COMMONWEALTH OF PENNSYLVANIA
GOVERNER'S OFFICE
PENSYLVANIA HUMAN RELATIONS COMMISSION

MARY ANN REMICK, Complainant

v.

WILKINS & ASSOCIATES REAL ESTATE, INC., Respondent

PHRC Docket No. E-91253-H

STIPULATIONS

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

COMMONWEALTH OF PENNSYLVANIA
GOVERNER'S OFFICE
PENSYLVANIA HUMAN RELATIONS COMMISSION

MARY ANN REMICK, Complainant

v.

WILKINS & ASSOCIATES REAL ESTATE, INC., Respondent

PHRC Docket No. E-91253-H

STIPULATIONS

Respondent and Pennsylvania Human Relations Commission, Harrisburg Regional Office staff hereby stipulation to the following:

1. The Complainant, Mary Ann Remick ("Remick"), is a competent adult who resides at RR1, Box 52, Scotrun, PA 18355.
2. Respondent, Wilkins & Associates Real Estate, Inc., is an "employer" for purposes of the Pennsylvania Human Relations Act, with a mailing address of 304 Park Avenue, Stroudsburg, PA 18360.
3. The employment actions challenged in the Complaint occurred in Monroe County .
4. Remick filed a timely Complaint with the Pennsylvania Human Relations Commission (the "PHRC"), alleging that Respondent discharged her "from employment and otherwise discriminated against her on September 19, 1998 and or on other occasions, based upon her non-job related handicap or disability, namely alcoholism…"
5. Remick is a recovering alcoholic and has been treated at Caron Foundation and the Clearbrook facility for alcoholism.
6. PHRC Harrisburg Regional Office staff docketed the Complaint on April 30, 1999.
7. PHRC Harrisburg Regional Office staff served Respondent with a true and correct copy of the Complaint on May 12, 1999.
8. PHRC Harrisburg Regional Office staff conducted a Fact Finding Conference on July 23, 1999, which was attended by both Remick and Respondent.
9. PHRC Harrisburg Regional Office staff served Respondent with a Probable Cause Finding on February 6, 2001.
10. By letter dated February 6, 2001, PHRC Harrisburg Regional Office staff invited Respondent to attend a Conciliation Conference.
11. PHRC Harrisburg Regional Office staff convened a Conciliation Conference on July 16, 2001.
12. The case did not conciliate.
13. All jurisdictional pre-requisites for a public hearing have been satisfied.
14. The parties signed an employment agreement on November 18, 1996.
15. Complainant, Mary Ann Remick, began her employment with Respondent, Wilkins & Associates Real Estate, Inc., on February 23, 1995.
16. Complainant's last day of work for Respondent was September 19, 1998.

FINDINGS OF FACT *

1. Complainant, Mary Ann Remick, ("Remick"), is an adult individual residing at R.R. #1, Box 52, Scotrun, Pennsylvania. (S.F. 1)
2. Remick is married and has four children. (N.T. 63, 279, 280)
3. In 1998, Remick's oldest son was approximately 18, her daughter was 16, and her other two sons were 13 and 8 years of age. (N.T. 297)
4. Remick attends Northampton Community College and has received specialized training in the Real Estate field. (N.T. 63, 64)
5. Since 1989, Remick has had a Real Estate license. (N.T. 64)
6. Remick is also certified as a residential specialist. (N.T. 64)
7. Respondent, Wilkins & Associates Real Estate, Inc., ("Wilkins") opened on July 15, 1988 and presently has a Headquarters Office located in Stroudsburg and six retail offices in various locations. (N.T. 305, 343)
8. Generally, Wilkins has three divisions: Wilkins and Associates Real Estate; NEPA Management Association; and Wilkins and Associates Short Term Rental Department. (N.T. 343)
9. Between 100 and 110 Realtors/Associate Brokers are affiliated with Wilkins. (N.T. 344)

* The foregoing "Stipulations" are hereby incorporated herein as if fully set forth. to the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

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

10. In the three divisions there are six managers and approximately 18-20 staff employees. (N.T. 306, 344)
11. Thomas Wilkins is the President of Wilkins. (N.T. 302, 305)
12. In approximately 1996, Thomas Wilkins' daughter, Yarrow Wilkins, began working at Wilkins. (N.T. 306, 388-389)
13. Between 1996 and 1998, Yarrow Wilkins worked in Wilkins' Short-Term Rental department. (N.T. 430)
14. In February 1995, Remick began working at Wilkins as a part-time receptionist. (N.T. 66, 67, 169, 308)
15. Prior to coming to work at Wilkins, from 1989 to 1992-93, Remick worked with Pat White Realtors. (N.T. 129, 147, 162, 308)
16. In approximately 1992, Remick became aware that she had a drinking problem. (N.T. 77)
17. Approximately a year later, in November 1993, Remick went into alcohol rehab at a facility called Clearbrook. (N.T. 77, 129, 149)
18. Remick last drank alcohol in October 1993. (N.T. 78)

19. Since November 1993, approximately once a week, Remick has attended Alcoholics Anonymous meetings. (N.T. 78)
20. In times of stress, the frequency of Remick's attendance at AA meetings increased. (N.T. 79)
21. When hired by Wilkins, Remick received Wilkins' Employee Policy Manual. (N.T. 68; C.E. 2)
22. The Employee Policy Manual provides for various leaves including: vacation; sick leave; family and medical leave; and personal leave. (C.E. 2)
23. Shortly after she was hired, Remick was promoted to the full-time position of Appraisal Flow Coordinator. (N.T. 69, 70, 308, 309)
24. Later, Remick became the receptionist of Wilkins' Short-Term Rental department. (N.T. 70, 71, 314-315)
25. Subsequently, Remick became the Manager of the Short-Term Rental department and on November 18, 1996, she signed an Employment Agreement. (N.T. 72, 73, 74, 345; C.E. 3)
26. Before 1997, Wilkins' Short-Term Rental department was staffed by Remick, Yarrow Wilkins, and Cindy Flora, who, at the time was a housekeeper. (N.T. 117, 118, 251-252)
27. In 1997, Cindy Flora obtained her Real Estate license and became a Reservationist in the Short-Term Rental department. (N.T. 118, 184, 252)
28. As Manager of the department, Remick listed properties, made reservations, prepared leases, set up benefit packages, met with homeowners, and facilitated repairs. (N.T. 72)
29. One component of Wilkins' operation was to facilitate the rental of properties owned by others by listing those properties as managing agent. (N.T. 243, 244)
30. While Remick was scheduled to work 5 days per week, she often worked 7 days per week. (N.T. 72)
31. When Remick joined the Short-Term Rental Department, short-term rental had been a part of Wilkins' operation for only one year. (N.T. 75)
32. Wilkins' Short-Term Rental department had two busy seasons: the ski season – November/December to approximately March; and Summer – June/July to Labor Day. (N.T. 74, 234, 253-254)
33. Between Labor Day and December, the Short-Term Rental department had a light volume of business. (N.T. 75)
34. Only one year after Remick had come to the Short Term Rental department, the department realized a 400% increase in business. (N.T. 76-77; C.E. 4)
35. Thomas Wilkins observed that Remick had a part in this dramatic increase in business and that Wilkins was the fastest growing realtor company in the Poconos. (N.T. 77, 374)
36. In April 1998, Thomas Wilkins promoted Yarrow Wilkins to a position over Remick. (N.T. 325, 366)
37. Prior to April 1998, Remick reported directly to Thomas Wilkins, after April 1998, Remick reported to Yarrow Wilkins. (N.T. 117, 185)
38. Approximately April 1997, Yarrow Wilkins spoke to Remick telling her that she had found her father in a bar in tears, scared and on the verge of drinking. (N.T. 79-80)
39. Thomas Wilkins has been a recovering alcoholic for 36 years. (N.T. 302)
40. In 1985, Thomas Wilkins had been admitted to the Carrier Foundation in Princeton, New Jersey. (N.T. 302)

