

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

**AIDA ARMANI,**  
Complainant

v.

**RAYA AND HAIG SALON,**  
Respondent

PHRC Case No. 199725234

**ENFORCEMENT DETERMINATION HEARING**

**PROCEDURAL HISTORY**

**FINDINGS OF FACT**

**OPINION**

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

**FINAL ORDER**



## PROCEDURAL HISTORY

On or about October 21, 1997 Aida Armani (hereinafter "Complainant") filed a complaint with the Commission against Raya and Haig Salon (hereinafter "Respondent") in which the Complainant alleged Respondent unlawfully discriminated against her in the terms and conditions of her employment, subjecting her to a hostile work environment, and discharging her because of her sex, female. In addition, the Complainant alleged she was subjected to incidents of sexual harassment practiced by Leonid Kadyshes who was the manager of Respondent as well as the Respondent Raya Yukimov. The Respondent filed an Answer in response to the Complaint on or about December 18, 1997.

On or about January 10, 2001, Complainant filed an Amended Complaint simplifying and clarifying her allegations including Respondents failed to promote Complainant to partner because of her sex, female. On or about February 12, 2009, Respondent filed a Verified Answer.

After probable cause was found, Commission staff and the parties attempted to resolve the matter by conference, conciliation and persuasion and were unable to do so. A Public Hearing was therefore convened on September 12, and 13, and November 22, 2002. On or about June 30, 2004, the Commission then issued a Final Order determining that Respondent violated the PHRA by allowing the existence of a hostile work environment by subjecting the Complainant to incidents of sexual harassment as practiced by Mr. Khararjian and by constructively discharging Complainant because of her sex, female. The Commission further instructed the parties to present additional evidence on the issue of appropriate damages.

On or about July 26, 2005 a Public Hearing was convened on the issue of appropriate damages, on January 24, 2006, the Commission issued a second Final Order ordering the Respondent to cease and desist discriminating against persons because of their sex, female, to provide appropriate training to management employees; awarded back pay to Complainant from April 25, 1997 through December 31, 2000 in the amount of \$156,421.00 with additional interest at the rate of 6 percent per annum and out-of-pocket fees.



The Respondent appealed both Orders to Commonwealth Court. On or about January 25, 2007 Commonwealth Court issued an Order, affirming in part, reversing in part and remanding the case to the Commission. Specifically, the Court affirmed the Respondent's liability but reversed the Commission's award of back pay and remanded the case for a new back pay award based on the principles set forth in Carden v Westinghouse Electric Corp., 850 F.2d 996, 1005 (3<sup>rd</sup> Cir. 1988) The Commission subsequently authorized the parties to engage in additional discovery regarding appropriate damages.

On or about October 17, 2007, the Commission notified the parties that a Public Hearing was scheduled on the issue of appropriate damages for November 5, 2007. Subsequently, Mr. Kharajian and Ms. Yukimov requested and were granted a continuance of the Public Hearing.

On January 10, 2008, Steven Barrett, counsel for Respondent, informed the Commission that he was in the process of resolving the dispute between the parties. The resolution did not occur and on April 3, 2009, Commission counsel presented the testimony of Ricardo Zayas, an expert witness, through a Public Hearing deposition in lieu of Public Hearing. The Respondent elected not to offer any witnesses or expert testimony. Both Commission counsel and Respondent filed Public Hearing briefs.

On August 31, 2009 the Commission issued a third Final Order ordering: (a) Respondent pay Complainant an amount of \$119,361.00, representing the recalculated back pay, less mitigation from April 25, 1997 through December 31, 1999; (b) Respondent to pay interest at a rate of 6 percent per annum from April 25, 1997 through the date of payment; and (c) Respondent within 30 days of the date of the Final Order to report the manner of compliance with the foregoing Final Order to Charles Nier, Assistant Chief Counsel. The Respondent did not seek appellate review of this Order.



