COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

RONALD J. McNIEL, Complainant

v.

FULLER COMPANY, Respondent

DOCKET NOS. E-90572D E-92059-D

ADMISSIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT

HEARING EXAMINER

FINAL ORDER

PHRC Harrisburg Regional Office staff's Request for Admissions is as follows:

BACKGROUND FACTS

1. The Complainant herein is Ronald J. McNiel, an adult male, who resides at 331 North Pine Street, Lancaster, Pennsylvania 17603.
2. The Respondent herein is Fuller Company, a corporation with headquarters at 2040 Avenue C, Bethlehem, Pennsylvania 18017-2188.

DAMAGES

3. McNiel has taken four eight-hour days off without pay from his employment at Fuller Company, to pursue his Pennsylvania Human Relations Commission ("PHRC") Complaint.
4. McNiel took off February 4, 1999, in order to meet with Commission staff in Harrisburg to prepare, verify and file the Complaint at E-90572D.
5. McNiel took off June 9, 1999, in order to meet with Commission staff to prepare, verify and file the Complaint at E-92059-D.
6. McNiel took off October 18, 2000, in order to meet with Commission staff to discuss the cancellation of a scheduled fact-finding conference and the progress of his PHRC Complaints.
7. McNiel took off September 27, 2000, in order to attend the pre-hearing conference and to meet with Commission staff counsel.
8. McNiel's rate of pay on all these dates was $12.76/hour.
9. In pursuing his PHRC Complaint, NcNiel drove from his home in Lancaster to Harrisburg and back to Lancaster four time.
10. The road trip between McNiel's home in Lancaster to Harrisburg is a drive of 74 miles.

PROCEDURAL HISTORY

11. McNiel filed the Complaint docketed at E-90572-D with the PHRC on November 5, 1998, 153 days after McNiel alleges therein that he was harassed on June 5, 1998.
12. McNiel filed an Amended Complaint at E-90572-D with PHRC Harrisburg Regional Office staff on February 10, 1999.
13. PHRC Harrisburg Regional Office staff served the Complaint and Amended Complaint at E-90572-D on Fuller Company on March 23, 1999.
14. McNiel filed a Second Amended Complaint at E-90572-D with PHRC Regional Office staff on October 25, 2000.
15. PHRC Harrisburg Regional Office staff served the Second Amended Complaint at E-90572-D on Fuller Company on October 26, 2000.
16. Fuller Company has never filed an Answer to the Complaint, the Amended Complaint or the Second Amended Complaint in E-90572-D.
17. On July 7, 1999, PHRC Harrisburg Regional Office staff filed and served on Fuller Company a "Petition for Rule to Show Cause Pursuant to 16 Pa. Code §42.33(c)" in E-90572-D.
18. On July 9, 1999, PHRC Motions Commissioner Russell S. Howell, issued and caused to be mailed to Fuller Company a Rule to Show Cause Order which extended another

opportunity to Fuller Company to file an Answer in E-90572-D on or before August 2, 1999.