41. When Yarrow Wilkins told Remick about Thomas Wilkins, this prompted Remick to reveal to Yarrow Wilkins that she too was a recovering alcoholic. (N.T. 79-80)
42. Remick told Yarrow Wilkins that she attended AA meetings and if there was anything that she could do, Yarrow Wilkins could just let her know. (N.T. 80)
43. After Remick told Yarrow Wilkins that she was a recovering alcoholic, Yarrow Wilkins passed this information to Thomas Wilkins. (N.T. 348)
44. On subsequent occasions, Remick also personally told Thomas Wilkins that she was a recovering alcoholic and discussed with him her alcoholism. (N.T. 80, 347, 370)
45. Thomas Wilkins told Remick that he thought people who go to AA meetings are a bunch of wimps that sit around and whine about their problems. (N.T. 81)
46. Thomas Wilkins revealed to Remick that he had been in rehab but only stayed one day before deciding to discharge himself. (N.T. 81)
47. On one occasion, Thomas Wilkins telephoned Remick at home to ask for recommendations of how to get his brother help as he too was an alcoholic and was currently experiencing troubles. (N.T. 81)
48. After Remick disclosed that she was a recovering alcoholic, Thomas Wilkins began to direct what Remick described as an "explosive temper" towards her. (N.T. 86, 88-89)
49. Remick testified that, up until then, Thomas Wilkins had only yelled and otherwise lost his temper with other employees. (N.T. 88-89, 259, 263)
50. Remick further described Thomas Wilkins' "tantrums" as awful and very frightening and at times very threatening. (N.T. 89)
51. Remick testified that she felt frightened, threatened and nervous and that the resultant pressure would cause her to freeze up and be unable to think clearly. (N.T. 89)
52. On one occasion, Remick had written a memorandum to her staff regarding lost keys, personal phone calls, lost badges and a staff member leaving a door unlocked and Thomas Wilkins informed Remick that he was angered by her memo. (N.T. 89-90, 91)
53. Remick left the workplace crying and Thomas Wilkins went after her to ask her to stay. (N.T. 91, 263)
54. Remick testified that Thomas Wilkins would scream and yell and later apologize. (N.T. 175)
55. During the summer of 1998, the frequency of Thomas Wilkins' confrontations increased. (N.T. 98)
56. In July 1998, Remick took two days off to address an imminent issue with her brother, who at the time had been living with her and who had become suicidal. (N.T. 176, 350)
57. Although Remick often worked seven days a week and many hours over her regularly scheduled time, Wilkins deducted the time Remick used to facilitate getting her brother into an alcohol rehab program. (N.T. 177, 182)
58. This angered Remick. (N.T. 177)
59. Normally, Remick's days off were Sunday and Monday as her normal workweek was Tuesday through Saturday. (N.T. 182, 394)
60. On August 19, 1998, Yarrow Wilkins passed out the upcoming Labor Day work schedule she had prepared. (N.T. 179, 393-394; R.E.4)
61. Yarrow Wilkins had scheduled Remick off on one of her normal workdays, Wednesday September 2, 1998, and to work one of her days off, Sunday September 6, 1998. (R.E. 4)
62. Yarrow Wilkins had scheduled herself off from Sunday, September 6th through the 10th and also scheduled Cindy Flora off on Sunday the 6th. (R.E. 4)

63. Remick became unhappy with the schedule and told Yarrow Wilkins so in a note at the bottom of Yarrow Wilkins' schedule. (R.E. 4)
64. Remick asked that she be given Tuesday the 15th of September off so that she too could enjoy a long weekend. (R.E. 4)
65. By memo dated August 27, 1998, Yarrow Wilkins advised Remick that two days were to be deducted from her paycheck due to be issued the next day on August 28, 1998. (R.E. 5)
66. Yarrow Wilkins advised Remick that she had 5 sick days and on August 20, 1998 she had taken a 6th sick day and that on March 10, 1998, Remick had taken a personal day but that Wilkins "does not give pay or offer personal days for any reason." (N.T. 398, 433; R.E. 5)
67. By memo dated September 11, 1998, Yarrow Wilkins advised Remick that she could not take off Tuesday September 15 but that another Tuesday would be considered. (N.T. 395-396; R.E. 13)
68. Remick then asked for Tuesday September 22nd off as a replacement for having worked Labor Day. (N.T. 396)
69. In the summer of 1998 and into the fall, Remick began attending AA meetings 4 to 5 times per week. (N.T. 54)
70. Towards the end of the summer of 1998 and into the fall, Remick dreaded going to work, she was on edge and both physically and emotionally sick. (N.T. 99, 100, 281)
71. Remick's husband described Remick as far from functioning well, unable to cook and care for herself, and all in pieces. (N.T. 281)
72. Although Thomas Wilkins recognized Remick as hard-working and capable of running the Short-Term Rental department in good fashion and a big asset to the department, Yarrow Wilkins testified that she perceived Remick as becoming unhappy, unprofessional and erratic in her behavior. (N.T. 323, 453)
73. Remick related how she was feeling to Thomas Wilkins, Yarrow Wilkins, Mary Lou Stavros, a Vice President at Wilkins, and Wilkins' Accountant, Carol Howard. (N.T. 83)
74. Remick described herself as really anxious and distraught. (N.T. 81-82)
75. Remick felt herself becoming unable to concentrate and focus and feeling that she was unable to present herself professionally with her co-workers and homeowners with whom she came in contact. (N.T. 82)
76. She reflected that she nearly had several automobile accidents. (N.T. 82)
77. Remick indicated that she just wanted to escape and drink and that she was afraid that she would relapse. (N.T. 100)
78. Remick was also relating her condition to friends at the AA meetings she was attending. (N.T. 83)
79. One of her friends was Mary Kay Carlin, ("Carlin"), an individual who is certified in alcoholism and as both an alcohol and drug counselor and a clinical supervisor. (N.T. 29-30, 40)
80. For 15 years, Carlin has specialized in work with those who either have relapsed or had reached a point where they were in danger of relapsing. (N.T. 27-28, 33)
81. Remick and Carlin were neighbors who went on walks together approximately 3 times a week. (N.T. 40, 42)
82. During the summer and early fall of 1998, Carlin observed Remick growing more and more anxious and nervous. (N.T. 44)