## FINDINGS OF FACT

1. In a PHRC Final Order dated August 21, 2009, Respondent was ordered to pay Complainant an amount of \$119,361.00 representing the recalculated back pay award less mitigation from April 25, 1997 through December 31, 1999.
2. The PHRC Final Order dated August 31, 2009 also ordered Respondent to pay interest at a rate of 6 percent per annum from April 25, 1997 through the date of payment.
3. The PHRC Final Order also ordered Respondent to report the manner of compliance within 30 days of the date of the Final Order to Charles Nier, Assistant Chief Counsel.
4. The Respondent has not appealed the PHRC's August 31, 2009 Final Order.
5. On or about October 3, 2009, the Commission filed a Motion for Hearing to Determine Appropriateness of Initiation of Enforcement Proceedings in Commonwealth Court (hereinafter "Motion for Enforcement").
6. On or about January 11, 2010 the Commission filed an Amended Motion for Enforcement against successor entities – Advocate Commerce and Development, LLC d/b/a Raya Coiffure and Boutique and Haig and Company, LLC. (hereinafter "Amended Motion for Enforcement").
7. On or about July 16, 2010 Advocate Commerce and Development, LLC (hereinafter "ACD") filed an Amended Response to Commission's Amended Motion for Enforcement and a Cross-Claim Motion against Haig and Company, LLC.
8. On or about October 25, 2010 Complainant and Haig Khararjian and Haig and Company entered into a Settlement Agreement and Mutual Release.
9. On or about March 16, 2011 an Enforcement Determination Hearing was convened in Philadelphia, PA.
10. During the hearing, Commission Counsel withdrew its Amended Motion as it pertained to Haig and Company, LLC due to the aforementioned Settlement Agreement.





11. Commission Counsel then made an oral Motion pursuant to 16 Pa Code 42.34(b) to include Raya Yukimov, individually as a liable successor.
12. At the conclusion of the Enforcement Hearing, the parties were directed to submit briefs regarding the successor liability of ACD and Ms. Yukimov.



## OPINION

The issue before the Commission as a result of the Enforcement Determination Hearing is two fold. The first prong is whether the Respondent herein has complied with August 31, 2009 Order. The second prong is whether ACD d/b/a Raya Coiffure and Boutique is liable as a successor entity to Raya and Haig Salon and whether Ms. Yukimov is liable for damages.

The doctrine of successor liability allows an aggrieved employee to enforce against a successor employer a claim or judgment he could have enforced against its predecessor. Rego v Arc Water Treatment Co. of Pa, 181 F.3d 396, 401 (3<sup>rd</sup> Cir. 1999) The case of EEOC v MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6<sup>th</sup> Cir. 1974), the Court clarified the equity principles in the doctrine of successor liability. The Court provided:

Failure to hold a successor employer liable for the discriminatory practice of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminate without a remedy or with an incomplete remedy.

In determining whether the imposition of successor liability is applicable, courts have considered a number of factors in the context of Title VII claims:

- (1) whether the new employer had notice of the charge or claim before acquisition of the business;
- (2) the ability of the predecessor to provide relief;
- (3) whether there has been substantial continuity of the same business operations;
- (4) whether the employer uses the same plant;
- (5) whether the new employer uses the same workforce;
- (6) whether the new employer uses the same supervisory personnel;
- (7) whether the same jobs exist under substantially similar working conditions;
- (8) whether the new employer uses substantially the same machines, equipment, and production methods; and
- (9) whether the new employer produces or offers substantially the same product or service.

Id at 1094.

In several cases, the Third Circuit has consistently held that there are three principal factors in determining successor liability. The factors are; (1) continuity in operations and work force of the successor and predecessor employees; (2) notice to the successor employee of its



predecessor's legal obligation; and (3) ability of the predecessor to provide relief directly.

Brzozowski v Correctional Physicians Services, Inc., 360 F.3d 173 (3<sup>rd</sup> C.R. 2004) and Rego v Arc Water treatment Co. of Pa, supra

We first look at the continuity of operations and work force, which has been interpreted to mean that a successor employer must have "substantial continuity of identity." Forde v Kee Lee Mfg. Co. Inc., 584 F.2d 4, 5 (2<sup>nd</sup> Cir. 1978) citing John Wiley & Sons v Livingston 376 U.S. 543, 551 (1964). In the instant case, Mr. Kadyshe and Ms. Yukimov have established a successor entity that has continuity in identity, operations and work force as its predecessor. ACD d/b/a Raya Coiffure and Boutique was established in 2007 by Leonid Kadyshe. Mr. Kadyshe is listed as the President of Advocate Commerce and Development, LLC, with the fictitious name of Raya Coiffure and Boutique. It is clear that ACD maintains many of the same employees as the predecessor, and offers the same products and services by using the same type of equipment and production methods of its predecessor. Furthermore Ms. Yukimov's name is retained by ACD for the successor and focuses on her participation. In fact, the website notes the continuity of her work and asserts that "for over 20 years, Raya's clientele have enjoyed an unparalleled dedication to the art of beauty." In addition, the predecessor Respondent operated a boutique. Raya Coiffure and Boutique maintains a boutique just like its predecessor. Lastly a number of employees of the predecessor Respondent left to join Raya Coiffure and boutique including Ms. Yukimov and Mr. Kadyshe as well as five other employees. Most importantly, each of these employees took their books, their personal list of customers and income accounts, from the predecessor to Raya Coiffure and Boutique.

