hospital and held the rank of Sergeant. He normally worked 32-33 hours a week at a rate of $7.20 per hour. (C.E. 3; N.T. 28). When Complainant returned to work, he was assigned to George F. Kempf Supply Co., and was demoted to the rank of Security Guard (S.F. #8). Also,

Complainant's hours were reduced to 24 hours per week and his pay was reduced to $6.00 an hour. Clearly, the evidence shows that the Complainant's rank, hours and pay were reduced by the Respondent. Lastly, the circumstances in this matter do give rise to the inference of discrimination. The Respondent asserted that he had no knowledge of the Complainant's medical condition or return to work status. There is credible testimony that not only did Complainant and his wife contact Respondent, but Dr. Jewell also contacted the Respondent. Also, the Respondent had a policy of how to change work schedules when an individual was out. In this case, the Respondent did not follow its own policy. Clearly, these circumstances give rise to an inference of discrimination. A review of the record before the Commission reveals that the Complainant has met his burden of establishing a *prima facie* case of discrimination because of his disability, Heart/Cardiovascular impairment.

As aforementioned, once the Complainant meets his burden of establishing a *prima facie* case, the Respondent must then articulate a legitimate non-discriminatory reason for its action. The Respondent in this matter has articulated several reasons for its action. Firstly the Respondent asserts that the Complainant never contacted Respondent regarding his medical condition and he was, therefore, terminated at some point between May 10, 1999 and September 7, 1999. He was then subsequently rehired and reassigned because his previous position had been filled. Secondly, Respondent argued that the Complainant's leave of absence was not a reasonable accommodation and represented undue hardship. The above reasons stated by the Respondent satisfies its burden of articulating legitimate

non-discriminatory reasons for its action.

As previously stated, the ultimate burden of persuasion is on the Complainant to prove by a preponderance of the evidence that he is a victim of unlawful discrimination. The Complainant may succeed in this burden of persuasion by showing that Respondent's articulated reasons are pretextual.

With respect to Respondent's first articulated reason that Complainant never informed the Respondent of his medical condition and had to be terminated, rehired and reassigned, there is both circumstantial and direct evidence that this articulated reason is untrue. The Complainant credibly testified that he regularly contacted the Respondent and George Hatton, the Director of Security at Methodist Hospital regarding his health and his return to work (N.T. 41-42). Also the Respondent acknowledged that Mr. Hatton may have spoken to Respondent regarding the Complainant's contacts relating to his medical status. (N.T. 90-91). The Complainant's wife also contacted the Respondent on several occasions regarding Complainant's medical status. In addition, the Respondent requested from Dr. Jewell documentation regarding Complainant's medical status and his return to work. Dr. Jewell provided Respondent at least two letters, pertaining to Complainant's health status and his release to work, effective September 7, 1999. (S.F #7; C.E. #6 C.E. #16). This evidence shows that Respondent clearly had knowledge of Complainant's health and his return to work status. The Respondent's reason that Complainant failed to contact is not credible and the true reason was discrimination.

Next, Respondent argues that the Complainant's position had been

permanently filled and he had to be reassigned to a different location. The evidence indicates that standard practice was that when an employee was out, the Respondent would "revamp the shift" and revert back to the previous status when the employee returned. (N.T. 99). In the instant case, Respondent's President testified that the Respondent simply adjusted the schedules of employees already employed at the hospital. (N.T. 96). However, the Respondent did not follow its own policy of reverting back to the previous shift when the Complainant returned. Moreover, the Respondent did not permanently fill the Complainant's position with a new employee. Thusly the Respondent's articulated reason that the position was permanently filled is not worthy of belief.

We now move to the Respondent's argument that the Complainant's leave of absence was not reasonable or an undue hardship. The case law is clear that the Respondent bears the burden of proving that an accommodation is unreasonable or creates an undue hardship. Walton v. Mental Health Ass'n 168 F.3d 661, 670 (3rd GR. 1999).

In the matter before the Commission, the Complainant certainly identified an accommodation that would make him qualified to perform the essential functions of his job. In fact, Complainant's witness, Dr. Jewell, testified that the Complainant was better able to perform major life activities after the leave of absence. (C.E. #16). The Respondent must show that the accommodation is unreasonable or creates a hardship. The Respondent simply has not done so. The time of the leave of absence was not unreasonable because the Respondent was apprised of Complainant's health and return to work status by

Complainant, Complainant's wife and Dr. Jewell. (N.T. 41-42; S.F. 7; C.E. 16). As a matter of fact, Dr. Jewell specifically notified Respondent that the Complainant would not require a indefinite leave of absence. (C.E. § 16). See Myers v. Hose, 50 F.3d 278, 283 (4th CR. 1995). The Respondent has not shown that the leave of absence was unreasonable.

Likewise the Respondent has not shown that the accommodation creates an undue hardship. Commission regulations provide some guidance in determining whether an accommodation imposes an undue burden:

> (i) The overall size and nature of a business, organization, program or public accommodation, including number of employees, structure and composition of workforce, and number and type of facilities. However, financial capability to make reasonable accommodation shall only be a factor when raised as part of an undue hardship defense.
>
> (ii) Good faith efforts previously made to accommodate similar handicaps or disabilities.
>
> (iii) The extent, nature, cost of the reasonable accommodation needed.
>
> (iv) The extent to which handicapped or disabled persons can reasonable be expected to need and desire to use, enjoy or benefit from the employment or public accommodation which is the subject of the reasonable accommodation in question.
>
> (v) Legal or proprietary interest in the subject of proposed reasonable accommodations including authority to make the accommodations under the terms of a bonafide agreement, such as a lease, governing or describing rights and duties with respect to the subject.

16 Pa. Code § 44.4

Succinctly put, the Respondent has presented absolutely no evidence that the leave of absence was an undue hardship. Respondent's President,

Robert Lubkay testified that the Respondent simply adjusted the work schedules of the other employees assigned to the Hospital. The Respondent has not established that the accommodation was undue hardship.

Lastly, Respondent argues that the Complainant had a job-related disability and was unable to perform the essential functions of the job. Once again, the Respondent presents no evidence showing that Complainant had a job related disability, The evidence in the record shows that the Complainant was better able to perform the essential functions of his job. Respondent attempted to argue that Dr. Jewell was unqualified because she did not understand the essential functions of the job. However, Dr. Jewell had staff privileges at the Methodist Hospital and had an acute awareness of the basic job duties and responsibilities of the security guards. In addition, Dr. Jewell reviewed Respondent's security policies and procedures and was able to make a well reasoned determination. Accordingly, Respondent's argument that Complainant had a job related disability and could not perform the essential functions of the job does not have any merit. It is also interesting to note that Mr. Lubkay admits that he did not rely on any medical opinion in making his determination. Mr. Lubkay is not a doctor and has not had any medical training. Also, the Respondent did not have a physician on staff and did not consult with a physician. In lieu of medical evidence, the Respondent relied on prejudices and stereotypes in making his determination. In fact, at the public hearing, Mr. Lubkay was very clear - "I own the company. I make that decision". (N.T. 83)

Upon review of all the evidence in the record, Complainant has shown that he is a victim of unlawful discrimination. We now move to the issue of remedy.

R E M E D Y

When there is a finding of liability, the Commissioner has broad discretion in fashioning a remedy, Murphy v. Commonwealth, PA Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985). Section 9 of the PHRA provides, in relevant 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 the Act, the Commission . . . . . shall issue and cause to be served on such Respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to hiring reinstatement or upgrading of employees, with or without back pay . . . and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice.

The awarding of a remedy under the PHRA is for two distinct purposes. First, any remedy awarded must ensure the state's interest in eradicating an unlawful discriminatory practice. The second purpose is restore the injured party to his pre-injury status and make him whole. Williamsburg Community S.D. v. Pennsylvania Human Relations Commission, 512 A.2d 1339 (1986). Clearly, in the instant case, the Respondent shall be ordered to cease and desist from discriminating against not only the Complainant but also other individuals who may have disabilities. Secondly, the complainant is entitled to not only an award of back pay, but also interest on the back pay. Brown v. Transport Corp. Pennsylvania Human Relations Commission, 133 Pa Cmwlth 845, 578 A. 2d 555 (1990). In this case, the determination of the back pay award is fairly simple to calculate. The determination is made by comparing Complainant's earnings and hours prior to his leave to his earnings and hours

upon his return. The difference represents returning him to pre-injury status. Williamsburg, supra. The Complainant was employed with reduced hours and pay from September 7, 1999 to December 15, 1999. The back pay for that time period is $1,560.60. The calculations are as follows:

Date	Actual Earning	Methodist Earnings	Difference
09/07/99	$ 86.40	$244.20	$157.80
09/13/99	$144.00	$244.20	$100.20
09/20/99	$144.00	$244.20	$100.20
09/27/99	$144.00	$244.20	$100.20
10/04/99	$144.00	$244.20	$100.20
10/11/99	$144.00	$244.20	$100.20
10/18/99	$144.00	$244.20	$100.20
10/25/99	$144.00	$244.20	$100.00
11/01/99	$144.00	$244.20	$100.20
11/08/99	$144.00	$244.20	$100.20
11/15/99	$144.00	$244.20	$100.20
11/22/99	$144.00	$244.20	$100.20
11/29/99	$144.00	$244.00	$100.20
12/06/99	$144.00	$244.00	$100.20
12/13/99	$144.00	$244.00	$100.20
TOTAL:			$1,560.60

Next Respondent's President testified that, while they had an affirmative action policy, it had not been updated in twelve or thirteen years (N.T. 108). Further, he indicated that it contained no mention of the PHRA or the ADA. Therefore, the Respondent shall establish, publish and provide a non-discriminatory policy to be distributed to all employees. Also, the Respondent shall provide training to all of its employees regarding the right of all individuals to work in a non-discriminatory environment consistent with the PHRA.

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION, INC. **Respondent**	:	

RECOMMENDATION OF HEARING PANEL

Upon review of the entire record in the above captioned matter, this Hearing Panel finds that the Complainant Raymond Maturo has proven discrimination against the Respondent Assets Protection, Inc., in violation of the Pennsylvania Human Relations Act.

Therefore, it is the Hearing Panel's recommendation that the attached Stipulations of Fact, 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 Hearing Panel recommends issuance of the attached Final Order.

Sylvia A. Waters

Commissioner Sylvia Waters, Panel Chairperson

Russell S. Howell

Commissioner Russell S. Howell

Daniel Yun

Commissioner Daniel Yun

COMMONWEALTH OF PENNSYLVANIA

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RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION , INC. **Respondent**	:	

FINAL ORDER

AND NOW, this 19th day of November 2001, after reviewing the entire record in the above captioned case, the 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 Hearing Panel. Furthermore, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinions, and enters said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record and hereby

O R D E R S

1. That, the Respondent shall cease and desist from discriminating against individuals because of their disabilities

2. That, the Respondent shall pay Complainant $1,560.60 which represents back pay from September 7, 1999 through December 15, 1999.

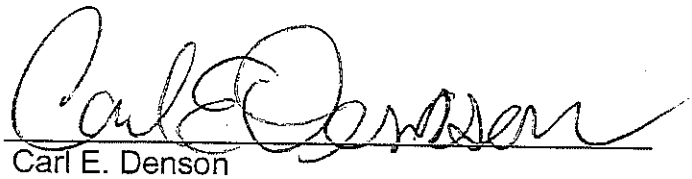
3. The Respondent shall also pay interest at the rate of 6% per annum from September 1999 until December 31, 1999, and at the rate of 8% per annum from January 2000 until December 20, 2000.