83. Remick manifested the new behavior by being weepy, upset and anxious. (N.T. 45)
84. Carlin became concerned about Remick's ability to continue to do her job and maintain other life responsibilities and continue to remain sober. (N.T. 46)
85. Remick expressed to Carlin her concerns about her job performance and that she wanted to do a good job and also be a good mother and wife. (N.T. 47, 48)
86. Carlin informed Remick that, in her opinion, she was in danger of relapse and suggested to Remick that she should speak with her sponsor at AA and seek treatment at the Caron Foundation by taking a one week co-dependency family program with subsequent follow-up care. (N.T. 48, 50, 55)
87. The Caron Foundation is located in Wernersville, Pennsylvania and is a rehabilitation center for drug and alcoholic problems with programs specifically designed to treat families. (N.T. 48, 49)
88. Acting on Carlin's advise, on September 14, 1998, Remick scheduled herself into a program at the Caron Foundation set to begin on Sunday, September 20, 1998. (N.T. 101, 102)
89. On Tuesday, September 15, 2004, Remick asked to meet with Yarrow Wilkins and Thomas Wilkins. (N.T. 103, 330, 331)
90. When Remick met with Yarrow and Thomas Wilkins, she was distraught and crying. (N.T. 103)
91. Remick informed Yarrow and Thomas Wilkins that she was in a very dangerous place, that she needed help, and that she had arranged to enter a week long program the following week to get the help she needed. (N.T. 106, 190)
92. Remick requested a week off without pay to get the help she believed she needed. (N.T. 190)
93. While Remick did not specify the nature of the program she had arranged to attend, Remick perceived that Thomas Wilkins understood that she was in danger of relapsing because Thomas Wilkins responded to her by stating that he understood Remick had to put her sobriety first. (N.T. 106, 189, 190, 479)
94. Thomas Wilkins asked Remick what was he going to do and what about him? (N.T. 189, 190)
95. Remick disagreed that Wilkins would be left in a lurch and brought up her request to be off on September 22nd. (N.T. 190, 397)
96. The brief meeting ended with Thomas Wilkins telling Remick that he needed time to think about her request and that he would get back to her. (N.T. 194, 331, 333-334)
97. Under Remick's Employment Agreement, she was entitled to 2 weeks annual vacation and sick leave as approved by Wilkins. (C.E. 3)
98. As of September 15, 1998, Remick had taken only 7 days annual leave. (N.T. 105; C.E. 7)
99. Numerous other Wilkins employees had been granted medical leaves of a week or more with little or no advance notice to Wilkins. (N.T. 119, 120, 255, 259, 383, 421, 423-424, 437; C.E. 20)
100. Consistent with standard procedure, on September 16, 1998, Remick left a note for Cindy Flora to handle several things in her absence. (N.T. 192, 194-195, 265; R.E. 7)
101. During the period between September 15, 1998 and September 19, 1998, Thomas Wilkins and Yarrow Wilkins discussed Remick's request noting their concern about Remick's personal well being. (N.T. 450)

102. Under cover letter dated September 16, 1998, drafted at Yarrow Wilkins' direction, Remick's Real Estate license was sent to the Pa. Department of State, Bureau of Professional and Occupational Affairs. (N.T. 108; C.E. 8)
103. Others who had been granted leaves of absence did not have their licenses returned to the state. (N.T. 146-147, 422, 456)
104. Remick was not told that her license was being sent to the state. (N.T. 108)
105. On Saturday, September 19, 1998, Remick was called into a conference room with Thomas Wilkins and Yarrow Wilkins. (N.T. 102, 107, 410)
106. Thomas Wilkins began the meeting by asking Remick if she still intended on taking the week off. (N.T. 107, 197, 335)
107. Acting bewildered, Remick responded "yes", she had to because she needed help. (N.T. 107, 197, 335, 364, 410)
108. Thomas Wilkins then told Remick that they were at an impasse so Remick had no reason to return to the office and that she should clean out her desk. (N.T. 107, 198, 411)
109. Thomas Wilkins also relayed that so there would be no hard feelings, through October, he would pay Remick commissions paid on short-term rentals that she had booked. (N.T. 107, 203)
110. When the very short meeting ended, Remick handed her keys to Yarrow Wilkins and went to collect some of her personal things. (N.T.197, 335, 413)
111. Prior to September 19, 1998, Remick had received no reprimands, warnings, or other disciplinary actions. (N.T. 82)
112. Beginning on September 20, 1998, Remick entered the Caron Foundation for 5 days. (N.T. 101, 111)
113. Remick did not relapse. (N.T. 111)
114. On Monday, September 21, 1998, Yarrow Wilkins directed a short memo to all Stroudsburg Office Employees stating, "Please be advised that Mary Ann Remick is on an extended leave of absence and is not expected to return. All calls can be given to myself or Cindy Flora." (N.T. 247, 419; R.E. 16)
115. Yarrow Wilkins also told Cindy Flora that it would be just the two of them in the department. (N.T. 254-255)
116. Yarrow Wilkins also rearranged the office space that she had shared with Remick by removing the desk that Remick had used and taking Remick's things down off the walls. (N.T. 113, 114, 260, 429)
117. Beginning on September 29, 1998 through October 8, 1998, Wilkins placed an ad in the local newspaper for a Reservationist. (N.T. 116, 352, 366; C.E. 10)
118. In a letter to Remick dated September 25, 1998, Yarrow Wilkins stated, "In an effort to make both our and your transition smooth, we have elected to extend to you a leave of absence, which began on Tuesday, September 15, 1998 and will conclude on November 30, 1998; our reason for this is to pay you overrides…" (C.E. 9)
119. Understanding that she had been terminated, Remick applied for unemployment compensation. (N.T. 118, 210)
120. When Thomas Wilkins received information from the unemployment office, he called Remick to tell her he had been given three options: that Remick had voluntarily quit; that she had been terminated; or that she was on a leave of absence. (N.T. 118, 338, 373)
121. Remick told Thomas Wilkins that she had not quit but had been terminated and that he should be truthful to the unemployment office. (N.T. 118)

122. Initially, Remick looked on the unemployment office computer for open positions for which she might apply and also looked in the want-ads of the local newspaper. (N.T. 210)
123. Remick noted an ad in the newspaper for a short-term rental manager but did not apply because of a non-compete clause in the Employment Agreement she had signed on November 18, 1996. (N.T. 124-125; C.E. 3)
124. Carlin testified that upon Remick's return from the Caron Foundation she found Remick to have more direction as to what she needed to do and that she was improved and now had goals and knew better how to help herself. (N.T. 52, 56)
125. Initially, upon her return from the Caron Foundation, Remick saw a psychologist twice a week and was placed on anti-depressant medication. (N.T. 123, 124, 285)
126. Remick also continued to attend AA meetings and started a co-dependency group. N.T. 122, 124)
127. Remick's husband asked her to stay home for a year with the children and Remick agreed. (N.T. 291-292, 293-294)
128. In September 1999, Remick decided to explore options other than in the real estate field. (N.T. 126, 128, 214)
129. Initially, Remick began working for Manpower and was assigned to the Pocono Medical Center where her starting salary was approximately $8.50 per hour. (N.T. 126, 127)
130. Eventually, Remick was hired full-time by the Pocono Medical Center where she now has weekends and holidays off to spend with her family and approximately six weeks of vacation per year. (N.T. 128)
131. The only expense that relates to the present matter that Remick presented at the public hearing is a 9/11/03 reporting charge of $344.10. (N.T. 242; C.E. 19)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Remick is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. Wilkins is an employer within the meaning of the PHRA.
5. An employer will be liable under the PHRA for failing to engage an employee with a disability in an interactive process.
6. Good faith participation in an interactive process promotes the policies which underline the disability protections afforded under the PHRA.
7. Wilkins failed to engage Remick in a good faith interactive process after Remick initiated the process by telling Thomas Wilkins that she was in a dangerous place, that she needed a week off without pay as she had arranged to enter a week long program to seek the help she believed she needed.
8. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on a complaint filed by Mary Ann Remick (hereinafter "Remick") against Wilkins and Associates Real Estate, Inc., (hereinafter "Wilkins"), on or about March 17, 1999, at PHRC Docket Number E-91253-H. Generally, Remick's complaint alleged that Wilkins discriminated against her because of her non-job–related handicap/disability, alcoholism, when Wilkins failed to provide Remick with a reasonable accommodation and then on September 19, 1998, terminated her. Remick claims that Wilkins' actions violate Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit the allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on September 26, 2003 and October 30, 2003, in Stroudsburg, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Briefs were submitted by the parties. Wilkins' post-hearing brief was received on April 21, 2004, and Remick's post-hearing brief was also received in April 2004. On April 19, 2004, the PHRC regional attorney filed a post-hearing brief advocating his position regarding what he submits should be a proper implementation of the PHRC's disability regulations. On May 26, 2004, Remick filed a reply brief to Wilkins' post-hearing brief. On May 28, 2004, Wilkins filed a reply brief in response to Remick's post-hearing brief.