In conclusion, the evidence shows that Raya Coiffure and Boutique had substantial continuity in terms of operations as a hair salon and boutique and in terms of work force. As counsel notes, the entire successor operation was named after Raya Yukimov, one of the partners of the predecessor Respondent.



Next, there is no question that ACD d/b/a Raya Coiffure and Boutique had notice of the predecessor's legal obligation. Both of the principals of the new entity were intimately involved in the litigation before the Commission and Commonwealth Court. Mr. Kadyshes and Ms. Yukimov were both deposed during discovery prior to public hearing. Also, on or about October 26, 2007, Ms. Yukimov filed a complaint in equity against Mr. Khararjian seeking, in part, to avoid liability to the Complainant. The Complaint most certainly establishes the two principals were aware of Respondent's potential liability to the Complainant.

Lastly there is the ability of the predecessor to provide adequate relief. This factor was satisfied when, on July 8, 2008, Mr. Khararjian and Ms. Yukimov executed an agreement to formally dissolve the predecessor Respondent. Therefore, because of this dissolution, the predecessor Respondent has no ability to provide the relief ordered by the Commission's Final Order. Ms. Yukimov, predecessor Respondent should not be allowed to avoid liability by dissolving and then reconstructing as a new entity. Accordingly, ACD d/b/a Raya Coiffure and Boutique is a successor entity to its predecessor and is liable for the Final Order, dated August 31, 2009.

The next issue is whether Ms. Yukimov is individually liable for the damages awarded by the Commission in its Final Order dated August 31, 2009. Stated quite succinctly, Ms. Yukimov is liable as an individual because she agreed to personal liability and partners may be held jointly and severally liable. In a July 8, 2008 agreement between Mr. Khararjian, Ms. Yukimov expressly agreed to be personally "responsible to pay one half of any award rendered against the partnership by the [Pennsylvania Human Relations] Commission. " Therefore, Ms. Yukimov should be held personally liable. Also in this case, Ms. Yukimov's assets were available to satisfy the Commission's Order for yet another reason. Ms. Yukimov transferred all of her assets she received from the dissolution of Respondent partnership without paying known creditor. She clearly retained possession and control of all the assets gained when the Respondent partnership was dissolved. After this transfer, the predecessor Respondent was insolvent. Accordingly, Ms.





Yukimov is jointly and severally liable to pay Complainant under the terms of the Commission's  
Final order dated August 31, 2009.

An appropriate Order follows



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

**AIDA ARMANI,**  
Complainant

v.

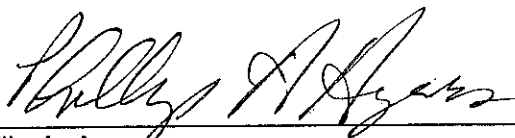
PHRC Case No. 19972534

**RAYA AND HAIG SALON,**  
Respondent

**RECOMMENDATION OF PERMANENT HEARING EXAMINER**

AND NOW, this 16<sup>TH</sup> day of MAY, 2011 upon consideration of the entire record of the Enforcement Determination hearing, held on March 16, 2011 the Permanent Hearing Examiner concludes that Advocate Commerce and Development, LLC, d/b/a Raya Coiffure and Boutique and Raya Yukimov, individually as successor entities to predecessor Respondent has failed to comply with the Pennsylvania Human Relations Commission's Final Order dated, August 31, 2009 and therefore, recommends that the foregoing Enforcement Determination Hearing, Findings of Fact, Opinion and Final Order attached be adopted by the full Pennsylvania Human Relations Commission pursuant to the Pennsylvania Human Relations Commission policy adopted on June 2, 1986.