4. That, the Respondent shall establish publish and provide a non-discrimination policy consistent with the Pennsylvania Human Relations Act.

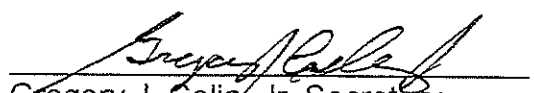
5. That, the Respondent shall provide training to all of its employees regarding the right of individuals to work in a non-discriminatory environment, including the right to reasonable accommodation.

6. That within thirty days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier III, Assistant Chief Counsel.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Carl E. Denson
Chairperson

Attest:


Gregory J. Celia, Jr. Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO, Complainant	:	
v.	:	DOCKET NO. E-93153-H
ASSETS PROTECTION, INC., Respondent	:	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. E-93153H
	:	
ASSETS PROTECTION, INC.,	:	
	:	
Respondent	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. Raymond Maturo (hereinafter "Complainant") is an adult, male.

2. Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act.

3. Assets Protection, Inc. (hereinafter "Respondent") is an employer that, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth.

4. On or about January 12, 1997, the Complainant was hired by the Respondent and assigned to the Methodist Hospital facility.

5. According to the Respondent's policies and its job description, the Complainant's daily duty assignments encompassed numerous major life activities, including: standing, sitting, walking, bending, and lifting.

6. Beginning on or about May 10, 1999 and continuing until September 7, 1999, the Complainant was unable to work due to health reasons.

7. On or about June 20, 1999, Dr. Melanie Jewell, M.D., the Complainant's treating physician, informed the Respondent that the Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis, and renal insufficiency.

8. Upon the Complainant's return to work in September 1999, he was assigned to George F. Kempf Supply Co. in the capacity of a security guard.

9. The Respondent replaced the Complainant with Carmen Garafalo, Steve Cardillo, Frank Fantazzi, and Ken Castellane, none of whom have a disability or were regarded as having a disability.

10. On or about October 5, 1999, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-91561D. A copy of the complaint will be included as a docket entry in this case at time of hearing.

11. On or about March 29, 2000, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.

12. In correspondence dated May 15, 2000, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint at docket number E-91561D.

13. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

14. In correspondence dated June 27, 2000, Commission staff notified the Complainant and Respondent that a public hearing had been approved in the complaint.

Charles L. Nier, III
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

9/14/00
Date

Raymond Maturo
(Complainant)

9-14-00
Date

Andrei Kuti
(Respondent, Office Manager)

9-14-2000
Date

FINDINGS OF FACT

1. The Complainant herein is Raymond Maturo (hereinafter "Complainant"). (S.F. #1).

2. The Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2).

3. The Respondent herein is Assets Protection, Inc. (hereinafter "Respondent"). (S.F. #3).

4. The Respondent is a professional service oriented firm providing a wide range of security related products and services, including patrol and guard services. (C.E. #1).

5. The Respondent at all times relevant to the instant case, employed four or more persons within the Commonwealth of Pennsylvania (S.F. #3).

6. The Complainant was originally hired by Capper Security and was assigned to the Methodist Hospital facility. (N.T. 27).

7. Subsequently, the Respondent in this matter acquired Capper Security. (N.T. 27).

The foregoing stipulations of fact are 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:

NT	Notes of Testimony
CE	Complainant's Exhibit
SF	Stipulations of Fact

8. On or about January 12, 1997, the Complainant was hired by Respondent and remained assigned to Methodist Hospital. (S.F. #4).

9. The Complainant was employed as a Sergeant working approximately 32-33 hours a week at a pay rate of $7.20 an hour (C.E. #3, N.T. 28)

10. The Complainant worked the 12:00 a.m. to 8:00 a.m. shift and supervised two security guards. (N.T. 34).

11. George Hatton was employed by Methodist Hospital as Director of Security. (N.T. 74).

12. Mr. Hatton communicated with Respondent on a frequent basis regarding Respondent's security services at the hospital. (N.T. 74, 83).

13. The Complainant's daily duties encompassed numerous major life activities such as; standing, sitting walking, bending and lifting. (S.F. #5).

14. The Complainant never received any negative comments, verbal warnings or written warnings regarding his performance on the job. (N.T. 39).

15. From May 10, 999 until September 7, 1999, the Complainant was not able to work for medical reasons. (S.F. #6).

16. The Complainant underwent several procedures, between May and August, relating to a heart condition including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. (N.T. 39-41).

17. Dr. Melanie Jewell was the Complainant's treating physician for his heart condition. (C.E. #16).

18. While on leave, Complainant contacted both Respondent and George Hatton as to his health status and return to work status. (N.T. 41-42).

19. Complainant's wife communicated with Respondent regarding Complainant's health and return to work status. (N.T. 42)

20. The Respondent sent Complainant an undated letter requesting that his physician provide documentation of the Complainant's health status and return to work status. (N.T. 42-43).

21. Dr. Jewell, on June 20, 1999, provided the Respondent with the requested information, stating that Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis and renal insufficiency. (C.E. #5 S.F. #7).

22. Dr. Jewell also stated that his return to work date was uncertain and could better assessed by October 1, 1999. (C. E. #5 § S.F. #7).

23. On or about August 20, 1999, Dr. Jewell provided a second letter which fully explained Complainant's medical status and released Complainant to full duty effective September 7, 1999. (N. T. 44-45).

24. The Complainant provided this letter to George Hatton who in turn provided it to Don Herr, a Respondent employee. (N.T. 44-46).

25. After recovery and rehabilitation, the Complainant was better able to perform major life activities than he was before the procedures. (C.E. #16 at 29-30).

26. Complainant was better able to perform the essential functions of his job after the medical procedures. (C.E. #16).

27. On September 7, 1999, the Complainant had made a full recovery and was prepared to fulfill his job duties. (N.T. 28).

28. Upon his return to work on September 7, 1999, the Complainant was temporarily assigned for one week to Methodist Nursing Home. (N.T. 47).

29. He worked for 16 hours at a pay rate of $5.40, earning $86.40. (N.T. 47).

30. Later in September, the Complainant was assigned to George F. Kempf Supply Co., and demoted to the rank of security guard. (N.T. 47-48; S.F. #8).

31. The Respondent then reduced Complainant's hours to 24 per week at a pay rate of $6.00 an hour from his previous status of 32-33 hours a week at a pay rate of $7.20 an hour. N.T. 48-49)

32. The Complainant was employed in that capacity from September 7, 1999 until December 15, 1999. (N.T. 48-49).

33. The Complainant earned $288.00 bi-weekly during that time period. (C.E. #8).

34. On or about July 5, 1999, all security officers at Methodist Hospital were given a raise of .20 cents per hour. (N.T. 110).

35. When an employee is out, the Respondent's practice is to "revamp the shift", and when the employee returns, revert back to the original shift. (N.T. 99).

36. In regard to the Complainant, Robert Lubkay, Respondent President testified that it was possible that the Respondent simply adjusted employee's schedules during Complainant's leave. (N.T. 96-99).

37. When the Complainant returned to work, the Respondent did not

follow its normal practice of reverting the shift back to the original status. (S.F. #8).

38. As of September 7, 1999, all guard personnel at Methodist Hospital were hired before Complainant's leave. (N.T. 96).

39. Mr. Lubkay made the subjective determination that the Complainant could not perform the essential functions of his job. (C.E. #10, #15).

40. Mr. Lubkay is not a physician and did not have any medical training. (N.T. 86).

41. The Respondent did not retain a physician on staff or as a consultant. (N.T. 116).

42. The Respondent did not rely on any opinions in determining that the Complainant was unable to perform the essential functions of the job. (N.T. 83).

43. Mr. Lubkay insisted since he owns the company, he is the one who makes the decisions. (N.T. 83).

44. The Respondent had an affirmative action policy which had not been updated for "twelve or thirteen years". (N.T. 108).

45. The policy, as indicated by Mr. Lubkay, did not mention the Pennsylvania Human Relations Act or the Americans with Disabilities Act. (N.T. 102, 108).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter 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. The Complainant is an individual within the meaning of Section 5(a) of the PHRA.

4. The Respondent is an employer within the meaning of Section 5(a) of the PHRA.

5. The complaint filed in this case satisfies the Section 9 filing requirements found in the PHRA.

6. Section 5(a) of the PHRA, inter alia, prohibits employers from discriminating against individuals in the terms and conditions of their employment because of their disability.

7. The Complainant has established a *prima facie* of disability discrimination by showing:

1) he is a member of a protected class;
2) he was qualified to perform the essential functions of the job; and
3) he was demoted and his hours were reduced;
4) circumstances gives rise to an inference of discrimination.

8. The Respondent articulated several legitimate non-discriminatory reasons for its actions.

9. The Complainant has shown that the articulated reasons are not credible.

10. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him in the terms and conditions of his employment because of his disability in violation of Section 5(a) of the PHRA.

11. Whenever the Commissioner 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 purpose of the PHRA.

12. The Commission may also issue a back pay award.

OPINION

On or about October 5, 1999, Raymond Maturo (hereinafter "Complainant") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Assets Protection, Inc. (hereinafter "Respondent"), Docket No. E-93153-H. In the complaint, the Complainant alleged that the Respondent unlawfully discriminated against him by demoting him and/or refusing to assign him to work as a supervisor, because of his disability, Heart Cardiovascular Impairment and/or because the Respondent regarded him as disabled. On or about March 29, 2000, an answer to the complaint was filed.

On May 15, 2000, Commission Staff advised the Respondent that the investigation had resulted in a finding of probable cause to credit the allegations found in the complaint. Subsequent to that determination of probable cause, Commission staff attempted to resolve the matter in dispute by conference, conciliation and persuasion, but were unable to do so. Commission staff, by correspondence dated June 27, 2000, notified the parties that the Commission had approved the convening of a public hearing.

A public hearing was convened on December 20, 2000. Commissioner Sylvia Waters, Panel Chairperson, Commissioner Russell S. Howell, and Commissioner Daniel Yun also served on the hearing panel. Phillip A. Ayers served as Panel Advisor. Robert Lubkay, Respondent President, appeared pro se. The Commission interest in this matter was overseen by Charles L. Nier III, Assistant Chief Counsel. Both Regional Counsel and Respondent filed post hearing briefs in this matter.

Section 5(a) of the PHRA, provides that it shall be an unlawful discriminatory practice:

> (a) For any employer because of the . . . disability, of any individual to or to otherwise discriminate against such individual or independent contractor with respect to compensation, terms, conditions or privileges of employment . . .

In reviewing the Complainant's allegations, we recognize the issue of disparate treatment. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a Pennsylvania Supreme Court case. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 US 792 (1973). The Court's guidance indicates that the Complainant must first establish a *prima facie* case of discrimination. If complainant establishes a *prima facie* case, the burden of production then shifts to the Respondent to "simply . . . produce evidence of a legitimate, non-discriminatory reason . . . for [its action]." If the Respondent meets this production burden, in order to prevail the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 US 248, 256 (1981).