Turning to the general issue arising from the substance of Remick's disability allegations, we note that the ultimate question for resolution here is whether Wilkins failed to reasonably accommodate Remick's disability and whether Wilkins terminated Remick in violation of the PHRA.

Section 5(a) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice. . . for any employer because of the. . . non-job-related handicap or disability. . . of any individual. . . to discharge from employment such individual. . . or to otherwise discriminate against such individual. . . with respect to compensation, hire, tenure, terms, conditions or privileges of employment,. . . if the individual. . . is the best able and most competent to perform the services required. . .
> (43 P.S. 955(a))

Section 4(p) and 4(p)(1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states:

> The term "non-job-related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. . .

Section 4(p)(1) states:

> The term "handicap or disability", with respect to a person, means:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities;
(2) a record of having such an impairment; or
(3) being regarded as having such an impairment. . .
(43 P.S. 954(p) and (p.1))

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which provide:

Handicapped or disabled person includes the following:

(i) A person who:
  (a) has a physical or mental impairment which substantially limits one or more major life activities;
  (b) has a record of such an impairment; or
  (c) is regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:
  (a) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.
  (b) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.
  (c) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.
  (d) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i) (a) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.
  (16 Pa. Code §44.4.)

General prohibitions

(b) Handicapped or disabled persons may not be denied the opportunity to use, enjoy or benefit from employment and public accommodations subject to the coverage of the act, where the basis for such denial is the need reasonable accommodations, unless the making of reasonable accommodations would impose an undue hardship.
(16 Pa. Code §44.5).

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 621, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

Another regulation found at 16 Pa. Code §44.2 provides general guidance which will be extremely useful to the resolution of the issues presented by the facts of this case. §44.2 states:

(a) The provisions of this chapter shall be construed liberally for the accomplishment of the purposes of the act.

(b) The provisions of this chapter will be construed consistently with other relevant Federal and State laws and regulations except where such construction would operate in derogation of the purposes of the act and this chapter.

§44.2 (a) is a continuation of the PHRA's mandate that the provisions of the PHRA be liberally construed, (Section 12(a) of the PHRA), and simply requires the regulations in support of the PHRA to also be construed liberally. §44.2 (b) states by regulation what the PHRC and Pennsylvania courts have consistently done, and that is to interpret the PHRA consistent with federal interpretations of parallel provision in the Americans with Disabilities Act (ADA), 42 U.S.C.S. §§12101-13 and relevant federal regulations. See Canteen Corporation v. PHRC, 814 A.2d 805 (Pa. Comwlth Ct. 2003); Harrisburg Area School District v. PHRC, 466 A.2d 760 (Pa. Comwlth Ct. 1983); Gomez v. Allegheny Health Services, Inc., 71 F.3d 1079 (3rd Cir.1995), cert. denied 116 S. Ct. 2524 (1996); and Chmill v. City of Pittsburgh, 488 Pa. 470, 412 A.2d 860 (Pa. 1980). Moreover, the PHRA definition of "handicap or disability" is substantially similar to the definition of "disability" under the ADA. Fehr v. McLean Packaging Corp., 860 F. Supp 198 (E.D.Pa. 1994).

Both post-hearing briefs filed in this case suggest that this matter should be analyzed using the traditional three-part burden shifting analysis originally developed in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). However, Remick has not stated a claim of disparate treatment. Her claim is based solely on the general responsibility of an employer to make accommodations to an employee's disability unless making an accommodation poses an undue hardship.

Remick claims that she was a qualified employee with a disability and that Wilkins' failure to accommodate her disability resulted in her termination. Such a claim alleges that the facts of this case directly establishes a violation of the PHRA. Thus, if we find that Wilkins should have reasonably accommodated Remick and did not, Wilkins will be found to have discriminated against Remick. Accordingly, the analysis that will be used in this case will be a reasonable accommodation analysis. This analytical approach was specifically approved by the Pennsylvania Commonwealth Court in the case of Canteen Corporation v. PHRC, 814 A.2d 805 (Pa. Cmwlth. Ct. 2003).

Before beginning this analysis, mention is made of the fundamental issue of whether Remick has a disability within the meaning of the PHRA. Wilkins' post-hearing brief makes no attempt to suggest that Remick does not have a disability within the meaning of the PHRA. In fact,

Wilkins' reply brief specifically acknowledges that Remick is a recovering alcoholic. Remick's post-hearing brief generally submits that alcoholism is a disability under Pennsylvania law.

Under the facts of this case, Remick is "disabled" not only because she has the progressive disease of alcoholism, a condition that has serious life implications, Remick is also "disabled" because she has a history of alcoholism. Generally, there can be little doubt that alcoholism is a disability for the purposes of the PHRA. Looking at the application of the Rehabilitation Act of 1973, 29 U.S.C. §§701-794, federal courts have consistently held that a recovered alcoholic is an "otherwise qualified handicapped individual" within the meaning of the Rehabilitation Act. See i.e. Tinch v. Walters, 765 F.2d 599, 603 (6th Cir. 1985). Indeed, alcoholism generally has been accepted as a disability for purposes of the Rehabilitation Act. See MacKey v. Cleveland State University, 2 AD Cases 1392, 1401 (N.D. Ohio 1993) citing Crewe v. U.S. Office of Personnel Management, 834 F.2d 140, 141 (8th Cir. 1987). Similarly, alcoholism has consistently been considered as a disability covered by the Americans with Disabilities Act, 42 U.S.C. §12101 et seq.; Schmidt v. Safeway, Inc., 864 F. Supp. 991 (D.C. Or. 1994). Indeed, both the interpretive regulations to the ADA and the EEOC's Technical Assistance Manual declare that alcoholism is a disability within the meaning of the ADA. Other states considering the question have also reached the same conclusion under their individual legislative schemes that have disability laws similar to the PHRA, See McEniry v. Landi, 620 N.Y.S.2d 328, 644 N.E.2d 1019 (1994); and Braun v. Aihrs, 2 AD Cases 567 (Oregon Sup. Ct. 1993). In any event, we find that Remick's history of alcoholism qualifies as a disability within the meaning of the PHRA.

We therefore turn to the questions which will be used to resolve the issue of liability in this case. While the PHRA and relevant regulations require some "reasonable accommodation", these provisions do not specify whether the employer or the disabled employee has the burden of proving the availability or lack thereof of a reasonable accommodation. 16 Pa. Code §§44.13 and 44.14 generally require both equipment and job modifications as reasonable accommodations, but again, these provisions do not specify who is responsible to determine and identify the appropriate reasonable accommodation.

One particular provision of the EEOC's regulations enforcing the ADA helps us understand the question of how an employer might gain knowledge of an appropriate reasonable accommodation to enable an employer to assess whether making an accommodation would create an undue hardship.