5/16/11  
Date

  
Phillip A. Ayers,  
Permanent Hearing Examiner



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

**AIDA ARMANI,**  
Complainant

v.

PHRC Case No. 19972534

**RAYA AND HAIG SALON,**  
Respondent

**FINAL ORDER**


**AND NOW**, this 23<sup>rd</sup> day of May, 2011 the Pennsylvania Human Relations Commission hereby adopts the foregoing Enforcement Determination Hearing Findings of Fact in accordance with the Recommendation of the Permanent Hearing Examiner, and therefore,


**ORDERS**

1. That the Advocate Commerce and Development, LLC, d/b/a Raya Coiffure and Boutique and Raya Yukimov, individually as successor entities to predecessor Respondent shall, within 30 days of the effective date of this Final Order, comply with the Pennsylvania Human Relations Commission's August 31, 2009 Final Order, in the above-captioned case.



2. That the Advocate Commerce and Development, LLC, d/b/a Raya Coiffure and Boutique and Raya Yukimov, individually as successor entities to predecessor Respondent failure to comply with such Final Order within 30 days shall automatically operate to authorize enforcement proceedings to be instituted in Commonwealth Court.

By:   
Stephen A. Glassman, Chairperson

Attest  
  
Dr. Daniel D. Yun, Secretary





COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

AIDA ARMANI,  
Complainant

v.

RAYA AND HAIG SALON,  
Respondent

PHRC Case No. 199725234

CERTIFICATE OF SERVICE

I, Debbie L. Smith, hereby certify that I have this 24<sup>th</sup> day of May, 2011, served the Respondent attorneys, Steven B. Barrett, Esquire, and Rochelle B. Fieldcamp, Esquire, by certified mail and also by first-class mail the Enforcement Determination Final Order upon all parties of this proceeding including:

Charles Nier, Esquire  
PA Human Relations Commission  
Philadelphia Regional Office  
110 N 8th St. Ste 501  
Philadelphia, PA 19107

Steven B. Barrett, Esquire  
375 Morris Road  
P.O. Box 1479  
Lansdale, PA 19446

Rochelle B. Fieldcamp, Esquire  
P.O. Box 24  
Bryn Mawr, PA 19009

Lisa Swan, Esquire  
One Commerce Square  
2005 Market Street, Suite 1000  
Philadelphia, PA 19103-7041

in accordance with the requirements of 1 PA Code §33.32.

Dated this 24<sup>th</sup> day of May, 2011.



Signature

Clerk Typist II

Title



**COMMONWEALTH OF PENNSYLVANIA**

**GOVERNOR'S OFFICE**

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

**AIDA ARMANI,  
Complainant**

**v.**

**RAYA and HAIG SALON,  
Respondent**

**PHRC CASE NO. 199725234**

**FINDINGS OF FACT**

**CONCLUSIONS OF LAW**

**OPINION**

**RECOMMENDATION OF HEARING PANEL**

**FINAL ORDER**

## FINDINGS OF FACT

1. The Complainant herein is Aida Armani, a female (hereinafter "Complainant")
2. The Respondent herein is Raya and Haig Salon (hereinafter "Respondent") and, at all times relevant to the instant case, Respondent employed four or more persons within the Commonwealth of Pennsylvania.
3. The Complainant worked for the Respondent from May 1989 through April of 1997. (N.T. 09/12/2002, 234).
4. The Complainant specialized in working with hair color. (N.T. 09/12/2002, 234).
5. On or about April 24, 1997, the Complainant was terminated by the Respondent. (N.T. 09/12/2002, 234).
6. During the Complainant's last full year of employment with the Respondent, the Complainant earned \$106,670.00.
7. On or about May 13, 1997 the Complainant opened her own salon. (N.T. 09/13/2002, 153).
8. During the time period of April 25, 1997 to December 31, 1997, the Complainant's earnings were \$3,300.00 consisting of her salary from Aida, Inc. (P.H.D Ex 2, 8).