Following the instruction found in Allegheny Housing on the effect of a

prima facie showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The Court stated that:

> *As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes".*

The Complainant is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up". Allegheny Housing, *supra*. At 319.

In this court-designed burden allocation, the Complainant must, of course, first establish a *prima facie* case. However, the *prima facie* showing should not be an onerous burden. In the instant case, a *prima facie* case of disability discrimination can be established by showing that:

(1) the Complainant was a member of a protected class;

(2) the Complainant was qualified to perform the job; and

(3) the Complainant was demoted and his hours were reduced; and

(4) circumstances give rise to an inference of discrimination.

Upon review of the evidence presented in this matter, it is clear that the Complainant has established a *prima facie* care of discrimination based on his

disability. First, the Complainant is a member of a protected class because of his disability, Heart/Cardiovascular Impairment. In the instant case, the parties in this matter executed a document entitled "Stipulations of Fact" on September 14, 2000. This document included the following stipulation:

Complainant has a disability, Heart/Cardiovascular Impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2). Because of this stipulation, the Complainant has certainly established the first element of the *prima facie* case.

Secondly, the Complainant was qualified to perform the essential functions of his job. The Respondent is a firm that provides patrol and guard services to various entities such as Methodist Hospital. The Complainant worked for Respondent as a Sergeant providing security for Methodist Hospital. His duties included: Standing, sitting, walking, bending, and lifting. There is no question that he admirably performed his job functions before his medical condition changed and he was granted a leave of absence. He had received praise for his job performance (N.T. 39). The Complainant had never received any negative evaluations regarding his job performance. The record reflects that from May 10, 1999 until September 7, 1999, the Complainant could not work due to treatment for heart condition. (S.F. #6). In fact, the Complainant required a leave of absence for several medical procedures and a period of rehabilitation.

As Commission Counsel notes, there is a significant body of law recognizing that a leave of absence may constitute a reasonable accommodation under the PHRA and the Americans with Disabilities Act

("ADA"). See Criado v. IBM Corp. 145 F. 3d 437 (1st Cir. 1998) (stating that leave may constitute reasonable accommodation); Schmidt v. Safeway, Inc. 864 F. Supp. 991, 996 (1994) (reasonable accommodation may include leave of absence for treatment).

During the Complainant's leave, he underwent several procedures including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. Dr. Melanie Jewell was the Complainant's physician for his heart condition. Dr. Jewell testified that "most people should be in better shape than they were pre-operatively because they should have better coronary blood flow. "(C.E. at #16)". Dr. Jewell further testified that, after several months of rehabilitation, Complainant was better able to perform the major life activities of walking, climbing, and lifting in September 1999 after the medical procedure as opposed to April 1999 prior to the medical procedure. (C.E. #16 at 29). On August 20, 1999, Dr. Jewell authorized Complainant to return to work on September 7, 1999 at full duty, (N.T. 25-26). Therefore, the Complainant was still qualified to perform the essential function of his job with a reasonable accommodation of a leave of absence. The Complainant has satisfied the second prong of the *prima facie* case.

Thirdly, the Complainant can show that he was demoted and his hours were reduced. Before the Complainant had the medical procedures, he was assigned to Methodist Hospital and held the rank of Sergeant. He normally worked 32-33 hours a week at a rate of $7.20 per hour. (C.E. 3; N.T. 28). When Complainant returned to work, he was assigned to George F. Kempf Supply Co., and was demoted to the rank of Security Guard (S.F. #8). Also,

Complainant's hours were reduced to 24 hours per week and his pay was reduced to $6.00 an hour. Clearly, the evidence shows that the Complainant's rank, hours and pay were reduced by the Respondent. Lastly, the circumstances in this matter do give rise to the inference of discrimination. The Respondent asserted that he had no knowledge of the Complainant's medical condition or return to work status. There is credible testimony that not only did Complainant and his wife contact Respondent, but Dr. Jewell also contacted the Respondent. Also, the Respondent had a policy of how to change work schedules when an individual was out. In this case, the Respondent did not follow its own policy. Clearly, these circumstances give rise to an inference of discrimination. A review of the record before the Commission reveals that the Complainant has met his burden of establishing a *prima facie* case of discrimination because of his disability, Heart/Cardiovascular impairment.

As aforementioned, once the Complainant meets his burden of establishing a *prima facie* case, the Respondent must then articulate a legitimate non-discriminatory reason for its action. The Respondent in this matter has articulated several reasons for its action. Firstly the Respondent asserts that the Complainant never contacted Respondent regarding his medical condition and he was, therefore, terminated at some point between May 10, 1999 and September 7, 1999. He was then subsequently rehired and reassigned because his previous position had been filled. Secondly, Respondent argued that the Complainant's leave of absence was not a reasonable accommodation and represented undue hardship. The above reasons stated by the Respondent satisfies its burden of articulating legitimate

non-discriminatory reasons for its action.

As previously stated, the ultimate burden of persuasion is on the Complainant to prove by a preponderance of the evidence that he is a victim of unlawful discrimination. The Complainant may succeed in this burden of persuasion by showing that Respondent's articulated reasons are pretextual.

With respect to Respondent's first articulated reason that Complainant never informed the Respondent of his medical condition and had to be terminated, rehired and reassigned, there is both circumstantial and direct evidence that this articulated reason is untrue. The Complainant credibly testified that he regularly contacted the Respondent and George Hatton, the Director of Security at Methodist Hospital regarding his health and his return to work (N.T. 41-42). Also the Respondent acknowledged that Mr. Hatton may have spoken to Respondent regarding the Complainant's contacts relating to his medical status. (N.T. 90-91). The Complainant's wife also contacted the Respondent on several occasions regarding Complainant's medical status. In addition, the Respondent requested from Dr. Jewell documentation regarding Complainant's medical status and his return to work. Dr. Jewell provided Respondent at least two letters, pertaining to Complainant's health status and his release to work, effective September 7, 1999. (S.F #7; C.E. #6 C.E. #16). This evidence shows that Respondent clearly had knowledge of Complainant's health and his return to work status. The Respondent's reason that Complainant failed to contact is not credible and the true reason was discrimination.

Next, Respondent argues that the Complainant's position had been

permanently filled and he had to be reassigned to a different location. The evidence indicates that standard practice was that when an employee was out, the Respondent would "revamp the shift" and revert back to the previous status when the employee returned. (N.T. 99). In the instant case, Respondent's President testified that the Respondent simply adjusted the schedules of employees already employed at the hospital. (N.T. 96). However, the Respondent did not follow its own policy of reverting back to the previous shift when the Complainant returned. Moreover, the Respondent did not permanently fill the Complainant's position with a new employee. Thusly the Respondent's articulated reason that the position was permanently filled is not worthy of belief.

We now move to the Respondent's argument that the Complainant's leave of absence was not reasonable or an undue hardship. The case law is clear that the Respondent bears the burden of proving that an accommodation is unreasonable or creates an undue hardship. Walton v. Mental Health Ass'n 168 F.3d 661, 670 (3rd GR. 1999).

In the matter before the Commission, the Complainant certainly identified an accommodation that would make him qualified to perform the essential functions of his job. In fact, Complainant's witness, Dr. Jewell, testified that the Complainant was better able to perform major life activities after the leave of absence. (C.E. #16). The Respondent must show that the accommodation is unreasonable or creates a hardship. The Respondent simply has not done so. The time of the leave of absence was not unreasonable because the Respondent was apprised of Complainant's health and return to work status by

Complainant, Complainant's wife and Dr. Jewell. (N.T. 41-42; S.F. 7; C.E. 16). As a matter of fact, Dr. Jewell specifically notified Respondent that the Complainant would not require a indefinite leave of absence. (C.E. § 16). See Myers v. Hose, 50 F.3d 278, 283 (4th CR. 1995). The Respondent has not shown that the leave of absence was unreasonable.

Likewise the Respondent has not shown that the accommodation creates an undue hardship. Commission regulations provide some guidance in determining whether an accommodation imposes an undue burden:

> (i) The overall size and nature of a business, organization, program or public accommodation, including number of employees, structure and composition of workforce, and number and type of facilities. However, financial capability to make reasonable accommodation shall only be a factor when raised as part of an undue hardship defense.
>
> (ii) Good faith efforts previously made to accommodate similar handicaps or disabilities.
>
> (iii) The extent, nature, cost of the reasonable accommodation needed.
>
> (iv) The extent to which handicapped or disabled persons can reasonable be expected to need and desire to use, enjoy or benefit from the employment or public accommodation which is the subject of the reasonable accommodation in question.
>
> (v) Legal or proprietary interest in the subject of proposed reasonable accommodations including authority to make the accommodations under the terms of a bonafide agreement, such as a lease, governing or describing rights and duties with respect to the subject.

16 Pa. Code § 44.4

Succinctly put, the Respondent has presented absolutely no evidence that the leave of absence was an undue hardship. Respondent's President,

Robert Lubkay testified that the Respondent simply adjusted the work schedules of the other employees assigned to the Hospital. The Respondent has not established that the accommodation was undue hardship.

Lastly, Respondent argues that the Complainant had a job-related disability and was unable to perform the essential functions of the job. Once again, the Respondent presents no evidence showing that Complainant had a job related disability, The evidence in the record shows that the Complainant was better able to perform the essential functions of his job. Respondent attempted to argue that Dr. Jewell was unqualified because she did not understand the essential functions of the job. However, Dr. Jewell had staff privileges at the Methodist Hospital and had an acute awareness of the basic job duties and responsibilities of the security guards. In addition, Dr. Jewell reviewed Respondent's security policies and procedures and was able to make a well reasoned determination. Accordingly, Respondent's argument that Complainant had a job related disability and could not perform the essential functions of the job does not have any merit. It is also interesting to note that Mr. Lubkay admits that he did not rely on any medical opinion in making his determination. Mr. Lubkay is not a doctor and has not had any medical training. Also, the Respondent did not have a physician on staff and did not consult with a physician. In lieu of medical evidence, the Respondent relied on prejudices and stereotypes in making his determination. In fact, at the public hearing, Mr. Lubkay was very clear - "I own the company. I make that decision". (N.T. 83)

Upon review of all the evidence in the record, Complainant has shown that he is a victim of unlawful discrimination. We now move to the issue of remedy.

R E M E D Y

When there is a finding of liability, the Commissioner has broad discretion in fashioning a remedy, Murphy v. Commonwealth, PA Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985). Section 9 of the PHRA provides, in relevant 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 the Act, the Commission . . . . . shall issue and cause to be served on such Respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to hiring reinstatement or upgrading of employees, with or without back pay . . . and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice.