19. Having received no Answer, the PHRC on August 23, 1999, issued an order which provided "that probable cause is found and judgment is hereby entered for the Complainant on the issue of liability… "
20. The PHRC's order of August 23, 19991, was mailed to Fuller Company that same day.
21. McNiel filed the Complaint docketed at E-92059-D with the PHRC on June 9, 1999, 70 days after McNiel alleges therein that he was harassed on March 31, 1999.
22. PHRC Harrisburg Regional Office staff served the Complaint in E-92059-D on Fuller Company on July 21, 1999.
23. Fuller Company has never filed an Answer to the Complaint in E-92059-D.
24. On October 19, 1999, PHRC Harrisburg Regional Office staff filed and served on Fuller Company a "Petition for Rule to Show Cause Pursuant to 16 Pa. Code §42.33(c)" in E-92059-D.
25. On October 21, 1999, PHRC Motions Commissioner Russell S. Howell, issued and caused to be mailed to Fuller Company a Rule to Show Cause Order which extended another opportunity to Fuller Company to file an Answer in E-92059-D on or before November 19, 1999.
26. From October 21, 1999, through March 28, 2000, Commission staff made numerous conciliation attempts to settle both the case at E-90572-D and the case at E-92059-D.
27. By March 29, 2000, it became evident that these conciliation attempts had failed.
28. On March 29, 2000, PHRC Harrisburg Regional Office staff notified Commissioner Howell by letter that conciliation had failed, requested an appropriate order in response to its Petition for Rule to Show Cause in E-92059-D, and requested that the case at E-90572-D and the case at E-92059-D be consolidated for the purpose of a public hearing on the issue of damages.
29. PHRC Harrisburg Regional Office Staff mailed this letter, which included a copy of the PHRC's order establishing liability in E-90572-D and a copy of its Petition for Rule to Show Cause in E-92059-D, to Fuller Company via Certified Mail, Return Receipt Requested (Z 015 177 654). A true and correct copy of the letter and appendices is attached as Exhibit "A."
30. PHRC Harrisburg Regional Office staff's letter of March 29, 2000, was received by Fuller Company on March 31, 2000. See the true and correct copy of Postal Service Form 3811 attached as Exhibit "B."
31. Having received no Answer in E-92059-D, the PHRC on April 24, 2000, issued an order which provided "that probable cause is found and judgment is hereby entered for Complainant on the issue of liability…"
32. The PHRC's order of April 24, 2000, was mailed to Fuller Company that same day.
33. On April 26, 2000, PHRC Harrisburg Regional Office staff wrote to Fuller Company's counsel stating that the PHRC had issued an order establishing liability in E-92059-D and stating once again Commission staff's desire to attempt conciliation of both the case at E-90572-D and the case at E-92059-D.
34. PHRC Harrisburg Regional Office Staff mailed this letter, which included a copy of the PHRC's order establishing liability in E-92059-D and a copy of PHRC Harrisburg Regional Office staff's proposed Conciliation Agreement, to Fuller Company via Certified Mail, Return Receipt Requested (Z 015 177 669). A true and correct copy of the letter and appendices is attached as Exhibit "C."

35. PHRC Harrisburg Regional Office staff's letter of April 26, 2000, was received by Fuller Company on April 28, 2000. See the true and correct copy of Postal Service Form 3811 attached as Exhibit "D."
36. Fuller Company never responded to PHRC Harrisburg Regional Office staff's letter of April 26, 2000.
37. By letter dated August 3, 2000, PHRC Executive Director Homer C. Floyd notified Fuller Company that the cases at E-90572-D and E-92059-D had been placed on the PHRC's Public Hearing Docket.
38. By letter dated August 22, 2000, PHRC Permanent Hearing Examiner Carl H. Summerson notified Fuller Company that a pre-hearing conference would be held on September 27, 2000.
39. Fuller Company did not attend the pre-hearing conference.
40. On September 27, 2000, Permanent Hearing Examiner Summerson issued a Pre-Hearing Order and sent a copy to Fuller Company.
41. On October 6, 2000, PHRC Harrisburg Regional Office staff mailed counsel for Fuller Company a letter which included Commission staff's witness list and which again attempted conciliation.
42. PHRC Harrisburg Regional Office Staff mailed this letter, which included a copy of the Pre-Hearing Order, to Fuller Company via Certified Mail, Return Receipt Requested (Z 398 723 699). A true and correct copy of the letter and appendices is attached as Exhibit "E."
43. PHRC Harrisburg Regional Office staff's letter of October 6, 2000, was received by Fuller Company on October 10, 2000. See the true and correct copy of Postal Service Form 3811 attached as Exhibit "F."
44. Fuller Company never responded to PHRC Harrisburg Regional Office staff's letter of October 6, 2000.
45. On October 26, 2000, PHRC Harrisburg Regional Office staff mailed Fuller Company a copy of the Second Amended Complaint by first class mail and a second copy via Certified Mail, return Receipt Requested (Z 398 723 691). A true and correct copy of PHRC Harrisburg Regional Office staff's cover letter and the Second Amended Complaint is attached as Exhibit "G."
46. PHRC Harrisburg Regional Office staff's letter of October 26, 2000, and the copy of the Second Amended Complaint were received by Fuller Company on October 27, 2000. A true and correct copy of Postal Service Form 3811 is attached as Exhibit "H."
47. All jurisdictional prerequisites for the cases at E-90572-D and E-92059-D to proceed to Public Hearing have been met.