\* The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

P.H.D.	Public Hearing Deposition of Ricardo Zayas
P.H.D. Ex.	Exhibit attached to – Public Hearing Deposition of Ricardo Zayas
N.T.	Transcript of First Hearing 09/12/2002 and 09/13/2002

9. During the time period from January 1, 1998 to December 31, 1998, the Complainant's earnings were \$56,355.00, consisting of \$25,900.00 in salary from Aida, Inc., \$16,138.00 in ordinary income from Aida, Inc., and \$14,317.00 in depreciation and amortization. (PHD Ex 2, 8).
10. During the time period from January 1, 1999 to December 31, 1999 the Complainant earned \$95,437.00, consisting of \$33,800.00 in salary from Aida, Inc., \$38,315.00, in ordinary income from Aida, Inc., \$5,918.00 from auto and other benefits and \$17,404.00 in depreciation and amortization. (P.H.D Ex 2, 8).
11. The Complainant on two occasions borrowed money in the form of loans from Aida, Inc., (P.H.D. 97).
12. Ricardo J. Zayas is a certified public accountant who specializes in forensic accounting, damage analysis and other forms of investigative accounting applications. (P.H.D. 4, 5).
13. Zayas has experience in the areas of valuations and financial analysis and has testified as an expert witness on a wide variety of issues related to financial analysis. (P.H.D. 78, 79).
14. In determining damages, Zayas used the maximum amount of the loan payment that was provided to the Complainant over the period from 1998–2001 (P.H.D. 97).
15. The loan was listed as a negative item on the balance sheet of Aida, Inc., but a positive balance sheet item on the Complainant's personal balance sheet. (P.H.D. 40, 51).

16. Zayas did not take into account that the personal loan was an account receivable to the Complainant and would increase the net assets on Complainant's own personal balance sheet by an amount equal to the negative amount on Aida Inc.'s balance sheet. (P.H.D. 40).
17. The loans were fully paid off as of December 31, 2001. (P.H.D. 68).
18. Zayas, in his review of the records, did not take into account that this entire loan was paid off in calendar year 2001. (P.H.D. 68-69).
19. The elimination of the loans would have increased Zayas' estimate of Aida Inc.'s earnings during the period of April 25, 1997 to December 31, 1999.

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and the subject matter of the complaint under the Pennsylvania Human Relations Act (hereinafter "Act").
2. The parties and the Commission have fully complied with the procedural prerequisite to hold a public hearing.
3. The Complainant is an individual within the meaning of Section 5(a) of the Act.
4. The Respondent is an employer within the meaning of the Act.
5. Section 5(a) of the Act, prohibits employers from discriminating against individuals in their employment because of their sex.
6. The instant case is on remand from Commonwealth Court and is limited solely to the issue of recalculating the back pay award based on the principles set forth in Carden v. Westinghouse Electric Corp., 850 F.2d. 996 (3<sup>rd</sup> Cir. 1988).
7. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission shall issue a cease and desist order and it may order such affirmative action as in its judgment will effectuate the purposes of the Act.

## OPINION

In order to put this matter in the proper perspective, it is necessary to review the procedural history of this case. On or about October 21, 1997, Aida Armani (hereinafter "Complainant") filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission Case No. 199725234. The Complaint alleged that Raya and Haig Salon (hereinafter "Respondent") unlawfully discriminated against her in the terms and conditions of her employment by subjecting her to a hostile work environment and constructively discharging her because of her sex, female. On or about December 18, 1997, Respondent filed an Answer to the complaint. On or about January 10, 2001, Complainant filed an Amended Complaint, amplifying and clarifying allegations, including Respondent's failure to promote Complainant to partner because of her sex, female. The Respondent filed an Answer to the Amended Complaint on or about February 12, 2001.

By correspondence dated March 1, 2001, Commission staff notified the parties that the Commission found probable cause to credit the allegations in the complaint and amended complaint. Subsequently, Commission staff and the parties attempted to resolve the matter by conference, conciliation and persuasion but were unable to do so. In subsequent correspondence, Commission staff notified the parties that a public hearing had been approved.

A public hearing was convened on September 12 and 13 and November 22, 2002 before Commissioners Dr. Raquel O. Yiengst and Dr. Daniel D. Yun. Commissioner Yiengst served as the Panel Chairperson and Phillip A. Ayers, Esquire served as Panel Advisor.



On or about June 30, 2004, the Commission issued a Final Order determining that the Respondent violated the Act by allowing the existence of a hostile work environment and constructively discharging the Complainant because of her sex, female. Further, the Commission reopened the case for the express purpose of the parties presenting additional evidence on the issue of appropriate damages. An additional day of public hearing on the issue of appropriate damages was held on July 26, 2005 before Commissioner Dr. Raquel O. Yiengst, Panel Chairperson, then Commissioner Toni M. Gilhooley and then Commissioner Theotis Brady. Phillip A. Ayers, Esquire served as Panel Advisor. After the hearing concluded, the parties were advised of their right to file post-hearing briefs in support of their positions.