The awarding of a remedy under the PHRA is for two distinct purposes. First, any remedy awarded must ensure the state's interest in eradicating an unlawful discriminatory practice. The second purpose is restore the injured party to his pre-injury status and make him whole. Williamsburg Community S.D. v. Pennsylvania Human Relations Commission, 512 A.2d 1339 (1986). Clearly, in the instant case, the Respondent shall be ordered to cease and desist from discriminating against not only the Complainant but also other individuals who may have disabilities. Secondly, the complainant is entitled to not only an award of back pay, but also interest on the back pay. Brown v. Transport Corp. Pennsylvania Human Relations Commission, 133 Pa Cmwlth 845, 578 A. 2d 555 (1990). In this case, the determination of the back pay award is fairly simple to calculate. The determination is made by comparing Complainant's earnings and hours prior to his leave to his earnings and hours

upon his return. The difference represents returning him to pre-injury status. Williamsburg, supra. The Complainant was employed with reduced hours and pay from September 7, 1999 to December 15, 1999. The back pay for that time period is $1,560.60. The calculations are as follows:

Date	Actual Earning	Methodist Earnings	Difference
09/07/99	$ 86.40	$244.20	$157.80
09/13/99	$144.00	$244.20	$100.20
09/20/99	$144.00	$244.20	$100.20
09/27/99	$144.00	$244.20	$100.20
10/04/99	$144.00	$244.20	$100.20
10/11/99	$144.00	$244.20	$100.20
10/18/99	$144.00	$244.20	$100.20
10/25/99	$144.00	$244.20	$100.00
11/01/99	$144.00	$244.20	$100.20
11/08/99	$144.00	$244.20	$100.20
11/15/99	$144.00	$244.20	$100.20
11/22/99	$144.00	$244.20	$100.20
11/29/99	$144.00	$244.00	$100.20
12/06/99	$144.00	$244.00	$100.20
12/13/99	$144.00	$244.00	$100.20
TOTAL:			$1,560.60

Next Respondent's President testified that, while they had an affirmative action policy, it had not been updated in twelve or thirteen years (N.T. 108). Further, he indicated that it contained no mention of the PHRA or the ADA. Therefore, the Respondent shall establish, publish and provide a non-discriminatory policy to be distributed to all employees. Also, the Respondent shall provide training to all of its employees regarding the right of all individuals to work in a non-discriminatory environment consistent with the PHRA.

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION, INC. **Respondent**	:	

RECOMMENDATION OF HEARING PANEL

Upon review of the entire record in the above captioned matter, this Hearing Panel finds that the Complainant Raymond Maturo has proven discrimination against the Respondent Assets Protection, Inc., in violation of the Pennsylvania Human Relations Act.

Therefore, it is the Hearing Panel's recommendation that the attached Stipulations of Fact, 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 Hearing Panel recommends issuance of the attached Final Order.

Sylvia A. Waters

Commissioner Sylvia Waters, Panel Chairperson

Russell S. Howell

Commissioner Russell S. Howell

Daniel Yun

Commissioner Daniel Yun

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION , INC. **Respondent**	:	

FINAL ORDER

AND NOW, this 19Th day of November 2001, after reviewing the entire record in the above captioned case, the 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 Hearing Panel. Furthermore, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinions, and enters said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record and hereby

O R D E R S

1. That, the Respondent shall cease and desist from discriminating against individuals because of their disabilities

2. That, the Respondent shall pay Complainant $1,560.60 which represents back pay from September 7, 1999 through December 15, 1999.

3. The Respondent shall also pay interest at the rate of 6% per annum from September 1999 until December 31, 1999, and at the rate of 8% per annum from January 2000 until December 20, 2000.

4. That, the Respondent shall establish publish and provide a non-discrimination policy consistent with the Pennsylvania Human Relations Act.

5. That, the Respondent shall provide training to all of its employees regarding the right of individuals to work in a non-discriminatory environment, including the right to reasonable accommodation.

6. That within thirty days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier III, Assistant Chief Counsel.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Carl E. Denson
Chairperson

Attest:

_____
Gregory J. Celia, Jr. Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO, Complainant	:	
v.	:	DOCKET NO. E-93153-H
ASSETS PROTECTION, INC., Respondent	:	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO,	:	
	:	
Complainant	:	
	:	
v.	:	Docket No. E-93153H
	:	
ASSETS PROTECTION, INC.,	:	
	:	
Respondent	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. Raymond Maturo (hereinafter "Complainant") is an adult, male.

2. Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act.

3. Assets Protection, Inc. (hereinafter "Respondent") is an employer that, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth.

4. On or about January 12, 1997, the Complainant was hired by the Respondent and assigned to the Methodist Hospital facility.

5. According to the Respondent's policies and its job description, the Complainant's daily duty assignments encompassed numerous major life activities, including: standing, sitting, walking, bending, and lifting.

6. Beginning on or about May 10, 1999 and continuing until September 7, 1999, the Complainant was unable to work due to health reasons.

7. On or about June 20, 1999, Dr. Melanie Jewell, M.D., the Complainant's treating physician, informed the Respondent that the Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis, and renal insufficiency.

8. Upon the Complainant's return to work in September 1999, he was assigned to George F. Kempf Supply Co. in the capacity of a security guard.

9. The Respondent replaced the Complainant with Carmen Garafalo, Steve Cardillo, Frank Fantazzi, and Ken Castellane, none of whom have a disability or were regarded as having a disability.

10. On or about October 5, 1999, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-91561D. A copy of the complaint will be included as a docket entry in this case at time of hearing.

11. On or about March 29, 2000, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.

12. In correspondence dated May 15, 2000, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint at docket number E-91561D.

13. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

14. In correspondence dated June 27, 2000, Commission staff notified the Complainant and Respondent that a public hearing had been approved in the complaint.

Charles L. Nier, III
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

9/14/00
Date

Raymond Maturo
(Complainant)

9-14-00
Date

Andrei Kuti
(Respondent, Office Manager)

9-14-2000
Date

FINDINGS OF FACT

1. The Complainant herein is Raymond Maturo (hereinafter "Complainant"). (S.F. #1).

2. The Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2).

3. The Respondent herein is Assets Protection, Inc. (hereinafter "Respondent"). (S.F. #3).

4. The Respondent is a professional service oriented firm providing a wide range of security related products and services, including patrol and guard services. (C.E. #1).

5. The Respondent at all times relevant to the instant case, employed four or more persons within the Commonwealth of Pennsylvania (S.F. #3).

6. The Complainant was originally hired by Capper Security and was assigned to the Methodist Hospital facility. (N.T. 27).

7. Subsequently, the Respondent in this matter acquired Capper Security. (N.T. 27).

The foregoing stipulations of fact are 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:

NT	Notes of Testimony
CE	Complainant's Exhibit
SF	Stipulations of Fact

8. On or about January 12, 1997, the Complainant was hired by Respondent and remained assigned to Methodist Hospital. (S.F. #4).

9. The Complainant was employed as a Sergeant working approximately 32-33 hours a week at a pay rate of $7.20 an hour (C.E. #3, N.T. 28)

10. The Complainant worked the 12:00 a.m. to 8:00 a.m. shift and supervised two security guards. (N.T. 34).

11. George Hatton was employed by Methodist Hospital as Director of Security. (N.T. 74).

12. Mr. Hatton communicated with Respondent on a frequent basis regarding Respondent's security services at the hospital. (N.T. 74, 83).

13. The Complainant's daily duties encompassed numerous major life activities such as; standing, sitting walking, bending and lifting. (S.F. #5).

14. The Complainant never received any negative comments, verbal warnings or written warnings regarding his performance on the job. (N.T. 39).

15. From May 10, 999 until September 7, 1999, the Complainant was not able to work for medical reasons. (S.F. #6).

16. The Complainant underwent several procedures, between May and August, relating to a heart condition including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. (N.T. 39-41).

17. Dr. Melanie Jewell was the Complainant's treating physician for his heart condition. (C.E. #16).

18. While on leave, Complainant contacted both Respondent and George Hatton as to his health status and return to work status. (N.T. 41-42).

19. Complainant's wife communicated with Respondent regarding Complainant's health and return to work status. (N.T. 42)

20. The Respondent sent Complainant an undated letter requesting that his physician provide documentation of the Complainant's health status and return to work status. (N.T. 42-43).

21. Dr. Jewell, on June 20, 1999, provided the Respondent with the requested information, stating that Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis and renal insufficiency. (C.E. #5 S.F. #7).

22. Dr. Jewell also stated that his return to work date was uncertain and could better assessed by October 1, 1999. (C. E. #5 § S.F. #7).

23. On or about August 20, 1999, Dr. Jewell provided a second letter which fully explained Complainant's medical status and released Complainant to full duty effective September 7, 1999. (N. T. 44-45).

24. The Complainant provided this letter to George Hatton who in turn provided it to Don Herr, a Respondent employee. (N.T. 44-46).

25. After recovery and rehabilitation, the Complainant was better able to perform major life activities than he was before the procedures. (C.E. #16 at 29-30).

26. Complainant was better able to perform the essential functions of his job after the medical procedures. (C.E. #16).

27. On September 7, 1999, the Complainant had made a full recovery and was prepared to fulfill his job duties. (N.T. 28).

28. Upon his return to work on September 7, 1999, the Complainant was temporarily assigned for one week to Methodist Nursing Home. (N.T. 47).

29. He worked for 16 hours at a pay rate of $5.40, earning $86.40. (N.T. 47).

30. Later in September, the Complainant was assigned to George F. Kempf Supply Co., and demoted to the rank of security guard. (N.T. 47-48; S.F. #8).

31. The Respondent then reduced Complainant's hours to 24 per week at a pay rate of $6.00 an hour from his previous status of 32-33 hours a week at a pay rate of $7.20 an hour. N.T. 48-49)

32. The Complainant was employed in that capacity from September 7, 1999 until December 15, 1999. (N.T. 48-49).

33. The Complainant earned $288.00 bi-weekly during that time period. (C.E. #8).

34. On or about July 5, 1999, all security officers at Methodist Hospital were given a raise of .20 cents per hour. (N.T. 110).

35. When an employee is out, the Respondent's practice is to "revamp the shift", and when the employee returns, revert back to the original shift. (N.T. 99).

36. In regard to the Complainant, Robert Lubkay, Respondent President testified that it was possible that the Respondent simply adjusted employee's schedules during Complainant's leave. (N.T. 96-99).

37. When the Complainant returned to work, the Respondent did not

follow its normal practice of reverting the shift back to the original status. (S.F. #8).

38. As of September 7, 1999, all guard personnel at Methodist Hospital were hired before Complainant's leave. (N.T. 96).

39. Mr. Lubkay made the subjective determination that the Complainant could not perform the essential functions of his job. (C.E. #10, #15).

40. Mr. Lubkay is not a physician and did not have any medical training. (N.T. 86).

41. The Respondent did not retain a physician on staff or as a consultant. (N.T. 116).

42. The Respondent did not rely on any opinions in determining that the Complainant was unable to perform the essential functions of the job. (N.T. 83).

43. Mr. Lubkay insisted since he owns the company, he is the one who makes the decisions. (N.T. 83).

44. The Respondent had an affirmative action policy which had not been updated for "twelve or thirteen years". (N.T. 108).

45. The policy, as indicated by Mr. Lubkay, did not mention the Pennsylvania Human Relations Act or the Americans with Disabilities Act. (N.T. 102, 108).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter 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. The Complainant is an individual within the meaning of Section 5(a) of the PHRA.

4. The Respondent is an employer within the meaning of Section 5(a) of the PHRA.

5. The complaint filed in this case satisfies the Section 9 filing requirements found in the PHRA.

6. Section 5(a) of the PHRA, inter alia, prohibits employers from discriminating against individuals in the terms and conditions of their employment because of their disability.

7. The Complainant has established a *prima facie* of disability discrimination by showing:

1) he is a member of a protected class;
2) he was qualified to perform the essential functions of the job; and
3) he was demoted and his hours were reduced;
4) circumstances gives rise to an inference of discrimination.