Dated: November 9,2000
Respectfully submitted:
Ronald W. Chadwell, Assistant Chief Counsel

FINDING OF FACT*

1. Having been duly notified, the Respondent, Fuller Company, failed to appear at the Public Hearing held on December 8, 2000. (N.T.3)
2. The Complainant, Ronald J. McNiel, lost an additional day of work on December 8, 2000, in order to attend the Public Hearing. (N. T. 11)

3. McNiel's job with the Respondent is Store Attendant, which is part of the Respondent's warehouse operation. {N. T. 21)
4. In 1997, Respondent Plant Manager, Joe Riely; McNiel's direct Supervisor, Dick Schrof; and Ralph Nissley, Respondent's warehouse manager, agreed together that Nissley was not to have any direct involvement with McNiel, but Nissley was instead to go through another manager in matters involving McNiel. (N.T. 13, 14, 21)
5. Ralph McCook is a Supervisor in one of the Respondent's assembly areas. (N.T. 26)
6. Contact between McCook and the warehouse could easily be accomplished without the need for interaction between McCook and McNiel. (N.T. 27)
7. Since filing of his complaints, the Respondent has given McNiel no assurances that McNiel would not be harassed. (N. T. 15-16)

*The foregoing "Admissions" were deemed admitted at the Public Hearing pursuant to 16 Pa. Code §42-55 (e), and are hereby incorporated herein as if fully set forth. To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviation will be utilized throughout these Findings of Fact for reference purposes:

N.T. -Notes of Testimony

CONCLUSIONS OF LAW

1. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31 (c) requires a respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31 (d) declares that the failure of a respondent to timely answer a complaint places a respondent in default.
3. Under 16 Pa. Code §42.33, when a respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under Pa. Code §42.33(d)(4), when a respondent does not respond to a Rule to Show Cause, the Pennsylvania Human Relations Commission ("PHRC") may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In these consolidated matters, the Respondent's failure to answer or respond to a Rule to show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.

OPINION

These consolidated cases arose on two complaints filed by Ronald J. McNiel against Fuller Company. The Complainant's complaint at PHRC Docket No. E-90572-D alleged that on June 5, 1998, the Complainant was harassed by Ralph McCook, a Respondent General Supervisor because of the Complainant's race, African-American, and in retaliation for the Complainant having filed a prior discrimination complaint, The complaint at Docket No. E-90572-D states a claim under Sections 5(a) and Section 5(d) of the Pennsylvania Human Relations Act ("PHRA").

Ronald J. McNiel's verified complaint at Docket No. E-90572-D was filed on or about November 5, 1998. By correspondence dated July 7, 1999, the Pennsylvania Human Relations

Commission ("PHRC") Harrisburg regional office petitioned Motions Commissioner Howell for a Rule to Show Cause, indicating that Fuller Company had not answered Ronald J. McNiel's complaint. The petition declared that Fuller Company had been served with the complaint on March 2, 1999. The petition further indicted that, by correspondence dated May 3, 1999, Fuller Company was notified that its failure to answer Ronald J. McNiel's complaint could result in a judgment being entered for Ronald J. McNiel.

On July 9, 1999, a Rule to Show Cause was issued, directing Fuller Company to respond on or before August 2, 1999. After no response was filed, on August 12, 1999, Motions Commissioner Howell recommended a finding of liability to the full PHRC On August 23, 1999, the full PHRC determined that on or about June 5, 19, 1998, Ronald J. McNiel was harassed because of his race, and in retaliation for filing a prior discrimination complaint.
The complaint at Docket No. E-92059-D alleged that on March 31, 1999, Ralph Nissley, the Respondent's Warehouse Manager harassed the Complainant because of his race and in retaliation for having filed a prior discrimination complaint**.** The complaint at Docket No, E-92059-D states claims under Section 5(a) and Section 5(d) of the PHRA.

