COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID A. RICCARDI, Complainant	:	
v,	:	PHRC CASE NO. 201305895 EEOC CHARGE NO. 17F201461492
HAROLD RICHARD GARTEN, d/b/a ABOVE ALL CHIMNEY AND MASONRY, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. The Complainant, David A. Riccardi, (hereinafter "Riccardi") has a disability within the meaning of the Pennsylvania Human Relations Act. (N.T. 156)
2. Riccardi was born with exstrophy of the bladder with epispadias. (C.E. 1 at 23-24)
3. At birth, Riccardi's body was open from his belly button to the tip of his penis. (N.T. 23)
4. During his youth, Riccardi underwent many surgeries in his lower abdomen and pelvic region. (N.T. 24)
5. Riccardi underwent a ureterosigmoidostomy which redirected his urethra to run through his colon. (C.E. 1 at 19, 23-24)
6. Riccardi also lost his right kidney and approximately one half of his colon. (N.T. 25; C.E. 1 at 19)
7. When Riccardi was approximately 18 or 19 years of age, Riccardi underwent surgery that was intended to straighten his penis and this surgery left a hole in Riccardi's pubic region. (N.T. 25)
8. The hole in Riccardi's pubic area will never close. (N.T. 26, 97; C.E. 1 at 13)
9. When polyps develop around the hole in Riccardi's pubic area, they are surgically removed. (N.T. 27-28; C.E. 1 at 48)

* 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
C.E.	Complainant Exhibit
R.E.	Respondent Exhibit
S.F.	Stipulation of Fact

10. Before polyps are removed, they cause severe irritation. (N.T. 27, 106-107)

11. The multiple surgeries have left Riccardi with excessive scar tissue in his lower abdomen and pubic areas as well as from the middle of his back to his front. (N.T. 28-29, 30, 106; C.E. 1 at 26-40, 57)

12. Riccardi also periodically has bowel obstructions that cause him to be hospitalized. (N.T. 28-29, 109)

13. Since Riccardi was 18 or 19, he has been unable to wear jeans and other tight clothing that covers his abdomen and pubic area. (N.T. 30-31)

14. If Riccardi were to wear tight clothing, such clothing constantly rubs the open hole and the entire abdomen and pubic area resulting in painful irritation to the point the area bleeds. (N.T. 27-28, 32, 105

15. Being unable to wear tight clothing, Riccardi began wearing sweat pants. (N.T. 31)

16. In his mid-20s, Riccardi began performing landscape work cutting grass and weed whacking. (N.T. 34)

17. Between 1998 and 2007, Riccardi had his own landscaping business. (N.T. 34)

18. In or around 2007, Riccardi had a CDL license and drove a truck. (N.T. 33)

19. Riccardi also performed warehouse factory work at several locations. (N.T. 33)

20. The Respondent is Harold Richard Garten, (hereinafter "Garten") the owner of Above All Chimney and Masonry, (hereinafter "Above All") since 1993. (N.T. 111-112, 130; C.E. 6 at 10)

21. Above All had two facets of the business: Landscaping and chimney and masonry work. (N.T. 112)

22. In March 2013, Above All placed an ad in the newspaper seeking to hire someone in the landscaping portion of Above All's business. (N.T. 35)

23. Riccardi responded to Above All's ad by physically going to Above All's location. (N.T 35)
24. At Above All's location, Riccardi was asked to demonstrate his driving skill with a mower and Riccardi was hired on the spot. (N.T. 52, 665)
25. Riccardi's performed mainly grass cutting, weed whacking and driving one of Above All's trucks. (N.T. 36, 115; C.E. 1 at 61)
26. When another employee from the chimney and masonry side of the business was out, Riccardi was assigned some work on the masonry side. (N.T. 115; C.E. 6 at 24, C.E. 6 at 26)
27. Doing landscape work, Riccard was allowed to wear sweat pants. (N.T. 37, 115)
28. Above All employees wore shirts with Above All's logo. (N.T. 53)
29. As fall approached and the landscaping business began to slow, before Garten hired someone else for the chimney/masonry side of the business, Garten selected three employees from the landscaping side to whom Garten extended an opportunity to work the chimney/masonry side of the business. (N.T. 56; C.E. 6 at 23, 26)
30. Garten thought that Riccardi did a good job, in fact, Riccardi had received a raise in his pay the end of October 2013. (C.E. 6 at 90; R.E. 1)
31. As the landscaping season was winding down, Garten did transfer Riccardi to the chimney and masonry side of the business. (N.T. 37)
32. Riccardi credibly testified that initially, Riccardi continued to wear sweat pants to work every day. (N.T. 37, 60)
33. On the chimney/masonry side of the business, Riccardi worked as a helper, mixing concrete and bringing work materials to the work area. (N.T. 99, 101)