8. The Respondent articulated several legitimate non-discriminatory reasons for its actions.

9. The Complainant has shown that the articulated reasons are not credible.

10. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him in the terms and conditions of his employment because of his disability in violation of Section 5(a) of the PHRA.

11. Whenever the Commissioner 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 purpose of the PHRA.

12. The Commission may also issue a back pay award.

OPINION

On or about October 5, 1999, Raymond Maturo (hereinafter "Complainant") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Assets Protection, Inc. (hereinafter "Respondent"), Docket No. E-93153-H. In the complaint, the Complainant alleged that the Respondent unlawfully discriminated against him by demoting him and/or refusing to assign him to work as a supervisor, because of his disability, Heart Cardiovascular Impairment and/or because the Respondent regarded him as disabled. On or about March 29, 2000, an answer to the complaint was filed.

On May 15, 2000, Commission Staff advised the Respondent that the investigation had resulted in a finding of probable cause to credit the allegations found in the complaint. Subsequent to that determination of probable cause, Commission staff attempted to resolve the matter in dispute by conference, conciliation and persuasion, but were unable to do so. Commission staff, by correspondence dated June 27, 2000, notified the parties that the Commission had approved the convening of a public hearing.

A public hearing was convened on December 20, 2000. Commissioner Sylvia Waters, Panel Chairperson, Commissioner Russell S. Howell, and Commissioner Daniel Yun also served on the hearing panel. Phillip A. Ayers served as Panel Advisor. Robert Lubkay, Respondent President, appeared pro se. The Commission interest in this matter was overseen by Charles L. Nier III, Assistant Chief Counsel. Both Regional Counsel and Respondent filed post hearing briefs in this matter.

Section 5(a) of the PHRA, provides that it shall be an unlawful discriminatory practice:

> (a) For any employer because of the . . . disability, of any individual to or to otherwise discriminate against such individual or independent contractor with respect to compensation, terms, conditions or privileges of employment . . .

In reviewing the Complainant's allegations, we recognize the issue of disparate treatment. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a Pennsylvania Supreme Court case. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 US 792 (1973). The Court's guidance indicates that the Complainant must first establish a *prima facie* case of discrimination. If complainant establishes a *prima facie* case, the burden of production then shifts to the Respondent to "simply . . . produce evidence of a legitimate, non-discriminatory reason . . . for [its action]." If the Respondent meets this production burden, in order to prevail the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 US 248, 256 (1981).

Following the instruction found in Allegheny Housing on the effect of a

prima facie showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The Court stated that:

> *As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes".*

The Complainant is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up". Allegheny Housing, *supra*. At 319.

In this court-designed burden allocation, the Complainant must, of course, first establish a *prima facie* case. However, the *prima facie* showing should not be an onerous burden. In the instant case, a *prima facie* case of disability discrimination can be established by showing that:

(1) the Complainant was a member of a protected class;

(2) the Complainant was qualified to perform the job; and

(3) the Complainant was demoted and his hours were reduced; and

(4) circumstances give rise to an inference of discrimination.

Upon review of the evidence presented in this matter, it is clear that the Complainant has established a *prima facie* care of discrimination based on his

disability. First, the Complainant is a member of a protected class because of his disability, Heart/Cardiovascular Impairment. In the instant case, the parties in this matter executed a document entitled "Stipulations of Fact" on September 14, 2000. This document included the following stipulation:

Complainant has a disability, Heart/Cardiovascular Impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2). Because of this stipulation, the Complainant has certainly established the first element of the *prima facie* case.

Secondly, the Complainant was qualified to perform the essential functions of his job. The Respondent is a firm that provides patrol and guard services to various entities such as Methodist Hospital. The Complainant worked for Respondent as a Sergeant providing security for Methodist Hospital. His duties included: Standing, sitting, walking, bending, and lifting. There is no question that he admirably performed his job functions before his medical condition changed and he was granted a leave of absence. He had received praise for his job performance (N.T. 39). The Complainant had never received any negative evaluations regarding his job performance. The record reflects that from May 10, 1999 until September 7, 1999, the Complainant could not work due to treatment for heart condition. (S.F. #6). In fact, the Complainant required a leave of absence for several medical procedures and a period of rehabilitation.

As Commission Counsel notes, there is a significant body of law recognizing that a leave of absence may constitute a reasonable accommodation under the PHRA and the Americans with Disabilities Act

("ADA"). See Criado v. IBM Corp. 145 F. 3d 437 (1st Cir. 1998) (stating that leave may constitute reasonable accommodation); Schmidt v. Safeway, Inc. 864 F. Supp. 991, 996 (1994) (reasonable accommodation may include leave of absence for treatment).

During the Complainant's leave, he underwent several procedures including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. Dr. Melanie Jewell was the Complainant's physician for his heart condition. Dr. Jewell testified that "most people should be in better shape than they were pre-operatively because they should have better coronary blood flow. "(C.E. at #16)". Dr. Jewell further testified that, after several months of rehabilitation, Complainant was better able to perform the major life activities of walking, climbing, and lifting in September 1999 after the medical procedure as opposed to April 1999 prior to the medical procedure. (C.E. #16 at 29). On August 20, 1999, Dr. Jewell authorized Complainant to return to work on September 7, 1999 at full duty, (N.T. 25-26). Therefore, the Complainant was still qualified to perform the essential function of his job with a reasonable accommodation of a leave of absence. The Complainant has satisfied the second prong of the *prima facie* case.

Thirdly, the Complainant can show that he was demoted and his hours were reduced. Before the Complainant had the medical procedures, he was assigned to Methodist Hospital and held the rank of Sergeant. He normally worked 32-33 hours a week at a rate of $7.20 per hour. (C.E. 3; N.T. 28). When Complainant returned to work, he was assigned to George F. Kempf Supply Co., and was demoted to the rank of Security Guard (S.F. #8). Also,

Complainant's hours were reduced to 24 hours per week and his pay was reduced to $6.00 an hour. Clearly, the evidence shows that the Complainant's rank, hours and pay were reduced by the Respondent. Lastly, the circumstances in this matter do give rise to the inference of discrimination. The Respondent asserted that he had no knowledge of the Complainant's medical condition or return to work status. There is credible testimony that not only did Complainant and his wife contact Respondent, but Dr. Jewell also contacted the Respondent. Also, the Respondent had a policy of how to change work schedules when an individual was out. In this case, the Respondent did not follow its own policy. Clearly, these circumstances give rise to an inference of discrimination. A review of the record before the Commission reveals that the Complainant has met his burden of establishing a *prima facie* case of discrimination because of his disability, Heart/Cardiovascular impairment.

As aforementioned, once the Complainant meets his burden of establishing a *prima facie* case, the Respondent must then articulate a legitimate non-discriminatory reason for its action. The Respondent in this matter has articulated several reasons for its action. Firstly the Respondent asserts that the Complainant never contacted Respondent regarding his medical condition and he was, therefore, terminated at some point between May 10, 1999 and September 7, 1999. He was then subsequently rehired and reassigned because his previous position had been filled. Secondly, Respondent argued that the Complainant's leave of absence was not a reasonable accommodation and represented undue hardship. The above reasons stated by the Respondent satisfies its burden of articulating legitimate

non-discriminatory reasons for its action.

As previously stated, the ultimate burden of persuasion is on the Complainant to prove by a preponderance of the evidence that he is a victim of unlawful discrimination. The Complainant may succeed in this burden of persuasion by showing that Respondent's articulated reasons are pretextual.

With respect to Respondent's first articulated reason that Complainant never informed the Respondent of his medical condition and had to be terminated, rehired and reassigned, there is both circumstantial and direct evidence that this articulated reason is untrue. The Complainant credibly testified that he regularly contacted the Respondent and George Hatton, the Director of Security at Methodist Hospital regarding his health and his return to work (N.T. 41-42). Also the Respondent acknowledged that Mr. Hatton may have spoken to Respondent regarding the Complainant's contacts relating to his medical status. (N.T. 90-91). The Complainant's wife also contacted the Respondent on several occasions regarding Complainant's medical status. In addition, the Respondent requested from Dr. Jewell documentation regarding Complainant's medical status and his return to work. Dr. Jewell provided Respondent at least two letters, pertaining to Complainant's health status and his release to work, effective September 7, 1999. (S.F #7; C.E. #6 C.E. #16). This evidence shows that Respondent clearly had knowledge of Complainant's health and his return to work status. The Respondent's reason that Complainant failed to contact is not credible and the true reason was discrimination.

Next, Respondent argues that the Complainant's position had been

permanently filled and he had to be reassigned to a different location. The evidence indicates that standard practice was that when an employee was out, the Respondent would "revamp the shift" and revert back to the previous status when the employee returned. (N.T. 99). In the instant case, Respondent's President testified that the Respondent simply adjusted the schedules of employees already employed at the hospital. (N.T. 96). However, the Respondent did not follow its own policy of reverting back to the previous shift when the Complainant returned. Moreover, the Respondent did not permanently fill the Complainant's position with a new employee. Thusly the Respondent's articulated reason that the position was permanently filled is not worthy of belief.

We now move to the Respondent's argument that the Complainant's leave of absence was not reasonable or an undue hardship. The case law is clear that the Respondent bears the burden of proving that an accommodation is unreasonable or creates an undue hardship. Walton v. Mental Health Ass'n 168 F.3d 661, 670 (3rd GR. 1999).

In the matter before the Commission, the Complainant certainly identified an accommodation that would make him qualified to perform the essential functions of his job. In fact, Complainant's witness, Dr. Jewell, testified that the Complainant was better able to perform major life activities after the leave of absence. (C.E. #16). The Respondent must show that the accommodation is unreasonable or creates a hardship. The Respondent simply has not done so. The time of the leave of absence was not unreasonable because the Respondent was apprised of Complainant's health and return to work status by

Complainant, Complainant's wife and Dr. Jewell. (N.T. 41-42; S.F. 7; C.E. 16). As a matter of fact, Dr. Jewell specifically notified Respondent that the Complainant would not require a indefinite leave of absence. (C.E. § 16). See Myers v. Hose, 50 F.3d 278, 283 (4th CR. 1995). The Respondent has not shown that the leave of absence was unreasonable.

Likewise the Respondent has not shown that the accommodation creates an undue hardship. Commission regulations provide some guidance in determining whether an accommodation imposes an undue burden:

> (i) The overall size and nature of a business, organization, program or public accommodation, including number of employees, structure and composition of workforce, and number and type of facilities. However, financial capability to make reasonable accommodation shall only be a factor when raised as part of an undue hardship defense.
>
> (ii) Good faith efforts previously made to accommodate similar handicaps or disabilities.
>
> (iii) The extent, nature, cost of the reasonable accommodation needed.
>
> (iv) The extent to which handicapped or disabled persons can reasonable be expected to need and desire to use, enjoy or benefit from the employment or public accommodation which is the subject of the reasonable accommodation in question.
>
> (v) Legal or proprietary interest in the subject of proposed reasonable accommodations including authority to make the accommodations under the terms of a bonafide agreement, such as a lease, governing or describing rights and duties with respect to the subject.

16 Pa. Code § 44.4

Succinctly put, the Respondent has presented absolutely no evidence that the leave of absence was an undue hardship. Respondent's President,

Robert Lubkay testified that the Respondent simply adjusted the work schedules of the other employees assigned to the Hospital. The Respondent has not established that the accommodation was undue hardship.