On or about January 24, 2006, the Commission issued a second Final Order regarding the issue of damages. In this Final Order, the Commission ordered Respondent to cease and desist from discriminating against persons because of their sex, female, to provide appropriate training to management employees, and awarded Complainant back pay from April 25, 1997 through December 31, 2000, with additional interest at the rate of 6 percent per annum and awarded Complainant out-of-pocket expenses. The Respondent appealed both Final Orders to Commonwealth Court.

On or about January 25, 2007 Commonwealth Court issued an Order, affirming in part, reversing in part and remanding the case to the Commission. Raya and Haig Salon v. PHRC, 915 A.2d 728 (Cmwlth. Ct. 2007). Specifically the Court affirmed the Commission's determination that the Respondent subjected Complainant to a hostile work environment; that she was constructively discharged by the Respondent; and she made a reasonable effort to mitigate her damages by opening her own salon. The Court further reversed the Commission's award of back pay and remanded the case for a new back

pay award based on the principles set forth in Carden v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3<sup>rd</sup> Cir. 1988). Subsequent to the Order by Commonwealth Court, the parties chose to engage in discovery and present evidence through public hearing depositions in lieu of a public hearing. Commission Counsel presented the testimony of Ricardo Zayas, an expert witness, through a public hearing deposition. The Respondent elected not to offer any witness or expert witness testimony. Commission Counsel and Respondent counsel filed post-hearing briefs in this matter.

The issue before the Commission is, after a judgment for the Complainant on the issue of liability, what is the appropriate back pay award for a self-employed Complainant in view of the decision by Commonwealth Court in Raya and Haig Salon v. PHRC. *Id.* The authority of the Commission to grant relief is found within Section 9 of the PHRA, which provides:

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 ... hiring, reinstatement on upgrading of employees, with or without back pay ... and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice ... 43 P.S. §959 (f)

The case law has consistently supported the Commission's authority to grant relief after a finding of discrimination. In Murphy v. Cmwlth, PA Human Relations Commission, 486 A.2d 388 (Pa. 1985) the Pa. Supreme Court stated: "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." There are essentially two purposes in awarding a remedy under the PHRA. First we must insure that the unlawful discriminatory practice is eradicated and secondly, we must restore the injured party to her pre-injury

status and make her whole. Williamsburg Community School District v. Pennsylvania Human Relations Commission., 99 Pa. Cmwlth. Ct. 206, 512 A.2d 1339 (1986). In regard to the mitigation of damages, it is the Respondent's burden to show that the Complainant did not exercise reasonable diligence in order to limit an entitlement to a back pay award. Carden v. Westinghouse Electric Corp., 850. F.2d 100 (3<sup>rd</sup> Cir. 1988).

Before moving forward with the specifics of the instant case, it is necessary to review the clear direction set forth by Raya and Haig Salon v. PHRC., 915 A.2d 728 (Cmwlth. Ct. 2007). The Court remanded this matter to the Commission to render a new award of back pay based on the principles set forth in Carden v. Westinghouse Electric Corp. *Id.* Therefore, it is necessary to review the principles set forth in Carden to make a proper and informed back pay calculation where the individual involved became self-employed after her termination. In Carden, as both counsel note, the overall purpose of mitigation is to prevent the Complainant from obtaining a double recovery or windfall *Id.* The Carden court further recognized that in the context of self employment, the determination of back pay is not easily determined.

The Carden case presented several questions which factor into a back pay calculation involving a self employed person. These questions include:

Has the plaintiff drawn a salary which has reduced, if not eliminated the year-end profit? Have personal expenses, normally paid by a wage earner from a salary, been absorbed by the business, e.g. personal car expenses, insurance, vacation and other personal expenses? Have dividends been paid? Have profits been earned? Have profits been reinvested in capital assets and have reserves been established? If so, how should they be treated in the mitigation context? Has the plaintiff benefited by an increase in the value of the business? *Id.* at 1006.

Clearly, the principles cited by the Carden case are designed to assess the proper monies that the Complainant is entitled to.