Ronald J. McNiel's complaint at Docket No. E-92059-D was filed on June 9,1999. By correspondence dated October 19, 1999, the Pennsylvania Human Relations Commission ("PHRC") Harrisburg regional office petitioned Motions Commissioner Howell for a Rule to Show Cause, indicating that Fuller Company had not answered the complaint at Docket No. E-92059-D. The petition declared that Fuller Company was served with the complaint at Docket No. E-92059-D on July 21,1999**.** The petition further indicated that by correspondence dated August 25, 1999, Fuller Company was notified that its failure to answer the Complaint at Docket No. E-92059-D could result in a judgment being entered for Ronald J. McNiel.

On October 21, 1999, a Rule to Show Cause was issued, directing Fuller Company to respond on or before November 19, 1999. After no response was filed, on March 29,2000, Motions Commissioner Howell recommended a finding a liability on Docket No. E-92059-D to the full PHRC. On April 24, 2000, the full PHRC determined that on March 31, 1999 Ronald J. McNiel was harassed because of his race and in retaliation for filing a prior discrimination complaint.

The consolidated public hearing on the issue of appropriate damages was held December 8, 2000, in Lancaster, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Ronald W. Chadwell, PHRC Assistant Chief Counsel. Fuller Company did not attend.

After finding of liability in these cases conciliation efforts were unsuccessfully attempted. Subsequently, these matters were approved for a consolidated public hearing on the issue of appropriate damages.

Since liability had been found after Fuller Company failed to file answers, the only question at the consolidated public hearing was what damages Ronald J. McNiel could establish. Under Section 9(f)(1) of the PHRA, the PHRC is empowered to order the Respondent "to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to, reimbursement of certifiable travel expenses in matters involving the complaint, compensation for loss of work in matters involving the complaint and any verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice…as, in the judgment of the Commission, will effectuate the purposes of this act…"

Since the Complainant remains an employee of Fuller Company, the only pay loss to consider is compensation for loss of work associated with the complaints filed. Here, the uncontroverted evidence reflects that the Complainant lost five days of work. The Complainant works eight hours per day at an hourly rate of $12.76 per hour. Accordingly, an award of $510.40 is appropriate to compensate the Complainant for lost work.

We next turn to consideration of certifiable travel expenses. The uncontroverted evidence shows that the Complainant made four trips from Lancaster to Harrisburg in pursuit of his complaints. Administrative notice is taken that a round trip between Lancaster and Harrisburg is 74 miles. Under the PA. Management Directive 231.10 Amended**,** §09.C.1), mileage reimbursement allowance for personal automobiles is 32.5 cents per mile. Accordingly, an award of $96.20 is appropriate to reimburse the Complainant for his travel expenses.

The Complainant seeks a review of his personnel file and the purging of any negative materials which, in any way, relate to the substance of the Complainant's complaints. Further the Complainant ask that the PHRC regional office be permitted to subsequently review the Complainant's personnel file to insure that an appropriate purging has occurred. This is an appropriate affirmative remedy.

Turning to the issue of the instances of race-based harassment and retaliation. Clearly, a cease and desist order is appropriate. Further, the Complainant seeks an order which insures that neither Ralph Nissley nor Ralph McCook will have further contact with the Complainant. With respect to Ralph Nissley, he is the manager of the department in which the Complainant works. This makes it impractical to order that there be no further contact between Nissley and the Complainant. Instead, it is appropriate to order that there be no further harassment and no further retaliation actions taken against the Complainant by Nissley. Further, it appears that in 1997, the Respondent's General Manager, Joe Riley; the Complainant's Supervisor, Dick Schroff; Nissley; and the Complainant had verbally agreed that Nissley would no longer address the Complainant directly. The PHRC will not interfere with such an agreement. Instead it is appropriate to order that, wherever practical, contact between Nissley and the Complainant shall be made through the Complainant's immediate Supervisor. When direct contact is necessary, such contact shall be wholly work related and done in a professional manner.

With respect to Ralph McCook, the evidence reflects that direct contact between McCook and the Complainant is not part of the daily operations of Fuller Company. Accordingly, it is appropriate to order that, absent an exigent circumstance, McCook shall have no contact with the Complainant.

As a connected issue, the Complainant seeks affirmative protection against retaliation of Valerie L. Green, a Respondent employee who testified on behalf of the Complainant at the Public Hearing. Such protection should be ordered.