Lastly, Respondent argues that the Complainant had a job-related disability and was unable to perform the essential functions of the job. Once again, the Respondent presents no evidence showing that Complainant had a job related disability, The evidence in the record shows that the Complainant was better able to perform the essential functions of his job. Respondent attempted to argue that Dr. Jewell was unqualified because she did not understand the essential functions of the job. However, Dr. Jewell had staff privileges at the Methodist Hospital and had an acute awareness of the basic job duties and responsibilities of the security guards. In addition, Dr. Jewell reviewed Respondent's security policies and procedures and was able to make a well reasoned determination. Accordingly, Respondent's argument that Complainant had a job related disability and could not perform the essential functions of the job does not have any merit. It is also interesting to note that Mr. Lubkay admits that he did not rely on any medical opinion in making his determination. Mr. Lubkay is not a doctor and has not had any medical training. Also, the Respondent did not have a physician on staff and did not consult with a physician. In lieu of medical evidence, the Respondent relied on prejudices and stereotypes in making his determination. In fact, at the public hearing, Mr. Lubkay was very clear - "I own the company. I make that decision". (N.T. 83)

Upon review of all the evidence in the record, Complainant has shown that he is a victim of unlawful discrimination. We now move to the issue of remedy.

R E M E D Y

When there is a finding of liability, the Commissioner has broad discretion in fashioning a remedy, Murphy v. Commonwealth, PA Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985). Section 9 of the PHRA provides, in relevant 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 the Act, the Commission . . . . . shall issue and cause to be served on such Respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to hiring reinstatement or upgrading of employees, with or without back pay . . . and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice.

The awarding of a remedy under the PHRA is for two distinct purposes. First, any remedy awarded must ensure the state's interest in eradicating an unlawful discriminatory practice. The second purpose is restore the injured party to his pre-injury status and make him whole. Williamsburg Community S.D. v. Pennsylvania Human Relations Commission, 512 A.2d 1339 (1986). Clearly, in the instant case, the Respondent shall be ordered to cease and desist from discriminating against not only the Complainant but also other individuals who may have disabilities. Secondly, the complainant is entitled to not only an award of back pay, but also interest on the back pay. Brown v. Transport Corp. Pennsylvania Human Relations Commission, 133 Pa Cmwlth 845, 578 A. 2d 555 (1990). In this case, the determination of the back pay award is fairly simple to calculate. The determination is made by comparing Complainant's earnings and hours prior to his leave to his earnings and hours

upon his return. The difference represents returning him to pre-injury status. Williamsburg, supra. The Complainant was employed with reduced hours and pay from September 7, 1999 to December 15, 1999. The back pay for that time period is $1,560.60. The calculations are as follows:

Date	Actual Earning	Methodist Earnings	Difference
09/07/99	$ 86.40	$244.20	$157.80
09/13/99	$144.00	$244.20	$100.20
09/20/99	$144.00	$244.20	$100.20
09/27/99	$144.00	$244.20	$100.20
10/04/99	$144.00	$244.20	$100.20
10/11/99	$144.00	$244.20	$100.20
10/18/99	$144.00	$244.20	$100.20
10/25/99	$144.00	$244.20	$100.00
11/01/99	$144.00	$244.20	$100.20
11/08/99	$144.00	$244.20	$100.20
11/15/99	$144.00	$244.20	$100.20
11/22/99	$144.00	$244.20	$100.20
11/29/99	$144.00	$244.00	$100.20
12/06/99	$144.00	$244.00	$100.20
12/13/99	$144.00	$244.00	$100.20
TOTAL:			$1,560.60

Next Respondent's President testified that, while they had an affirmative action policy, it had not been updated in twelve or thirteen years (N.T. 108). Further, he indicated that it contained no mention of the PHRA or the ADA. Therefore, the Respondent shall establish, publish and provide a non-discriminatory policy to be distributed to all employees. Also, the Respondent shall provide training to all of its employees regarding the right of all individuals to work in a non-discriminatory environment consistent with the PHRA.

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION, INC. **Respondent**	:	

RECOMMENDATION OF HEARING PANEL

Upon review of the entire record in the above captioned matter, this Hearing Panel finds that the Complainant Raymond Maturo has proven discrimination against the Respondent Assets Protection, Inc., in violation of the Pennsylvania Human Relations Act.

Therefore, it is the Hearing Panel's recommendation that the attached Stipulations of Fact, 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 Hearing Panel recommends issuance of the attached Final Order.

Sylvia A. Waters

Commissioner Sylvia Waters, Panel Chairperson

Russell S. Howell

Commissioner Russell S. Howell

Daniel Yun

Commissioner Daniel Yun

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION , INC. **Respondent**	:	

FINAL ORDER

AND NOW, this 19Th day of November 2001, after reviewing the entire record in the above captioned case, the 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 Hearing Panel. Furthermore, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinions, and enters said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record and hereby

O R D E R S

1. That, the Respondent shall cease and desist from discriminating against individuals because of their disabilities

2. That, the Respondent shall pay Complainant $1,560.60 which represents back pay from September 7, 1999 through December 15, 1999.

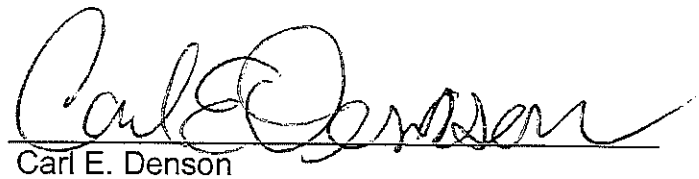
3. The Respondent shall also pay interest at the rate of 6% per annum from September 1999 until December 31, 1999, and at the rate of 8% per annum from January 2000 until December 20, 2000.

4. That, the Respondent shall establish publish and provide a non-discrimination policy consistent with the Pennsylvania Human Relations Act.

5. That, the Respondent shall provide training to all of its employees regarding the right of individuals to work in a non-discriminatory environment, including the right to reasonable accommodation.

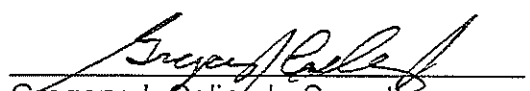
6. That within thirty days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier III, Assistant Chief Counsel.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 

Carl E. Denson
Chairperson

Attest:



Gregory J. Celia, Jr. Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO, Complainant	:	
v.	:	DOCKET NO. E-93153-H
ASSETS PROTECTION, INC., Respondent	:	

STIPULATIONS OF FACT

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO, Complainant	:	
v.	:	Docket No. E-93153H
ASSETS PROTECTION, INC., Respondent	:	

STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. Raymond Maturo (hereinafter "Complainant") is an adult, male.

2. Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act.

3. Assets Protection, Inc. (hereinafter "Respondent") is an employer that, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth.

4. On or about January 12, 1997, the Complainant was hired by the Respondent and assigned to the Methodist Hospital facility.

5. According to the Respondent's policies and its job description, the Complainant's daily duty assignments encompassed numerous major life activities, including: standing, sitting, walking, bending, and lifting.

6. Beginning on or about May 10, 1999 and continuing until September 7, 1999, the Complainant was unable to work due to health reasons.

7. On or about June 20, 1999, Dr. Melanie Jewell, M.D., the Complainant's treating physician, informed the Respondent that the Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis, and renal insufficiency.

8. Upon the Complainant's return to work in September 1999, he was assigned to George F. Kempf Supply Co. in the capacity of a security guard.

9. The Respondent replaced the Complainant with Carmen Garafalo, Steve Cardillo, Frank Fantazzi, and Ken Castellane, none of whom have a disability or were regarded as having a disability.

10. On or about October 5, 1999, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-91561D. A copy of the complaint will be included as a docket entry in this case at time of hearing.

11. On or about March 29, 2000, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.

12. In correspondence dated May 15, 2000, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint at docket number E-91561D.

13. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

14. In correspondence dated June 27, 2000, Commission staff notified the Complainant and Respondent that a public hearing had been approved in the complaint.

Charles L. Nier, III
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

9/14/00
Date

Raymond Maturo
(Complainant)

9-14-00
Date

Andrei Kuti
(Respondent, Office Manager)

9-14-2000
Date

FINDINGS OF FACT

1. The Complainant herein is Raymond Maturo (hereinafter "Complainant"). (S.F. #1).

2. The Complainant has a disability, Heart/Cardiovascular impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2).

3. The Respondent herein is Assets Protection, Inc. (hereinafter "Respondent"). (S.F. #3).

4. The Respondent is a professional service oriented firm providing a wide range of security related products and services, including patrol and guard services. (C.E. #1).

5. The Respondent at all times relevant to the instant case, employed four or more persons within the Commonwealth of Pennsylvania (S.F. #3).

6. The Complainant was originally hired by Capper Security and was assigned to the Methodist Hospital facility. (N.T. 27).

7. Subsequently, the Respondent in this matter acquired Capper Security. (N.T. 27).

The foregoing stipulations of fact are 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:

NT	Notes of Testimony
CE	Complainant's Exhibit
SF	Stipulations of Fact

8. On or about January 12, 1997, the Complainant was hired by Respondent and remained assigned to Methodist Hospital. (S.F. #4).

9. The Complainant was employed as a Sergeant working approximately 32-33 hours a week at a pay rate of $7.20 an hour (C.E. #3, N.T. 28)

10. The Complainant worked the 12:00 a.m. to 8:00 a.m. shift and supervised two security guards. (N.T. 34).

11. George Hatton was employed by Methodist Hospital as Director of Security. (N.T. 74).

12. Mr. Hatton communicated with Respondent on a frequent basis regarding Respondent's security services at the hospital. (N.T. 74, 83).

13. The Complainant's daily duties encompassed numerous major life activities such as; standing, sitting walking, bending and lifting. (S.F. #5).

14. The Complainant never received any negative comments, verbal warnings or written warnings regarding his performance on the job. (N.T. 39).

15. From May 10, 999 until September 7, 1999, the Complainant was not able to work for medical reasons. (S.F. #6).

16. The Complainant underwent several procedures, between May and August, relating to a heart condition including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. (N.T. 39-41).

17. Dr. Melanie Jewell was the Complainant's treating physician for his heart condition. (C.E. #16).

18. While on leave, Complainant contacted both Respondent and George Hatton as to his health status and return to work status. (N.T. 41-42).

19. Complainant's wife communicated with Respondent regarding Complainant's health and return to work status. (N.T. 42)

20. The Respondent sent Complainant an undated letter requesting that his physician provide documentation of the Complainant's health status and return to work status. (N.T. 42-43).

21. Dr. Jewell, on June 20, 1999, provided the Respondent with the requested information, stating that Complainant had A-V fistula of the right groin, coronary artery bypass, emphysema with bronchiectasis and renal insufficiency. (C.E. #5 S.F. #7).

22. Dr. Jewell also stated that his return to work date was uncertain and could better assessed by October 1, 1999. (C. E. #5 § S.F. #7).

23. On or about August 20, 1999, Dr. Jewell provided a second letter which fully explained Complainant's medical status and released Complainant to full duty effective September 7, 1999. (N. T. 44-45).

24. The Complainant provided this letter to George Hatton who in turn provided it to Don Herr, a Respondent employee. (N.T. 44-46).