In the instant case, the parties agreed to engage in discovery and present evidence via a public hearing deposition in lieu of a public hearing. The Commission presented the testimony of Ricardo J. Zayas (hereinafter "Zayas") as an expert witness on the issue of mitigation and back pay calculation. He also has varied experiences in damage analysis.

Zayas is a certified public accountant and has additional specialized training in areas of evaluation and financial analysis. The Respondent does not challenge Zayas' qualifications as an expert witness.

While it is clear that Zayas is eminently qualified as an expert witness, it is important to review the process he utilized in determining that the Complainant's back pay award is consistent with Commonwealth Court's guidance and direction. Zayas' report does address the concern of Commonwealth Court that the Commission utilized limited information in its initial calculation of back pay. Zayas' report not only relies on the Complainant's personal tax returns from 1998 to 2003, but he also reviewed the corporate tax returns of Aida, Inc., for the same time period. (PHD Ex 2) There was sufficient information available to prepare his expert report.

Secondly Zayas recognized that the court is "interested in an assessment of economic benefits actually received by Aida, Inc., during the relevant time period". (PHD Ex 2). Zayas stated in his report that he addressed the issue of the value of Aida Inc., by utilizing a net cash flow analysis which seeks to discern the economic benefit stream to the owner of a business. Zayas concluded that a "single point business valuation would not, in my opinion, have been the appropriate means to measure mitigation". (PHD 49). Stated differently, any attempt to pick a single point or place in time valuation over a three and one half year period is not an accurate measure when attempting a mitigation analysis.

In general, the record reflects that Zayas' analysis was consistent with the decisions in Raya and Haig Salon and Carden. As PHRC counsel noted, Zayas had sufficient information to render an expert opinion since he evaluated the personal and corporate returns of the Complainant and Aida, Inc. He analyzed the factors raised in Carden in determining the earnings of a self employed person, and he utilized an acceptable methodology in the valuation of Complainant's business. Lastly and most importantly, the Respondent did not offer any evidence to rebut Zayas' testimony. As always, the burden is on the Respondent to show that a back pay award should be limited.

We now move to the Complainant's remedy in this case. Clearly, the Complainant is entitled to a back pay award and is also entitled to interest on the back pay award. Goetz v. Norristown Area School District. 328 A.2d 579 (1974). The initial step in this process is to ascertain the relevant time period for any back pay award. The evidence is undisputed that the Complainant was constructively discharged by the Respondent on April 25, 1997, and that any back pay award should stop when Complainant's actual earnings with her business was equal to or greater than the salary she received from Respondent. Zayas' report indicates that, after review of corporate and personal tax returns, the Complainant earned \$118,995.00 in 2000. Consequently the back pay award should end on December 31, 1999. Thus the relevant time period for any back pay award is April 25, 1997 to December, 31, 1999.

Next, we must begin with a determination of the Complainant's earnings with the Respondent. It is undisputed that the Complainant's last full year with Respondent was in 1996 and she earned \$106,870.00. Consequently during the relevant time period, April 25, 1997 to December 31, 1999, the Complainant would have earned \$284,453.00 if she had not been constructively discharged by the Respondent.

In Zayas' report, he had to calculate the Complainant's true earnings from April 25, 1997 to December 31, 1999 in order to determine appropriate amounts to deduct as mitigation. In making this determination, Zayas creditably testified that he incorporated those factors detailed in the Carden case and followed Commonwealth Court's instructions. Zayas further reviewed the issues raised in Carden regarding whether Complainant drew a salary; whether there were personal expenses; insurance and/or vacations; whether profits were earned and dividends paid; and how these issues were considered in the mitigation context. The factors he considered included; Complainant's salary from Aida Inc., Aida Inc.'s ordinary income, auto benefits, interest income, depreciation and amortization expenses. (P.H.D. 74, 97). The Respondent has not shown that the Complainant earned monies that Zayas neglected to mention in either his expert report or in his deposition testimony. Also, the Respondent, though given the opportunity, did not rebut Zayas testimony that the Complainant's true earnings from April 25, 1997 to December 31, 1999 were \$165,092.00. (P.H.D. Ex 2).