This brings us to consideration of whether Fuller Company has an effective policy against harassment and retaliation. To insure that Fuller Company has an effective policy, Fuller Company shall present to the PHRC Harrisburg regional office within thirty days a plan outlining the steps it intends to take to prevent both racial harassment and retaliation from occurring. Such plan should include an intention to affirmatively raise the issues of harassment and intimidation expressing strong disapproval, the development of appropriate sanctions, a method to inform employees of their right to raise issues of harassment and instructions to employees how to raise such issues.

The required plan should also include the development of methods to sensitize all concerned and a plan of education and training of all Fuller Company employees in the detection, correction, and prevention of harassment and retaliation.

Finally, the plan must be acceptable to the PHRC Harrisburg regional office. An appropriate order follows.

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v.

FULLER COMPANY, Respondent

DOCKET NOS. E-90572D E-92059-D

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Carl H. Summerson
Permanent Hearing Examiner

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DOCKET NOS. E-90572D E-92059-D

FINAL ORDER

AND NOW, this 26th day of March, 2001 after a review of the entire record in these consolidated matters, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Admissions, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further *I* the Commission adopts said Admissions, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaints and hereby

ORDERS

1. That, within thirty days of this order, Fuller Company shall reimburse McNiel for his certifiable travel expenses incurred due to McNiel's involvement in his complaints in the amount of $96.20 (74 miles round trip from Lancaster to Harrisburg - 4 round trips @ 32.5ct per mile).
2. That, within thirty days of this order, Fuller Company shall compensate McNiel for five days of work lost as McNiel pursued his complaints in the amount of $510.40. (5 days - 8 hours per day @ $12.76 per hour).
3. That, Fuller Company is hereby enjoined from causing, encouraging, condoning, or permitting racial harassment of the Complainant by any Fuller Company employee when such conduct has the purpose or effect of interfering with the Complainant's work performance or creating an intimidating or hostile or offensive work environment.
4. That, Fuller Company is hereby enjoined from any act of retaliation against either the Complainant or Valerie L. Green, a Respondent employee who testified at the Public Hearing.
5. Fuller Company shall take steps to insure that neither Ralph McCook, nor Ralph Nissley shall have direct contact with the Complainant unless contact is necessitated by exigent circumstances, in which event, such contact shall be wholly professional.
6. That, within thirty days of this order, Fuller Company shall purge from the Complainant's personnel file any negative documentation which in any way relates to the allegations of the Complainant's PHRC complaints. Subsequently, PHRC

Harrisburg regional office staff shall have the right to review the Complainants personnel file to insure the requisite purging has been accomplished.

7. That, by June 30, 2001, Fuller Company shall fashion and implement internal policies and procedures for effectively accepting and resolving employee complaints of discriminatory treatment. Such policies and procedures shall be subject to review by the PHRC Harrisburg regional office and must be found acceptable by them. Further, the policies and procedures must include, at a minimum, a prohibition of all forms of discrimination, including racial harassment and retaliation; and an effective grievance procedure calculated to resolve claims of disparate treatment and to encourage employees who feel themselves victimized to come forward with their complaints.
8. That, Fuller Company shall conduct appropriate sensitivity training on work-place harassment and acceptable work-place behavior and shall conduct training on the employment provisions of the Pennsylvania Human Relation Act, Pennsylvania Human Relations Commission regulations, Title VII of the Civil Rights Act, the Americans with Disabilities Act and the Age Discrimination in Employment Act. Pennsylvania Human Relations Commission staff shall participate in the training and shall review all training materials before the training is conducted. The training will be given to all employees at Fuller Company's Manheim, Pennsylvania facilities and shall take place by June 30, 2001.
9. That, Fuller Company is hereby advised of Section II of the PHRA, which states in pertinent part, "Any person who shall willfully...violate an order of the Commission, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than five hundred dollars ($500.00), or to undergo imprisonment not exceeding thirty (30) days, or both..."
10. That, within thirty days of the effective date of this order, Fuller Company shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Ronald W. Chadwell, Assistant Chief Counsel, PHRC Harrisburg Regional Office, 5th Floor, Riverfront Office Center, 1101-1125 S. Front Street, Harrisburg, PA 17104-2515

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Carl E. Denson
Chairperson