25. After recovery and rehabilitation, the Complainant was better able to perform major life activities than he was before the procedures. (C.E. #16 at 29-30).

26. Complainant was better able to perform the essential functions of his job after the medical procedures. (C.E. #16).

27. On September 7, 1999, the Complainant had made a full recovery and was prepared to fulfill his job duties. (N.T. 28).

28. Upon his return to work on September 7, 1999, the Complainant was temporarily assigned for one week to Methodist Nursing Home. (N.T. 47).

29. He worked for 16 hours at a pay rate of $5.40, earning $86.40. (N.T. 47).

30. Later in September, the Complainant was assigned to George F. Kempf Supply Co., and demoted to the rank of security guard. (N.T. 47-48; S.F. #8).

31. The Respondent then reduced Complainant's hours to 24 per week at a pay rate of $6.00 an hour from his previous status of 32-33 hours a week at a pay rate of $7.20 an hour. N.T. 48-49)

32. The Complainant was employed in that capacity from September 7, 1999 until December 15, 1999. (N.T. 48-49).

33. The Complainant earned $288.00 bi-weekly during that time period. (C.E. #8).

34. On or about July 5, 1999, all security officers at Methodist Hospital were given a raise of .20 cents per hour. (N.T. 110).

35. When an employee is out, the Respondent's practice is to "revamp the shift", and when the employee returns, revert back to the original shift. (N.T. 99).

36. In regard to the Complainant, Robert Lubkay, Respondent President testified that it was possible that the Respondent simply adjusted employee's schedules during Complainant's leave. (N.T. 96-99).

37. When the Complainant returned to work, the Respondent did not

follow its normal practice of reverting the shift back to the original status. (S.F. #8).

38. As of September 7, 1999, all guard personnel at Methodist Hospital were hired before Complainant's leave. (N.T. 96).

39. Mr. Lubkay made the subjective determination that the Complainant could not perform the essential functions of his job. (C.E. #10, #15).

40. Mr. Lubkay is not a physician and did not have any medical training. (N.T. 86).

41. The Respondent did not retain a physician on staff or as a consultant. (N.T. 116).

42. The Respondent did not rely on any opinions in determining that the Complainant was unable to perform the essential functions of the job. (N.T. 83).

43. Mr. Lubkay insisted since he owns the company, he is the one who makes the decisions. (N.T. 83).

44. The Respondent had an affirmative action policy which had not been updated for "twelve or thirteen years". (N.T. 108).

45. The policy, as indicated by Mr. Lubkay, did not mention the Pennsylvania Human Relations Act or the Americans with Disabilities Act. (N.T. 102, 108).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter 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. The Complainant is an individual within the meaning of Section 5(a) of the PHRA.

4. The Respondent is an employer within the meaning of Section 5(a) of the PHRA.

5. The complaint filed in this case satisfies the Section 9 filing requirements found in the PHRA.

6. Section 5(a) of the PHRA, inter alia, prohibits employers from discriminating against individuals in the terms and conditions of their employment because of their disability.

7. The Complainant has established a *prima facie* of disability discrimination by showing:

1) he is a member of a protected class;
2) he was qualified to perform the essential functions of the job; and
3) he was demoted and his hours were reduced;
4) circumstances gives rise to an inference of discrimination.

8. The Respondent articulated several legitimate non-discriminatory reasons for its actions.

9. The Complainant has shown that the articulated reasons are not credible.

10. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him in the terms and conditions of his employment because of his disability in violation of Section 5(a) of the PHRA.

11. Whenever the Commissioner 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 purpose of the PHRA.

12. The Commission may also issue a back pay award.

OPINION

On or about October 5, 1999, Raymond Maturo (hereinafter "Complainant") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") against Assets Protection, Inc. (hereinafter "Respondent"), Docket No. E-93153-H. In the complaint, the Complainant alleged that the Respondent unlawfully discriminated against him by demoting him and/or refusing to assign him to work as a supervisor, because of his disability, Heart Cardiovascular Impairment and/or because the Respondent regarded him as disabled. On or about March 29, 2000, an answer to the complaint was filed.

On May 15, 2000, Commission Staff advised the Respondent that the investigation had resulted in a finding of probable cause to credit the allegations found in the complaint. Subsequent to that determination of probable cause, Commission staff attempted to resolve the matter in dispute by conference, conciliation and persuasion, but were unable to do so. Commission staff, by correspondence dated June 27, 2000, notified the parties that the Commission had approved the convening of a public hearing.

A public hearing was convened on December 20, 2000. Commissioner Sylvia Waters, Panel Chairperson, Commissioner Russell S. Howell, and Commissioner Daniel Yun also served on the hearing panel. Phillip A. Ayers served as Panel Advisor. Robert Lubkay, Respondent President, appeared pro se. The Commission interest in this matter was overseen by Charles L. Nier III, Assistant Chief Counsel. Both Regional Counsel and Respondent filed post hearing briefs in this matter.

Section 5(a) of the PHRA, provides that it shall be an unlawful discriminatory practice:

> (a) For any employer because of the . . . disability, of any individual to or to otherwise discriminate against such individual or independent contractor with respect to compensation, terms, conditions or privileges of employment . . .

In reviewing the Complainant's allegations, we recognize the issue of disparate treatment. The analytical mode of evidence assessment in a matter such as the instant case is clearly set forth in a Pennsylvania Supreme Court case. In Allegheny Housing Rehabilitation Corp. v. PHRC, 516 Pa. 124, 532 A.2d 315 (1987), the Pennsylvania Supreme Court clarified the order and allocation of burdens first defined in McDonnell-Douglas Corp. v. Green, 411 US 792 (1973). The Court's guidance indicates that the Complainant must first establish a *prima facie* case of discrimination. If complainant establishes a *prima facie* case, the burden of production then shifts to the Respondent to "simply . . . produce evidence of a legitimate, non-discriminatory reason . . . for [its action]." If the Respondent meets this production burden, in order to prevail the Complainant must demonstrate by a preponderance of the evidence that the Complainant was the victim of intentional discrimination. A complainant may succeed in this ultimate burden of persuasion either by direct persuasion that a discriminatory reason more likely motivated a respondent, or indirectly by showing that a respondent's proffered explanation is unworthy of credence. Texas Department of Community Affairs v. Burdine, 450 US 248, 256 (1981).

Following the instruction found in Allegheny Housing on the effect of a

prima facie showing and a successful rebuttal thereof, the Pennsylvania Supreme Court then articulated principles which are useful in the ultimate resolution of some aspects of this matter. The Court stated that:

> *As in any other civil litigation, the issue is joined, and the entire body of evidence produced by each side stands before the tribunal to be evaluated according to the preponderance standard: Has the plaintiff proven discrimination by a preponderance of the evidence? Stated otherwise, once the defendant offers evidence from which the trier of fact could rationally conclude that the decision was not discriminatorily motivated, the trier of fact must then "decide which party's explanation of the employer's motivation it believes".*

The Complainant is, of course, free to present evidence and argument that the explanation offered by the employer is not worthy of belief. He is not, however, entitled to be aided by a presumption of discrimination against which the employer's proof must "measure up". Allegheny Housing, *supra*. At 319.

In this court-designed burden allocation, the Complainant must, of course, first establish a *prima facie* case. However, the *prima facie* showing should not be an onerous burden. In the instant case, a *prima facie* case of disability discrimination can be established by showing that:

(1) the Complainant was a member of a protected class;

(2) the Complainant was qualified to perform the job; and

(3) the Complainant was demoted and his hours were reduced; and

(4) circumstances give rise to an inference of discrimination.

Upon review of the evidence presented in this matter, it is clear that the Complainant has established a *prima facie* care of discrimination based on his

disability. First, the Complainant is a member of a protected class because of his disability, Heart/Cardiovascular Impairment. In the instant case, the parties in this matter executed a document entitled "Stipulations of Fact" on September 14, 2000. This document included the following stipulation:

Complainant has a disability, Heart/Cardiovascular Impairment and/or is regarded as having a disability, Heart/Cardiovascular impairment within the meaning of the Pennsylvania Human Relations Act. (S.F. #2). Because of this stipulation, the Complainant has certainly established the first element of the *prima facie* case.

Secondly, the Complainant was qualified to perform the essential functions of his job. The Respondent is a firm that provides patrol and guard services to various entities such as Methodist Hospital. The Complainant worked for Respondent as a Sergeant providing security for Methodist Hospital. His duties included: Standing, sitting, walking, bending, and lifting. There is no question that he admirably performed his job functions before his medical condition changed and he was granted a leave of absence. He had received praise for his job performance (N.T. 39). The Complainant had never received any negative evaluations regarding his job performance. The record reflects that from May 10, 1999 until September 7, 1999, the Complainant could not work due to treatment for heart condition. (S.F. #6). In fact, the Complainant required a leave of absence for several medical procedures and a period of rehabilitation.

As Commission Counsel notes, there is a significant body of law recognizing that a leave of absence may constitute a reasonable accommodation under the PHRA and the Americans with Disabilities Act

("ADA"). See Criado v. IBM Corp. 145 F. 3d 437 (1st Cir. 1998) (stating that leave may constitute reasonable accommodation); Schmidt v. Safeway, Inc. 864 F. Supp. 991, 996 (1994) (reasonable accommodation may include leave of absence for treatment).

During the Complainant's leave, he underwent several procedures including cardiac cauterization, pseudoaneurysm repair and coronary artery bypass surgery. Dr. Melanie Jewell was the Complainant's physician for his heart condition. Dr. Jewell testified that "most people should be in better shape than they were pre-operatively because they should have better coronary blood flow. "(C.E. at #16)". Dr. Jewell further testified that, after several months of rehabilitation, Complainant was better able to perform the major life activities of walking, climbing, and lifting in September 1999 after the medical procedure as opposed to April 1999 prior to the medical procedure. (C.E. #16 at 29). On August 20, 1999, Dr. Jewell authorized Complainant to return to work on September 7, 1999 at full duty, (N.T. 25-26). Therefore, the Complainant was still qualified to perform the essential function of his job with a reasonable accommodation of a leave of absence. The Complainant has satisfied the second prong of the *prima facie* case.

Thirdly, the Complainant can show that he was demoted and his hours were reduced. Before the Complainant had the medical procedures, he was assigned to Methodist Hospital and held the rank of Sergeant. He normally worked 32-33 hours a week at a rate of $7.20 per hour. (C.E. 3; N.T. 28). When Complainant returned to work, he was assigned to George F. Kempf Supply Co., and was demoted to the rank of Security Guard (S.F. #8). Also,

Complainant's hours were reduced to 24 hours per week and his pay was reduced to $6.00 an hour. Clearly, the evidence shows that the Complainant's rank, hours and pay were reduced by the Respondent. Lastly, the circumstances in this matter do give rise to the inference of discrimination. The Respondent asserted that he had no knowledge of the Complainant's medical condition or return to work status. There is credible testimony that not only did Complainant and his wife contact Respondent, but Dr. Jewell also contacted the Respondent. Also, the Respondent had a policy of how to change work schedules when an individual was out. In this case, the Respondent did not follow its own policy. Clearly, these circumstances give rise to an inference of discrimination. A review of the record before the Commission reveals that the Complainant has met his burden of establishing a *prima facie* case of discrimination because of his disability, Heart/Cardiovascular impairment.