34. Most of Riccardi's work was performed outside and he had minimal contact with Garten's customers. (N.T. 61)

35. Crews of 2 or 3 employees would work jobs on the chimney/masonry side. (N.T. 91-92; C.E. 6 at 69)

36. One of the members of a crew who principally worked inside a customer's home would be assigned to interact with customers. (N.T. 92; C.E. 6 at 68)

37. The employee assigned to the inside would evaluate the customer's service needs and sell services by making suggestions for repairs. (N.T. 138)

38. This employee would go through a condition report with a customer, a task that Riccardi was unqualified to perform. (N.T. 138, 146)

39. Riccardi credibly testified that another employee came to work wearing shorts over sweat pants which looked terrible. (N.T. 38-39)

40. Riccardi testified that Garten informed this other employee to stop wearing sweat pants. (N.T. 61)

41. In Riccardi's opinion, this prompted Garten to also comment to Riccardi that he was no longer allowed to wear sweat pants to work because they did not look professional and Garten wanted all employees to dress like him. (N.T. 38, 41, 62)

42. When Garten informed Riccardi that he was not permitted to wear sweat pants any longer, Riccardi told Garten of his medical condition explaining why he would not be able to wear jeans to work. (N.T. 36, 39)

43. When Riccardi attempted to show Garten his lower abdomen, Garten would not look and simply stated that he did not care and repeated that Riccardi could no longer wear sweat pants. (N.T. 39, 124)

44. Garten declared that there had always been an oral policy that employees who worked in the home of a customer were required to look presentable and professional. (C.E. 5)

45. At some point, Garten told Riccardi that if he had known that Riccardi had a medical problem, he would never have moved Riccardi to the chimney/masonry side. (C.E. 4)

46. Riccardi tried to wear a pair of "dickies" work pants that he already had. (N.T. 40, 64-65, 125)

47. The "dickies" pants had a zipper and after only a day or two, his abdomen and pubic area became irritated and was bleeding. (N.T. 65)

48. Riccardi testified that he then bought four pair of cargo pants that Garten found unacceptable because they were sweat pants. (N.T. 67-70, 382; J.E. 58)

49. Riccardi and Garten argued about Riccardi's medical condition and, for several days, went back and forth regarding what Riccardi could wear to work. (N.T. 77, 79; CE 6 at 38; R.E. 1)

50. Garten never told Riccardi that a customer had complained about what Riccardi wore. (N.T. 41)

51. Riccardi indicated that no customer ever commented to him about what he was wearing. (N.T. 41; C.E. 6 at 69)

52. Garten never mentioned anything about wearing sweat pants presented a safety hazard. (N.T. 41)

53. No evidence was presented that wearing sweat pants had caused a safety incident of any kind. (C.E. 6 at 52)

54. Garten never asked Riccardi to provide a Doctor's note regarding the need for an accommodation of his medical condition. (N.T. 41)

55. Garten never asked Riccardi for his permission to call Riccardi's Doctor. (N.T. 41)

56. Garten never asked Riccardi to be evaluated by an independent doctor. (N.T. 42)

57. Towards the end of Riccardi's employment, Riccardi was permitted to take a week off to work on a house Riccardi had purchased. (N.T. 142; C.E. 6 at 86)

58. Riccardi called Garten requesting additional time but was told he was needed. (N.T. 142; C.E. 6 at 87)

59. Upon returning to work, Riccardi was wearing sweat pants. (N.T. 143)

60. Riccardi credibly testified that Garten told him that if he could not wear jeans, he could not have a job. (N.T. 67-68)

61. On November 20, 2013, Garten sent Riccardi home, in effect, telling him he was not permitted to return to work unless he changed into appropriate pants that look professional . (N.T. 42-43, 67-68,145: C.E. 5)

