

FINDINGS OF FACT*

1. On or about June 27, 2012, Complainant, Joseph C. Keegan, (hereinafter "Keegan"), filed a PHRC Complaint against Popeye's Chicken & Biscuits, in which Keegan alleged that on March 25, 2012, Keegan was terminated from his position as a Prep Cook because of his disabilities, legally blind in the right eye and hydrocephalus. Subsequently, the Complainant filed an Amended Complaint that was verified on June 24, 2012. The Complainant's Amended Complaint changed the name of the Respondent to CJ&L Incorporated d/b/a Popeye's Famous Fried Chicken & Biscuits. During the Public Hearing, the Complainant's complaint was again amended to correct a typographical error in listing the name of the Respondent. During the Public Hearing, a Motion was made seeking to amend the caption of the Complainant's Amended Complaint to "CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits." Without objection, this Motion was granted. (N.T. 8; O.D. 1)
2. On January 4, 2013, the PHRC's Harrisburg regional office filed a Petition for a Rule to Show Cause. (O.D. 1)

- To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:
N.T. Notes of Testimony
O.D. Official Docket

3. On January 7, 2013, PHRC Motions Examiner Carl H. Summerson issued a Rule to Show Cause which, in effect, notified CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits (hereinafter "CL&J") that it had until January 28, 2013, to file an answer to Keegan's complaint. (O.D. 2)
4. On January 9, 2013, a Respondent representative signed a PS Form 3811, indicating receipt of the certified mailing of the Rule to Show Cause. (O.D. 3)
5. CL&J neither filed an answer to Keegan's complaint nor responded to the January 7, 2013, Rule to Show Cause. (O.D. 4)
6. On February 11, 2013, Motions Examiner Summerson recommended to the full PHRC that CL&J be found liable for Keegan's allegation. (O.D. 4)
7. By Order dated February 25, 2013, the PHRC found CL&J liable for Keegan's allegation. (O.D. 4)
8. A public hearing on the issue of what, if any, damages are appropriate was held on November 18, 2013, in Harrisburg, Pennsylvania.
9. Keegan worked for CL&J as Prep Cook and Dishwasher for approximately one and a half years. (N.T. 12)
10. During Keegan's employment, Keegan worked approximately 25 to 30 hours per week earning \$7.50 per hour. (N.T. 12)
11. On March 25, 2012, Keegan was terminated because of his disabilities. (O.D. 1)
12. Following his termination, Keegan began to seek alternate employment. (N.T. 13, 18)

13. Keegan incurred travel expenses for parking when he attended the Public Hearing and a round trip to the Public Hearing in his Father's vehicle. (N.T. 15, 18)

CONCLUSIONS OF LAW

1. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.
3. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the Pennsylvania Human Relations Commission ("PHRC") may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In this matter, CL&J's failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for Keegan on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy. *Murphy v. Pa. Human Relations Commission*, 486 A.2d 388 (1985).
7. The Commission may also order a Respondent to cease and desist from discriminatory practices and to take affirmative action as, in the judgment of the Commission, will effectuate the purposes of the PHRA.

OPINION

This case arose on an initial complaint filed by Joseph C. Keegan, (hereinafter "Keegan"), against Popeye's Chicken & Biscuits. Subsequently, Keegan filed an Amended Complaint listing the Respondent as CJ&L Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits. During the Public Hearing, a Motion was made to again change the name of the Respondent to CL&J incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits. Without objection, the Motion to Amend the complaint was granted. In Keegan's complaint, Keegan alleged that on March 25, 2013, he was terminated from his position as Prep Cook because of his non-job related disabilities: legally blind in the right eye, and hydrocephalus. Keegan's complaint states a claim under Sections 5(a) of the Pennsylvania Human Relations Act ("PHRA").

By correspondence dated January 4, 2013, the Pennsylvania Human Relations Commission ("PHRC") Harrisburg regional office petitioned Motions Examiner Summerson for a Rule to Show Cause, indicating that CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits (hereinafter "CL&J") had not answered Keegan's complaint. The petition declared that CL&J had been served with Keegan's complaint on September 18, 2012. The petition further indicated that by correspondence dated December 18, 2012 an efforts had been made to obtain an answer from CL&J.

On January 7, 2013, a Rule to Show Cause was issued directing CL&J to respond on or before January 28, 2013. After no response was filed, on February

11, 2013, Motions Examiner Summerson recommended a finding of liability to the full PHRC. On February 25, 2013, the full PHRC determined that Keegan had been terminated from his position as Prep Cook because of Keegan's disabilities.

After the finding of liability in this case, conciliation efforts were unsuccessful. Subsequently, this matter was approved for a public hearing on the issue of appropriate damages.

The public hearing on the issue of appropriate damages was held November 18, 2013, in Harrisburg, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Martin Cunningham, PHRC Assistant Chief Counsel. Keegan appeared at the Public Hearing. Although duly notified, CL&J failed to attend the public hearing.