That regulation is 29 C.F.R. §16 30.2(o)(3) which states:

> To determine the appropriate reasonable accommodation it may be necessary for [an employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Similarly, interpretive guidance found at 29 C.F.R. 1630 Appendix states:

> . . . the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a

> flexible, interactive process that involves both the employer and the qualified individual with a disability. . .

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
>
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
>
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform to essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

We note that 29 D.F.R. §1630.2(o)(3) uses the word "may" with respect to an employer's participation in an interactive process which might specifically identify limitations and potential reasonable accommodations. Additionally, in the interpretive guidance the word "should" is used with respect to the four-part process available to evaluate limitations and possible reasonable accommodations.

Courts that have reviewed this issue have taken a variety of approaches. Because the EEOC regulations only strongly recommend cooperation by both employers and employees in identifying limitations and reasonable accommodations, the question becomes does an employer's failure to participate in an interactive process create liability independent from a resulting failure to accommodate a disabled employee. The regulatory recommendation has resulted in conflicting positions over whether an employer should be required to participate in an interactive process designed to determine if there can be a reasonable accommodation.

Courts that have not required employer participation in the interactive process have, in effect, given no deference to ADA regulations suggesting such participation. See Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1098); Willis v. Conopco, Inc., 108 F. 3d 282 (11th Cir. 1997); White v. York Int'l Corp, 45 F. 3d 357 (10th Cir. 1995); Moses v. American Nonwovens, Inc., 97 F. 3d 446 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997), and Staub v. Boeing Co., 919 F. Supp. 366 (W.D.Wash. 1996). These cases indicate that the ADA and its regulations do not create independent liability for an employer's failure to engage in an interactive process with an employee in order to find a reasonable accommodation. Collectively they conclude that the regulations only recommend an interactive process but do not require one.

Conversely, other courts have, in effect, held that an employer does have an obligation to participate in an interactive process. See Beck v. University of Wisconsin Board of Regents., 75 F. 3d 1130, 5 ADC 304 (7th Cir. 1996); Taylor v. Principal Financial Group., 93 F. 3d 155, 5

ADC 1653 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996); Mengine v. Runyn., 114 F.3d 415, 6 ADC 1530 (3rd Cir. 1997), (Same analysis applied to a federal employee under the Rehabilitation Act of 1973, 29 U.S.C. §§701 et. seq. (1994)); Gerdes v. Swift Eckrich Inc., (N.D. Iowa 1996); Hendricks–Robinson v. Excel Corp., 154 F. 3d 685 (7th Cir. 1998); Baert v. Euclid Beverage, 8 ADC 973 (7th Cir. 1998); McAlpin v. National Semiconductor Corp., 5 ADC 1047 (N.D. TX. 1996); Breiland v. Advance Circuits, Inc., 976 F. Supp. 58 (D.C. Minn. 1997); and Stewart v. Happy Herman's, 6 ADC 1834 (11th Cir. 1997). Such courts defer to the ADA regulations that recommend an interactive process. The opinions may differ regarding whether the employer or employee bears the initial burden of beginning the interactive process, but all agree that courts should require employers and employees to participate in an interactive process.

A summary review of several of the cases which have faced the issue of the required degree of employer involvement in an interactive process illustrate that resolution of the question is dependent on the particular facts of a given circumstance. An early case that addressed this issue was Beck v. University of Wisconsin Board of Regents., supra. Beck was a university employee from 1967 to 1993, who, during the latter part of her employment, suffered from osteoarthritis and depression. In August, 1991, Beck began a three-month medical leave for conditions described to the University as "multiple medical conditions" and "post viral fatigue". When Beck returned in October 7, 1991, she was reassigned to a position where for one month she was only required to learn and practice a word processing program. Thereafter, Beck suffered from osteoarthritis aggravated by repetitive keyboarding. A February, 1992 doctor's note stated, " I would recommend, if possible, that she avoid repetitive keyboard use, in which case, quite possibly her symptoms will resolve". In May, 1992 Beck was hospitalized with severe depression and anxiety. Beck claimed that this was the result of stress from the new job and lack of training and support. On June 9, 1992, Beck returned to work with another doctor's note which released her to return to work on June 11, 1992. The note generally stated she "may require some reasonable accommodation so that she does not have a recurrence. . ."

The University tried to have Beck sign a release so the University could get further information from her doctor. Beck did not sign the requested release, no additional information was provided, and a scheduled meeting to discuss possible accommodations never occurred.

In July 1992, Beck again took medical leave and returned on August 10, 1992 with another doctor's note that related Beck had been hospitalized for depression and medication readjustment. The note generally indicated that she may require appropriate assistance with her workload. Possible equipment modification was noted as well as tailoring of her workload. Upon her return, Beck was given a memorandum stating that her manager did not understand what accommodations were necessary and until he received more information she would be moved to another location and simply assigned work by her supervisor.

On September 25, 1992, Beck went on medical leave for the third time and received electric-shock therapy. She was given a six-month unpaid medical leave of absence that was later extended. In June, 1993 Beck filed a charge with the EEOC. Beck later requested reinstatement to a different department. This request was denied and she was told she had to return to her original department. Beck did not and was therefore, terminated.

The central issue in the Beck case was whether the University provided Beck with a reasonable accommodation. Beck claimed it did not and the University claimed that it never understood exactly what accommodations Beck required, and that it tried in vain to determine what accommodations were necessary, and that given the limited understanding of Beck's disability it did what it could.

The crux of the dispute was defined as whether the employer or the employee bears ultimate responsibility for determining what accommodations are needed? The Beck court began by noting an employee has an initial duty to inform the employer of a disability before liability will attach for a failure to provide a reasonable accommodation. In Beck, the University knew of Beck's disabilities.

The court went on to frame the issue by noting that someone, either the employer or employee, bears the ultimate responsibility for determining what specific actions an employer must take. The court then declared that employers have at least some responsibility and that 29 C.F.R. §1630.2 (o)(3) envisions an interactive process that requires participation by both employers and employees.

The facts of Beck reveal that there had been an interactive process between Beck and the University. Beck brought in doctor's notes that prompted the University to schedule a meeting to discuss accommodations and to direct a memo to Beck explaining the University was unclear about her limitations. The record also was clear that the interactive process broke down.

Wisely, the Beck court noted that no hard and fast rule will suffice and that Courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party to determine what specific accommodations are necessary. A party that delays or obstructs the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation of response, may also be acting in bad faith. The Beck court notes that a fact finder should attempt to isolate the cause of a process breakdown and then assign responsibility.

When the court applied these principles to the facts in Beck, the responsibility for the process breakdown fell on Beck. The University consistently responded to Beck's requests. It was Beck who failed to sign a release to allow the University to get additional information and never provided additional information after she received a memo indicating the University was unclear.

In Beck the University made multiple attempts to acquire information and Beck, it appeared, did not make reasonable efforts. The court concluded by saying that the law requires the parties to engage in an interactive process to determine what precise accommodations are necessary. In Beck the employer was left to guess what actions to take. Liability for failure to provide reasonable accommodations ensues only where an employer bears responsibility for the breakdown of the process.

In Taylor v. Principal Financial Group., supra, Taylor was an office manager who had bipolar and anxiety disorders that negatively affected his productivity at work. On discussions with his employer, Taylor simply mentioned that he suffered from mental illnesses, yet he did not

indicate that this prevented him from doing his job. When Taylor was fired for non-productivity, he filed a claim alleging a failure to reasonably accommodate.