Next, we must determine the impact of the Complainant's loan of \$123,135.00. to Aida, Inc. In actuality, the figure of \$125,135.00 is a combination of two loans, \$35,028.00, and \$88,107.00. Zayas stated that these loans should be treated as an asset to Aida Inc.'s revenues. The court in Carden specifically noted a trier of fact should take special care in reviewing expenses by an individual with the power to control the amount of earnings and losses from the business. Certainly, in the instant case, the Complainant had the power to control the personal income and expenses. If the loans are treated as an offset, it would appear that the Complainant would get a "windfall" because the loan was an asset to Complainant and Complainant then repaid the losses to herself. Also, on this specific point, Zayas' view that loans to a business create negative cash flow that

adds to a back pay claim has been rejected. See Serricchio v. Wachovia Securities, LLC., 606 F.Supp. 2d 256 (2009). Therefore, the two loans, totaling \$123,135.00, shall not be included in the mitigation analysis in this case.

Accordingly, the Complainant's back pay award for the time period is the figure that Zayas' report concludes "reasonably captures" the economic benefits Complainant received from April 25, 1997 to December 31, 1999. Zayas' calculations were consistent with specific instructions set forth by Commonwealth Court in regard to Carden, and, the Respondent did not rebut the offered testimony. Since the two loans shall not be included in the analysis, the back pay award is \$284,453.00 minus \$165,092.00 which equals \$119,361.00. Lastly in any award of back pay, the Complainant may recover interest on the back pay award. Brown Transport v. Commonwealth of Pennsylvania, Pennsylvania Human Relations Commission., 578 A.2d 555 (1990). Accordingly the Complainant is entitled to interest at six percent per annum from April 25, 1997 until payment is made.

An appropriate Order follows.

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

**AIDA ARMANI,**  
Complainant

v.

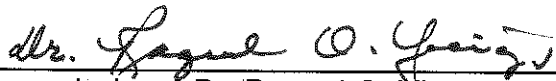
**RAYA and HAIG SALON,**  
Respondent

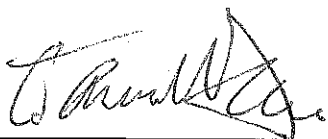
PHRC CASE NO. 199725234

**RECOMMENDATION OF HEARING PANEL**

Upon consideration of the entire record regarding damages in the above captioned case, the Hearing Panel finds that, after remand from Commonwealth Court, the Complainant has shown an entitlement to a back pay award. It is, therefore, the Hearing Panel's Recommendation that the attached Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Commission. If approved and adopted the Hearing Panel recommends issuance of the attached Final Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

  
\_\_\_\_\_  
Commissioner Dr. Raquel O. Yengst  
Panel Chairperson

  
\_\_\_\_\_  
Commissioner Daniel D. Yun,  
Panel member



COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

AIDA ARMANI,  
Complainant

v.

RAYA and HAIG SALON,  
Respondent

PHRC CASE NO. 199725234

FINAL ORDER

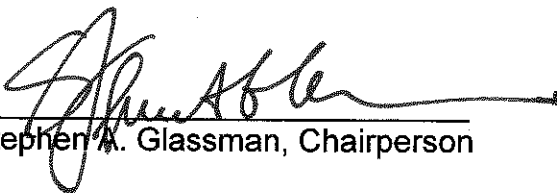
AND NOW, this 31<sup>ST</sup> day of August, 2009 upon review of the entire record in this matter, the full Pennsylvania Human Relations Commission hereby approves the foregoing Findings of Fact, Conclusions of Law, Opinion and Recommendation of the Hearing Panel. Accordingly, the full Commission adopts said Findings of Fact, Conclusions of Law and Opinion as its own finding and incorporates the 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

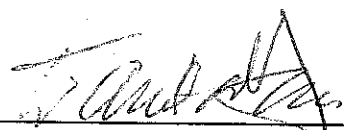
**ORDERS**

1. That the Respondent shall pay Complainant an amount of \$119,361.00, which represents back pay less mitigation from April 25, 1997 through December 31, 1999.

2. That the Respondent shall pay interest at the rate of 6% per annum from April 25, 1997 through the date of the payment of the back pay award.
3. The Respondent shall report the means by which it will comply with the foregoing Final Order to Charles L. Nier, III., Assistant Chief Counsel within thirty days of the date of this Final Order.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

  
\_\_\_\_\_  
Stephen A. Glassman, Chairperson

  
\_\_\_\_\_  
Dr. Daniel D. Yun, Secretary