62. Riccardi left on November 20th and did not return as he considered that he had been terminated. (N.T. 42, 67)

63. After leaving Above All, Riccardi began collecting unemployment compensation. ("N.T. 44, 45, 98)

64. For the six month period Riccardi was on unemployment compensation, he applied for masonry and landscaping work through the unemployment office. (N.T. 87)

65. Once Riccardi's unemployment benefits ended, Riccardi "didn't really look after that." (N.T. 101)

66. During the period immediately following the end of Riccardi collecting unemployment and several years later when Riccardi started up his own

landscaping business again, Riccardi failed to sufficiently mitigate his damages.. (N.T. 45, 99, 101)

67. At the time Riccardi left the employ of Above All, Riccardi worked approximately 40 hours a week earning $13.00 per hour. (N.T. 44; C.E. 6 at 89)

68. Riccardi incurred a parking expense of $20.00 when he attended a fact finding conference at the PHRC's Philadelphia regional office. (N.T. 481)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of this case.

2. The parties have fully complied with the procedural prerequisites to a Public Hearing in this case.

3. David A. Riccardi is an individual within the meaning of the PHRA.

4. Harold Richard Garten d/b/a Above All Chimney and Masonry is an employer within the meaning of the PHRA.

5. To establish a *prima facie* case of disability discrimination, Riccardi must prove by a preponderance of the evidence that:

   a. He is a disabled person within the meaning of the PHRA;

   b. He is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and

   c. He suffered an adverse employment action as a result of discrimination.

6. Riccardi established a *prima facie* case of disability discrimination.

   a. Riccardi established that he has a disability.

   b. Riccardi established that he was qualified to do the job of laborer in Above All's Chimney/Masonry business.

   c. Riccardi established that on November 20, 2013, he suffered an adverse employment action in the form of Above All's denial of an accommodation and termination of him.

7. Above All articulated that Riccardi was denied an accommodation and terminated because Riccardi refused to adhere to Above All's dress code policy.

8. Riccardi has proven by a preponderance of the evidence that Above All's denial of an accommodation of his medical condition and Above All's termination of him were because of his disability.

9. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on an informal Questionnaire Complaint filed by David A. Riccardi (hereinafter "Riccardi") against Above All Chimney and Masonry (hereinafter "Above All"), on or about May 12, 2014, at PHRC Case Number 201305895. Generally, Riccardi's Questionnaire Complaint alleges that Above All discriminated against him because of his disability, exstrophy of the bladder with epispadias, ureterosigmoidostomy and right kidney nephrectomy and half of a colon, when Above All failed to provide Riccardi with a reasonable accommodation and then on November 20, 2013, terminated him from his position as chimney/masonry laborer. Subsequently, Riccardi filed an Amended Complaint that was verified on September 3, 2014 which articulated the same allegations. Finally, on November 30, 2017, Riccardi filed a Second Amended Complaint that named as Respondent Harold Richard Garten, d/b/a Above All Chimney and Masonry. Riccardi's claims of failure to accommodate and termination allege violations of 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 Ricciardi's allegations of discrimination. The PHRC and the parties 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 June 7, 2018, in Bristol, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. The state's interest in Riccardi's allegations was presented at the Public Hearing by Lisa M. Knight, Esquire. Andrew S. Abramson, Esquire was Riccardi's private attorney. Stanley B.

Cheiken, Esquire represented Above All. Post-Hearing briefs were submitted by the parties August 27, 2018.

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))

Sections 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 persons 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 at 16 Pa. Code §44.4 which provide:

> *Handicapped or disabled person* - Includes the following:
>
> (i) A person who has or is one of the following:
>
> (A) A physical or mental impairment, which substantially limits one or more major life activities.
>
> (B) A record of such impairment.

(C) 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 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)

Non-job-related handicap or disability – The term includes the following:

(i) 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. Uninsurability or increased cost of insurance under a group or employee insurance plan does not render a handicap or disability job-related.

(ii) A handicap or disability is not job-related merely because the job may pose a threat of harm to the employee or applicant with the handicap or disability unless the threat is one of demonstrable and serious harm.

(iii) A handicap or disability may be job-related if placing the handicapped or disabled employee or applicant in the job would pose a demonstrable threat of harm to the health and safety of others.