The court in Taylor stated, "it is the employee's initial request for an accommodation that triggers the employer's obligation to participate in the interactive process of determining one." Since Taylor had merely informed his employer of his disability and did not inform the employer of the limitations caused by his condition, the court determined that Taylor failed to "trigger" a duty by the employer to participate in the interactive process. In noting an important distinction between an employer's knowledge of a disability and knowledge of limitations caused by the disability, interactive process, the Taylor court held that employers only have a duty to reasonably accommodate limitations, not disabilities.

Here in the Third Circuit, the case of Mengine v. Runyon, supra, found that an employer is required to participate in the interactive process in the context of the Rehabilitation Act. Mengine was a disabled letter carrier for the U.S. Postal Service. Mengine requested reassignment to a less strenuous position. The Postal Service made employment offers that Mengine rejected because they did not meet his physical limitations. Mengine later identified possible suitable positions, but was told these positions were not vacant. Mengine filed a charge for failure to reasonably accommodate him.

Generally the court found that since the Postal Service had offered Mengine several positions and had continually worked with him to try to find a reasonable accommodation, the Postal Service had satisfied its duty to engage in the interactive process in good faith. The court reasoned that an interactive process where both parties work together more effectively furthers the goals of both the Rehabilitation Act and the ADA.

In the case of Bultemeyer v. Fort Wayne Community Schools, 6 ADC 67 (7th Cir. 1996), Bultemeyer had a serious mental illness. After a disability leave, Bultemeyer notified his employer he was ready to return to work and toured the location where the employer intended to place him as a custodian. Bultemeyer expressed anxiety that being a custodian at a large school would be too stressful. Bultemeyer obtained a doctor's note which suggested placement at a less stressful school, but the employer had already terminated Bultemeyer for failure to return to work.

The Bultemeyer court cited Beck in requiring both parties to work together to determine a reasonable accommodation. The court went so far as to find that the employer had the duty to initiate the interactive process.

Because the employer neither considered Bultemeyer's doctor's note, nor inquired with Bultemeyer or his doctor how to reasonably accommodate him, the employer had acted in bad faith and thus caused the interactive process to breakdown. If the doctor's note was too ambiguous, the employer could have requested a clarification. The court held "if it appears that the employee may need an accommodation but does not know how to ask for it, the employer should do what it can to help". The court noted that it placed the burden on employers to "take the small step of inquiring". Further, the court noted that "it seems eminently reasonable that [the employer] would. . . call his doctor".

In McAlpin v. National Semiconductor Corp., supra, an employer repeatedly asked McAlpin to get more specific medical information the employer needed to make a reasonable accommodation determination. McAlpin failed to respond to these requests. Under such circumstances, the breakdown of the interactive process was not the fault of the employer.

Similarly, in Breiland v. Advance Circuits, Inc., supra, when the court isolated the cause of the breakdown of an interactive process, it found that since the employer had communicated both with Breiland and his doctor, the responsibility for the breakdown was the employee's.

Turning to the facts of the present case, first, Wilkins generally asserts that on September 15, 1998, Remick did not specifically request an accommodation of her alcoholism. Wilkins asserts that it is "undisputed" that at no time did Remick tell Yarrow and Thomas Wilkins that she was in a dangerous condition, that job stress necessitated the leave request, or that she needed to attend the Caron Foundation or a program for addiction.

Wilkins' characterization of the evidence on this point as "undisputed" is simply inaccurate. Remick clearly testified that although the meeting on September 15, 1998 was short, she articulated that she was in a very dangerous place, that she needed help, and that she had made arrangements to enter a week long program the following week. A fundamental credibility issue is raised by the different versions of what was said during this meeting.

Remick testified that although she did not specifically mention her fear of imminent relapse by drinking, she clearly understood that Thomas Wilkins knew what she was talking about. Remick indicated that Thomas Wilkins responded to her stated situation by telling her that he understood that she had to put her sobriety first. On this critical point, rather than affirmatively denying making such a statement to Remick, Thomas Wilkins suggested, "while I don't recall it, yes, I could have said it." (N.T. 479)

We find that Remick sufficiently made Yarrow and Thomas Wilkins aware that she was requesting assistance to prevent a relapse of her alcoholism, that Thomas Wilkins knew of Remick's alcoholism and that Remick had requested the accommodation of a week off without pay to attend a program. Yarrow Wilkins testified that she was aware that Remick was becoming unhappy at work, at times very unprofessional and acting erratic. Near the end of the summer of 1998, and just before the meeting on September 15, 1998, Yarrow Wilkins not only knew that Remick was a recovering alcoholic but that there were noticeable changes in Remick's behavior and performance. We also find that at the September 15, 1998 meeting, Thomas Wilkins did tell Remick that he understood she had to put her sobriety first and that he did so because Remick had just declared that she was in a dangerous place in need of help and that a week's treatment was needed. At this point, rather than engage Remick further in an effort to determine an appropriate reasonable accommodation, Thomas Wilkins rhetorically asked Remick "what about him" and simply told Remick that he would have to get back to her.

On September 19, 1998, Thomas Wilkins did get back to Remick, however, when he did, the meeting between them was not designed to engage in a flexible, interactive process with Remick. The meeting on September 19, 1998 also was not a good faith search by Thomas Wilkins for a

reasonable accommodation of Remick's September 15th request. While Remick's request triggered Wilkins obligation to participate in the interactive process, Wilkins' response constituted a fundamental break down of the required interactive process.

Wilkins submits that Remick was extended a 10-week leave of absence at the September 19th meeting and that Remick simply quit. Wilkins suggests that Remick anticipated and even hoped that she would be terminated. Conversely, Remick's version is that Thomas Wilkins began the September 19th meeting by asking her if she still intended to take the following week off and that when Remick responded yes, Thomas Wilkins stated that they were at an impasse so there was no reason for Remick to return and that she should clean out her desk.

The post-hearing brief submitted by Wilkins places a great deal of emphasis on the position that Remick was offered a 10-week leave of absence at the September 19th meeting and that Remick voluntarily quit. Wilkins argues that there is evidence that an extended leave of absence was offered to Remick. For instance, Wilkins submits that on September 21, 1998, Yarrow Wilkins directed a written memo to Stroudsburg Office Employees advising them that Remick is on an extended leave of absence. (R.E. 16) The full text of that memo is "Please be advised that Mary Ann Remick is on an extended leave of absence and is not expected to return. All calls can be given to myself or Cindy Flora. Thank you."

The unexplained portion of that memo is "and is not expected to return." Clearly, Yarrow Wilkins knew that Remick would not be returning because she had been terminated. Many employers who have terminated one employee have been known to tell the remaining employees that the terminated employee has either quit or for some reason other than that they were terminated, no longer there. Just by saying that Remick is on an extended leave of absence in a memo to staff does not counter stronger evidence of record that supports the finding that Remick had been terminated.

There is no dispute that at the September 19th meeting Remick was crying and distraught. Further, after the meeting concluded, it is undisputed that Remick gave her keys to Yarrow Wilkins and partially cleaned out her desk. Had Thomas Wilkins just told Remick that she could have 10 weeks off, even though she had only asked for one week, discussion between Remick and Thomas Wilkins would have continued regarding the length of time needed by Remick. Instead, Yarrow and Thomas Wilkins can be found observing Remick giving her keys back and clearing out her desk. Had a 10-week leave of absence just been given to her and she then began clearing out her desk, either Yarrow or Thomas Wilkins surely would have gone to her to ask what she was doing. Yarrow and Thomas Wilkins suggest that Remick had just thanked them for giving her the 10 week leave of absence. In actuality, the evidence shows that Remick had thanked them for telling her that she would be paid overrides though November despite the fact that she had just been fired.