As aforementioned, once the Complainant meets his burden of establishing a *prima facie* case, the Respondent must then articulate a legitimate non-discriminatory reason for its action. The Respondent in this matter has articulated several reasons for its action. Firstly the Respondent asserts that the Complainant never contacted Respondent regarding his medical condition and he was, therefore, terminated at some point between May 10, 1999 and September 7, 1999. He was then subsequently rehired and reassigned because his previous position had been filled. Secondly, Respondent argued that the Complainant's leave of absence was not a reasonable accommodation and represented undue hardship. The above reasons stated by the Respondent satisfies its burden of articulating legitimate

non-discriminatory reasons for its action.

As previously stated, the ultimate burden of persuasion is on the Complainant to prove by a preponderance of the evidence that he is a victim of unlawful discrimination. The Complainant may succeed in this burden of persuasion by showing that Respondent's articulated reasons are pretextual.

With respect to Respondent's first articulated reason that Complainant never informed the Respondent of his medical condition and had to be terminated, rehired and reassigned, there is both circumstantial and direct evidence that this articulated reason is untrue. The Complainant credibly testified that he regularly contacted the Respondent and George Hatton, the Director of Security at Methodist Hospital regarding his health and his return to work (N.T. 41-42). Also the Respondent acknowledged that Mr. Hatton may have spoken to Respondent regarding the Complainant's contacts relating to his medical status. (N.T. 90-91). The Complainant's wife also contacted the Respondent on several occasions regarding Complainant's medical status. In addition, the Respondent requested from Dr. Jewell documentation regarding Complainant's medical status and his return to work. Dr. Jewell provided Respondent at least two letters, pertaining to Complainant's health status and his release to work, effective September 7, 1999. (S.F #7; C.E. #6 C.E. #16). This evidence shows that Respondent clearly had knowledge of Complainant's health and his return to work status. The Respondent's reason that Complainant failed to contact is not credible and the true reason was discrimination.

Next, Respondent argues that the Complainant's position had been

permanently filled and he had to be reassigned to a different location. The evidence indicates that standard practice was that when an employee was out, the Respondent would "revamp the shift" and revert back to the previous status when the employee returned. (N.T. 99). In the instant case, Respondent's President testified that the Respondent simply adjusted the schedules of employees already employed at the hospital. (N.T. 96). However, the Respondent did not follow its own policy of reverting back to the previous shift when the Complainant returned. Moreover, the Respondent did not permanently fill the Complainant's position with a new employee. Thusly the Respondent's articulated reason that the position was permanently filled is not worthy of belief.

We now move to the Respondent's argument that the Complainant's leave of absence was not reasonable or an undue hardship. The case law is clear that the Respondent bears the burden of proving that an accommodation is unreasonable or creates an undue hardship. Walton v. Mental Health Ass'n 168 F.3d 661, 670 (3rd GR. 1999).

In the matter before the Commission, the Complainant certainly identified an accommodation that would make him qualified to perform the essential functions of his job. In fact, Complainant's witness, Dr. Jewell, testified that the Complainant was better able to perform major life activities after the leave of absence. (C.E. #16). The Respondent must show that the accommodation is unreasonable or creates a hardship. The Respondent simply has not done so. The time of the leave of absence was not unreasonable because the Respondent was apprised of Complainant's health and return to work status by

Complainant, Complainant's wife and Dr. Jewell. (N.T. 41-42; S.F. 7; C.E. 16). As a matter of fact, Dr. Jewell specifically notified Respondent that the Complainant would not require a indefinite leave of absence. (C.E. § 16). See Myers v. Hose, 50 F.3d 278, 283 (4th CR. 1995). The Respondent has not shown that the leave of absence was unreasonable.

Likewise the Respondent has not shown that the accommodation creates an undue hardship. Commission regulations provide some guidance in determining whether an accommodation imposes an undue burden:

> (i) The overall size and nature of a business, organization, program or public accommodation, including number of employees, structure and composition of workforce, and number and type of facilities. However, financial capability to make reasonable accommodation shall only be a factor when raised as part of an undue hardship defense.
>
> (ii) Good faith efforts previously made to accommodate similar handicaps or disabilities.
>
> (iii) The extent, nature, cost of the reasonable accommodation needed.
>
> (iv) The extent to which handicapped or disabled persons can reasonable be expected to need and desire to use, enjoy or benefit from the employment or public accommodation which is the subject of the reasonable accommodation in question.
>
> (v) Legal or proprietary interest in the subject of proposed reasonable accommodations including authority to make the accommodations under the terms of a bonafide agreement, such as a lease, governing or describing rights and duties with respect to the subject.

16 Pa. Code § 44.4

Succinctly put, the Respondent has presented absolutely no evidence that the leave of absence was an undue hardship. Respondent's President,

Robert Lubkay testified that the Respondent simply adjusted the work schedules of the other employees assigned to the Hospital. The Respondent has not established that the accommodation was undue hardship.

Lastly, Respondent argues that the Complainant had a job-related disability and was unable to perform the essential functions of the job. Once again, the Respondent presents no evidence showing that Complainant had a job related disability, The evidence in the record shows that the Complainant was better able to perform the essential functions of his job. Respondent attempted to argue that Dr. Jewell was unqualified because she did not understand the essential functions of the job. However, Dr. Jewell had staff privileges at the Methodist Hospital and had an acute awareness of the basic job duties and responsibilities of the security guards. In addition, Dr. Jewell reviewed Respondent's security policies and procedures and was able to make a well reasoned determination. Accordingly, Respondent's argument that Complainant had a job related disability and could not perform the essential functions of the job does not have any merit. It is also interesting to note that Mr. Lubkay admits that he did not rely on any medical opinion in making his determination. Mr. Lubkay is not a doctor and has not had any medical training. Also, the Respondent did not have a physician on staff and did not consult with a physician. In lieu of medical evidence, the Respondent relied on prejudices and stereotypes in making his determination. In fact, at the public hearing, Mr. Lubkay was very clear - "I own the company. I make that decision". (N.T. 83)

Upon review of all the evidence in the record, Complainant has shown that he is a victim of unlawful discrimination. We now move to the issue of remedy.

R E M E D Y

When there is a finding of liability, the Commissioner has broad discretion in fashioning a remedy, Murphy v. Commonwealth, PA Human Relations Commission, 506 Pa. 549, 486 A.2d 388 (1985). Section 9 of the PHRA provides, in relevant 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 the Act, the Commission . . . . . shall issue and cause to be served on such Respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to hiring reinstatement or upgrading of employees, with or without back pay . . . and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice.

The awarding of a remedy under the PHRA is for two distinct purposes. First, any remedy awarded must ensure the state's interest in eradicating an unlawful discriminatory practice. The second purpose is restore the injured party to his pre-injury status and make him whole. Williamsburg Community S.D. v. Pennsylvania Human Relations Commission, 512 A.2d 1339 (1986). Clearly, in the instant case, the Respondent shall be ordered to cease and desist from discriminating against not only the Complainant but also other individuals who may have disabilities. Secondly, the complainant is entitled to not only an award of back pay, but also interest on the back pay. Brown v. Transport Corp. Pennsylvania Human Relations Commission, 133 Pa Cmwlth 845, 578 A. 2d 555 (1990). In this case, the determination of the back pay award is fairly simple to calculate. The determination is made by comparing Complainant's earnings and hours prior to his leave to his earnings and hours

upon his return. The difference represents returning him to pre-injury status. Williamsburg, supra. The Complainant was employed with reduced hours and pay from September 7, 1999 to December 15, 1999. The back pay for that time period is $1,560.60. The calculations are as follows:

Date	Actual Earning	Methodist Earnings	Difference
09/07/99	$ 86.40	$244.20	$157.80
09/13/99	$144.00	$244.20	$100.20
09/20/99	$144.00	$244.20	$100.20
09/27/99	$144.00	$244.20	$100.20
10/04/99	$144.00	$244.20	$100.20
10/11/99	$144.00	$244.20	$100.20
10/18/99	$144.00	$244.20	$100.20
10/25/99	$144.00	$244.20	$100.00
11/01/99	$144.00	$244.20	$100.20
11/08/99	$144.00	$244.20	$100.20
11/15/99	$144.00	$244.20	$100.20
11/22/99	$144.00	$244.20	$100.20
11/29/99	$144.00	$244.00	$100.20
12/06/99	$144.00	$244.00	$100.20
12/13/99	$144.00	$244.00	$100.20
TOTAL:			$1,560.60

Next Respondent's President testified that, while they had an affirmative action policy, it had not been updated in twelve or thirteen years (N.T. 108). Further, he indicated that it contained no mention of the PHRA or the ADA. Therefore, the Respondent shall establish, publish and provide a non-discriminatory policy to be distributed to all employees. Also, the Respondent shall provide training to all of its employees regarding the right of all individuals to work in a non-discriminatory environment consistent with the PHRA.

An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION, INC. **Respondent**	:	

RECOMMENDATION OF HEARING PANEL

Upon review of the entire record in the above captioned matter, this Hearing Panel finds that the Complainant Raymond Maturo has proven discrimination against the Respondent Assets Protection, Inc., in violation of the Pennsylvania Human Relations Act.

Therefore, it is the Hearing Panel's recommendation that the attached Stipulations of Fact, 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 Hearing Panel recommends issuance of the attached Final Order.

Sylvia A. Waters

Commissioner Sylvia Waters, Panel Chairperson

Russell S. Howell

Commissioner Russell S. Howell

Daniel Yun

Commissioner Daniel Yun

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

RAYMOND MATURO **Complainant**	:	
v.	:	**DOCKET NO. E-93153-H**
ASSETS PROTECTION , INC. **Respondent**	:	

FINAL ORDER

AND NOW, this 19th day of November 2001, after reviewing the entire record in the above captioned case, the 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 Hearing Panel. Furthermore, the full Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion as its own Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinions, and enters said Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion into the permanent record and hereby

O R D E R S

1. That, the Respondent shall cease and desist from discriminating against individuals because of their disabilities

2. That, the Respondent shall pay Complainant $1,560.60 which represents back pay from September 7, 1999 through December 15, 1999.

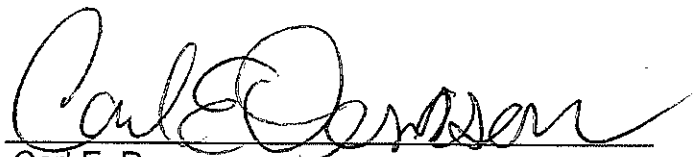
3. The Respondent shall also pay interest at the rate of 6% per annum from September 1999 until December 31, 1999, and at the rate of 8% per annum from January 2000 until December 20, 2000.

4. That, the Respondent shall establish publish and provide a non-discrimination policy consistent with the Pennsylvania Human Relations Act.

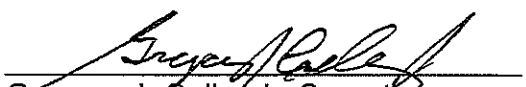
5. That, the Respondent shall provide training to all of its employees regarding the right of individuals to work in a non-discriminatory environment, including the right to reasonable accommodation.

6. That within thirty days of the effective date of this Order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier III, Assistant Chief Counsel.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Carl E. Denson
Chairperson

Attest:


Gregory J. Celia, Jr. Secretary