Since liability had been found after CL&J failed to file an answer, the only question at the public hearing was what damages Keegan could establish.

Section 9(f) of the PHRA 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 finding 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 reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement...with or without back pay...and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice...as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish a Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. See

Albermarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975); PHRC v. Alto-Reste Park Cemetery Association., 306 A.2d 881 (Pa. S. Ct. 1973).

The first aspect we must consider regarding making Keegan whole is the issue of the extent of financial losses suffered. When Complainants prove an economic loss, back pay should be awarded absent special circumstances. See *Walker v. Ford Motor Company, Inc.*, 684 F.2d 1355, 29 FEP Cases 1259 (11th Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a “reasonable means to determine the amount [the Complainant] would probably have earned...” *PHRC v. Transit Casualty Insurance Co.*, 340 A.2d 624 (Pa. Commonwealth Ct. 1975), *aff’d*. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See *Green v. USX Corp.*, 46 FEP Cases 720 (3rd Cir. 1988).

In this case, Keegan’s claim initially involves a loss of wages following his termination on March 25, 2012. During the public hearing, Keegan offered testimony that he attempted to mitigate his damages. Additionally, the burden to establish a failure to mitigate rests with a Respondent. See *Wheeler v. Snyder Buick, Inc.* 794 F.2d 1228 (7th Cir. 1986). Of course, since the Respondent did not even appear at the public hearing, there has been no showing that Keegan failed to mitigate his damages. Accordingly, Keegan’s lost wages in this case are calculated for the period from March 25, 2012 until the present. These calculations are as follows:

30 hours per week at \$7.50 per hour =	\$225.00 per week
2012 - \$225.00 per week @ 40 weeks =	\$9,000.00
2013 - \$225.00 per week @48 weeks =	<u>\$10,800.00</u>
Total Lost Wages.....	\$19,800.00

In addition, Keegan should be reinstated either into the position from which he was terminated or into a position that is substantially equivalent and acceptable to Keegan. In the event that Keegan cannot be reinstated immediately, an award of front pay is appropriate. Front pay is a monetary award that compensates a victim of discrimination for lost employment extending beyond the date of a remedial order. Here, if, within 30 days of the date of the Order in this case, Keegan is not placed into the position he held prior to his termination or into a substantially equivalent position agreeable to Keegan, front pay shall commence at that time at the rate of \$225.00 per week until such time as Keegan is offered a position that would restore him to his rightful position. If such a position is offered and rejected by Keegan, front pay will end at that time. Further, if Keegan obtains other employment subsequent to the date of this Order, the front pay obligation will be reduced by the amounts earned by Keegan. Should Keegan obtain other employment, he shall report the circumstances to Martin Cunningham, Esquire, PHRC Assistance Chief Counsel, and an appropriate adjustment of the front pay award will be made.

In addition to back pay, reinstatement, and front pay, Keegan generally testified that there was an expense associated with bringing him to the public hearing. Keegan testified that there were both travel costs and a parking expense associated with his appearance. In this regard, Keegan should be awarded \$15.00 as a parking expense and \$15.00 in travel expenses.


Finally, the PHRC is authorized to award interest on the back pay award at the rate of six percent per annum. *Goetz v. Norristown Area School Dist.*, 328 A.2d 579 (Pa. Cmwlth. Ct. 1975).

An appropriate order follows.

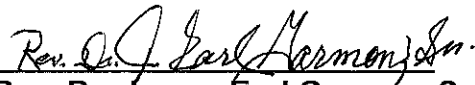
2. That CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits shall pay Keegan the lump sum of \$19,800.00 which amount represents lost wages between March 25, 2012 and the present.
3. That CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits shall pay additional interest of 6% per annum on the award in paragraph 2 above, calculated from March 25, 2012 until payment is made.
4. That CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits shall reimburse Keegan \$30.00, which amount represents travel expenses incurred by Keegan to attend the Public Hearing.
5. That, within 30 days of the date of this Order, CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits shall reinstate Keegan either into the position he held at the time of his termination or into a substantially comparable position that is agreeable to Keegan.
6. In the event CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits fails to reinstate Keegan, CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits shall pay to Keegan front pay in the amount of \$225.00 per week until such time as either Keegan is reinstated or Keegan finds other work that pays him at least \$225.00 per week. Should Keegan find another job that pays him less than \$225.00 per week, Keegan will report this eventuality to PHRC Attorney Martin Cunningham and the amounts earned by Keegan shall reduce the front pay obligation by amounts earned.
7. That, within thirty days of the effective date of this Order, CL&J Incorporated, d/b/a Popeye's Famous Fried Chicken & Biscuits shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed

to Martin Cunningham, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 333 Market Street, 8th Floor, Harrisburg, PA 17126-0333.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: 
Gerald S. Robinson, Esquire
Chairperson

Attest:


Rev. Dr. James Earl Garmon, Sr.
Secretary