Wilkins also points to a letter bearing the date of September 25, 1998 from Yarrow Wilkins to Remick as evidence that Remick was extended a leave of absence through November 30, 1998. Wilkins submits that this letter was intended to confirm the content of the September 19th meeting. A close reading of this letter reveals that it lends more support to Remick's version of the September 19th meeting than the version offered by Wilkins.

While the letter opens with a statement that the letter confirms the conversation on September 19th, it then states, "In an effort to make both our and your transition smooth, we have elected to extend to you a leave of absence…our reason for this is to pay you overrides." The letter does not state something like "as we discussed on September 19th" or "as told to you on the 19th", instead, the letter says "we have elected". In effect, the letter is telling Remick something new. That Wilkins has now elected to create the illusion that Remick is on a leave of absence so overrides can be paid. The letter also makes reference to a "transition". When read in light of Remick's version of the September 19th meeting, the transition to which the letter refers is her September 19th termination. In order to now pay overrides that would otherwise not be payable, Wilkins was informing Remick that subsequent to the September 19th meeting, Wilkins had come up with an illusory leave of absence beginning on September 15th.

One reason that September 15th may have been chosen to begin the illusory leave of absence is that on the 16th of September, Yarrow Wilkins directed that Remick's real estate license be forwarded back to the state. It appears that as early as September 16th, only one day after Remick requested time to attend a program, Wilkins had decided that Remick would be terminated rather than accommodated. While Wilkins argues that this letter was merely a form letter and that the date on the letter is wrong it is more believable that the letter was dated correctly. Wilkins asserts that this letter was created on September 25, 1998 rather than September 16th, and that the typist simply neglected to change the date from an earlier September 16th forwarding of a license to Harrisburg. There was no dispute that very few instances where an employee of Wilkins had their real estate license sent to Harrisburg. To believe that Remick's letter was misdated, one would have to believe that on the 16th of September, Wilkins sent another employee's real estate license to Harrisburg. However, Wilkins could not name the individual whose license was purportedly returned on the 16th. They could not name one simply because there had not been one. We find that Remick's license was returned on the 16th of September and the letter doing so was not misdated.

Yarrow Wilkins' September 25, 1998 letter to Remick also stated, "your last salary check was mailed to you on Friday, September 25, 1998." (C.E. 9) Two things are evident in this statement. First, Yarrow Wilkins confirms that Remick would be receiving her "last" salary check. No checks would follow simply because Remick had been terminated on September 19, 1998. Second, this letter from Yarrow Wilkins is postmarked as having been mailed on September 28, 1998. By saying that Remick's check "was" mailed on September 25, 1998, more than a suggestion can be drawn that Yarrow Wilkins actually wrote this letter after September 25, 1998. Had the letter been drafted on September 25, 1998, Yarrow Wilkins would have said you last check was mailed today. Instead, Yarrow Wilkins indicated that Remick's check "was" mailed on September 25th. This brings us to an argument made by Remick that the September 25th letter was only written because, it is likely that on September 28, 1998, Wilkins was informed that Remick had filed for unemployment. Remick argues that the September 25th letter was written solely to create a "paper trail" in an effort to substantiate to the unemployment office that Remick had voluntarily left Wilkins' employ. Given the sequence of events, Remick's argument is well taken.

Wilkins also notes that Remick gave a note to Cindy Flora along with several computer printouts asking that Flora monitor mailings regarding the rental of several properties because Remick would not be around. While Wilkins would have us believe that Remick was telling Flora that she would not be around through Mid-October, in actuality, Remick was asking Flora to monitor any inquiries that might be made during the week she expected to be out attending the Caron Foundation program she had scheduled. Remick's actions were not only prudent but consistent with the standard practice for the department. It appears that those who have scheduled a short-term rental in the future do call with questions and concerns prior to their arrival. Here, Remick was simply asking Flora to field advance calls from scheduled renters should any occur. Nothing about what Remick was asking Flora to do suggests that she would not be there after spending a week at the Caron Foundation.

Perhaps the most striking evidence that Remick had been terminated and not placed on a leave of absence by Wilkins was Wilkins' act of advertising for a reservationist in the Short-Term Rental department. Beginning on September 29, 1998, the first ad for Remick's replacement appeared in the local newspaper. The ad ran from the 29th of September to October 8, 1998. We must remember that after Labor Day and until the ski season, Wilkins' short-term rental department was not busy. The ad for a replacement was placed to secure a replacement for Remick before the busy ski season began.

Yarrow Wilkins testified of a concern that seems to be at the heart of why Remick was not extended the accommodation she was seeking. Yarrow Wilkins testified that she was concerned that Remick might return and need more time later. (N.T. 453) It would appear that Remick was not given a reasonable accommodation because Yarrow Wilkins did not want to be in the position of possibly having to consider another leave for Remick during one of Wilkins' busy times.

Requiring employers to engage disabled employees in an interactive process is consistent with the remedial goals of the PHRA which attempt to ensure full participation in the workplace. Without an interactive process informational barriers will prevent an open and honest exchange of information that will enable a proper determination of whether reasonable accommodations can be made in specific situations. Here, Wilkins is liable for failure to reasonably participate in the requisite interactive process. Instead of participating in good faith, Wilkins took the measure of terminating Remick. Accordingly, we consider an appropriate remedy.

Section 9(f)(1) of the PHRA generally outlines the remedies the PHRC is authorized to order. This section provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this act, the Commission shall state its findings of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to. . . reinstatement. . . with or without back pay. . . as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish the Respondent, but simply to make a complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. See Albemarle Paper Co. v. Moody., 422 U.S. 405, 10 FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. S. Ct. 1973).

First, it is clear that a general cease and desist order is appropriate. Additionally, the facts of this case would normally present the issue of whether reinstatement is an appropriate remedy. Clearly, reinstatement is not a mandatory remedy upon a finding of a discriminatory discharge, but is instead an equitable remedy whose appropriateness depends upon the discretion of the fact finder in light of the facts of each individual case. Ginsberg v. Burlington Industries, Inc., 24 EPD ¶18,115, 500 F. Supp. 696 (S.D.N.Y. 1980).

Here, Remick testified that she did not want to return to Wilkins. Accordingly, reinstatement will not be ordered.

This brings us to the remaining issue – back pay. Of course, the ultimate focus regarding this remedy is what is the proper amount to be awarded. We begin this inquiry by recognizing that a loss must first be shown. Clearly, had Remick continued working she would have been paid a salary and overrides.

However, before calculating Remick's back pay, we turn to the question of what duty a Complainant has to mitigate damages following a discriminatory discharge. See eg. Kaplan v. Int'l Alliance of Theatrical & State Employees & Motion Picture Machine Operators., 525 F. 2d 1354, 10 EPD ¶10,504 (9th Cir. 1975); EEOC v. Sandia Corp., 639 F.2d 600 (1980); Thurber v. Jack Reilly's Inc., 26 EPD ¶32,109; 521 F. Supp 238 (D Mass. 1981); EEOC v. Kallir, Phillips, Ross, Inc., 12 EPD ¶11,253, 420 F. Supp 919 (S.D., N.Y. 1976); Marks v. Prattco, Inc., 24 EPD ¶31,477, 633 F. 2d 1122 (5th Cir. 1981).

In prior PHRC cases, the PHRC has exercised its discretion in the remedy area by reducing back pay awards because Complainant's mitigation efforts have been insufficient. Ore v. Albert Einstein Medical Center., Docket No. E-19935 (Pa. Human Relations Commission, February 9, 1984) affirmed, 87 Pa. Cmwlth. Ct. 145, 486 A.2d 575 (1985); Mebane v. Reading Eagle Co., Docket No. E-30222-D (Pa. Human Relations Commission, June 28, 1990); and Saidu-Kamara v. Parkway Corporation., Docket No. E-77300-D (Pa. Human Relations Commission, January 27, 2000).

Here, Wilkins argues that Remick failed to present sufficient evidence to establish that she sustained any damages. First, Wilkins argues that no evidence was presented from which a determination could be made regarding overrides. Wilkins argues that without evidence of the net profits for any period after September 1998, a calculation of overrides would be pure speculation. Accordingly, Wilkins argues, the only damage to consider is salary lost.

In effect, on the question of lost salary, Wilkins argues that Remick failed to mitigate her damages in several ways. First, Wilkins submits that Remick chose to remain home for a year rather than seek employment. Next, Wilkins suggests that once Remick did seek employment she

began in a job that initially paid approximately $17,000 per year, but that this salary was soon increased to approximately $30,000 per year, more than she earned in salary with Wilkins. Further, Wilkins asserts that Remick has been happy with her present job because of the good work environment and excellent benefits it provides.

In response, Remick's post-hearing brief generally suggests that Remick should receive a full back pay award beginning on September 19, 1998. The evidence regarding Remick's mitigation efforts reveals that initially, Remick filed for unemployment and while at the unemployment office reviewed the openings listed on their computer system. Remick also testified that she looked at the want-ads in local newspaper. One position that appears to have suited Remick's experience was another short-term rental position opening she saw in the newspaper, however, she did not apply for that position because of a clause in her Employment Agreement with Wilkins. That clause prohibited Remick from working for or operating a "short-term rental department or company" for a period of 18 months and within a radius of twenty-five miles. (C.E. 3)

During the Public Hearing, Remick's testimony suggests that upon returning from the Caron Foundation, she was emotionally not ready to work. In the case of Bossalina, et al v. Lever Brothers Co., 40 EPD ¶36,250 (D.C.Md.1986), several Complainants maintained that their failures to use reasonable diligence to find employment was that they had suffered such emotional distress from their discharges that they were unfit to look for other work. The court held that such an excuse is insufficient as a matter of law.

The evidence in this case shows that after returning from her week program at the Caron Foundation, Remick and her husband made an agreement whereby Remick agreed with him that she would stay home for a year with her children. Whether she did this because she was not ready to go back to work or whether she just needed a break, it is clear that Remick did not attempt to find alternative work for the year after she was terminated. For this period, Remick failed to mitigate her damages.

When Remick did elect to seek employment, she choose to look in an entirely new direction. Remick was simply tired of the rigors of the real estate field so she looked elsewhere. Initially, Remick turned to the local Manpower to help her locate a job. Manpower first assigned Remick to the Pocono Medical Center with a starting salary of $8.50 per hour. Eventually, Remick hired by the Pocono Medical Center where she now has more time for her family. Remick now has weekends and holidays off and approximately six weeks of vacation per year.

Between January 1, 1998 and September 19, 1998, while an employee of Wilkins, Remick earned $15,230.76 in salary and another $23,534.38 in overrides for a total of $38,765.14. On average, in this 37 week period, Remick earned approximately $1,047.71 per week.

When Remick did begin working she earned the following:

1999…….. $4,105.00
2000…….. $21,014.00
2001…….. $27,833.00
2002…….. $30,353.00

Until the Public Hearing in 2003……..	$23,452.89
TOTAL	$106,757.89

Had Remick continued to work at Wilkins, she would have earned approximately $54,480.92 per year. This figure is calculated by multiplying her average weekly salary in 1998 times 52 weeks per year.

The only evidence when Remick began working for the Pocono Medical Center can be found in the fact that she earned $4,105.00 in 1999. At $8.50 per hour for a 40 hour work week, Remick worked approximately 12 weeks of 1999. Accordingly, the following calculations are made regarding the difference in what Remick earned and what she would have earned had she not been terminated:

LOST WAGES	
1999 (12 weeks at $1,047.71)……..	$12,572.52
2000 …….	$54,480.92
2001……..	$54,480.92
2002……..	$54,480.92
2003 (38 weeks at $1,047.71)……..	$39,812.98
TOTAL LOST WAGES	$215,828.26
MINUS INTERIM WAGES	$106,757.89
BACK PAY AWARD	$109,070.37

A final area of damages involves expenses associated with Remick's PHRC case. Here, the only expense shown to be related to her PHRC complaint was a reporter expense of $344.10 incurred on September 11, 2003.

As to whether unemployment benefits Remick had received should be deducted, we find that they should not. In the Third Circuit, courts have carved out an exception to what has come to be known as the "collateral source rule". Under the collateral source rule, payments under Social Security, unemployment compensation and similar programs are normally treated as collateral benefits which would not ordinarily be set off against damages awards. See, Craig v. Y&Y Snacks, Inc., 721 F.2d 77, (3rd Cir. 1983); and Maxfield v. Sinclair Int'l, 766 F. 2d 788, 38 FEP 442 (3rd Cir. 1985).

Finally, the PHRC is authorized to award interest on the back pay award. Goetz v. Norristown Area School District, 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1975). Until January 1, 2000, interest shall be computed using that rate of six percent. For the period of calendar year 2000, the interest rate shall be eight percent and from 2001 until the back pay award is paid, the interest rate shall be nine percent. (Computation of interest penalties, Act 1982-266 Amended).

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

COMMONWEALTH OF PENNSYLVANIA
GOVERNER'S OFFICE
PENSYLVANIA HUMAN RELATIONS COMMISSION

MARY ANN REMICK, Complainant

v.

WILKINS & ASSOCIATES REAL ESTATE, INC., Respondent

PHRC Docket No. E-91253-H

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Remick has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Carl H. Summerson, Permanent Hearing Examiner
September 14, 2004

COMMONWEALTH OF PENNSYLVANIA
GOVERNER'S OFFICE
PENSYLVANIA HUMAN RELATIONS COMMISSION

MARY ANN REMICK, Complainant

v.

WILKINS & ASSOCIATES REAL ESTATE, INC., Respondent

PHRC Docket No. E-91253-H

FINAL ORDER

AND NOW, this 28th day of September, 2004, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Stipulations, Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations, Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That Wilkins shall cease and desist from failing to engage disabled employees who are seeking a reasonable accommodation in an interactive process.
2. That Wilkins shall pay to Remick within 30 days of the effective date of this Order the lump sum of $109,070.37, which amount represents back pay lost between October 1999 and September 26, 2003.
3. That Wilkins shall pay additional interest of six percent per annum on the back pay award, calculated from October 1, 1999, until December 31, 1999, and interest at the rate of eight percent for calendar year 200, and interest at the rate of nine percent thereafter.
4. That within 30 days of the effective date of the Order, Wilkins shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Ronald W. Chadwell, Esquire, in the Commission's Harrisburg Regional Office, 1101-1125 S. Front Street, 5th Floor, Harrisburg, PA 17104.

PENNSYLVANIA HUMAN RIGHTS COMMISSION
By: Stephen A. Glassman, Chairperson
Attest: Sylvia A. Waters, Secretary