(16 Pa. Code §44.4)

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. See Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983) and Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 624, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

Before applying applicable legal principles to the facts of this case, fundamentally, there are two very different versions of events that occurred between Riccardi asking to be transferred to the masonry/chimney side of Above All's business and Riccardi's last day of employment. Because relevant portions of the two versions dramatically differ in several significant respects, an assessment must be made regarding which version is more credible, Garten's or Riccardi's.

Garten's version begins with Riccardi, at some point, asking to be moved to the masonry/chimney side of the business. (N.T. 139; R.E. 1; C.E. 6 at 24-25) Garten contends that at the time Riccardi was informed that his transfer request was granted, Garten told Riccardi that he would have to dress presentably. (N.T. 117, 139; C.E. 5, C.E. 6 at 26) Garten says that Riccardi was told that under no circumstances would it be appropriate for Riccardi to wear sweat pants.

Garten testified that Above All had always had on oral dress code policy that required all masonry/chimney employees who performed work in a customer's home to look presentable and professional. (C.E. 5) Garten offered that jeans look professional but sweat pants did not. (C.E. 6 at 77) Further, Garten offered that his employees were given

professional looking shirts with the company logo to identify them as Above All employees. (N.T. 135)

In Garten's Answer to Riccardi's Complaint and in his deposition, Garten offered that, for approximately one month, Riccardi complied with the requirements of the dress code. (R.E. 1; C.E. 6 at 26) Garten relayed that Riccardi did come to work wearing "dickies" but after a while, Riccardi stopped and began wearing sweat pants. (C.E. 6 at 35) Garten submits that up to this point, Riccardi had not mentioned of the medical reason Riccardi wore sweat pants.

Garten's testimony discussed Riccardi requesting time off to work on a house he had purchased. (N.T. 142; C.E. 6 at 87) Garten offered that this happened a few weeks before Riccardi's last day of employment. (N.T. 142) Garten then offered that upon Riccardi's return to work, he arrived at work wearing sweat pants. Garten says that it was at this time that Riccardi informed Garten that he had a medical problem that prevented him from wearing pants with zippers because they would irritate his abdomen and pubic area and eventually cause bleeding. (N.T. 143) Garten submits that Riccardi did offer to show Garten the problem area but Garten declined to look at it. (N.T. 124)

Garten submits that he and Riccardi went back and forth a few days regarding Riccardi's medical condition that prevented Riccardi from wearing the type of pants that Garten wanted. (C.E. 6 at 38) Garten offered that when Riccardi would come to work in sweat pants, Garten would tell Riccardi to go home and change. (C.E. 6 at 54-55) Garten also offered that he discussed with Riccardi the possibility of wearing pants that had no zippers and suggests that he told Riccardi which store he could go to and purchase acceptable pants that could be pulled up. (N.T. 144; C.E. 5; C.E. 6 at 79) Garten says that

he informed Riccardi that he could wear sweat pants underneath acceptable pants. (N.T. 121; C.E. 6 at 36)

In effect, it is Garten's testimony that on November 20, 2013, when he informed Riccardi to go home and change, Riccardi simply left and did not return. (C.E. 6 at 54-55) Garten offered that he had expected Riccardi to return wearing acceptable pants, but Riccardi did not. Instead, Riccardi initiated the present Complaint.

Riccardi's version of the events are vastly different in several important respects. First, Riccardi agrees that in August 2013, he asked Garten to allow him to move from landscaping work to the masonry/ chimney side of the business. (R.X. 1) Riccardi's version finds Riccardi working on the masonry/chimney side for several months wearing sweat pants to work without an issue. (N.T. 37, 60) In Riccardi's version, Above All did not have a dress code until sometime after October 2013, when Garten became angry with another employee because that employee was wearing shorts over sweat pants and his pants were hanging around his hips. (N.T. 38-39)

Riccardi testified that he tried to comply with the requirements of the dress code but was unable to because pants that would be acceptable would irritate Riccardi and he would bleed. (N.T. 40, 62, 64-65) Riccardi submits that he came in early one morning to tell Garten of his medical issues. (N.T. 118) Riccardi testified that Garten told Riccardi that it is his company and Riccardi's medical issues were not his problem. (N.T. 118) Riccardi offered that Garten told him such things as: If you keep wearing sweat pants you will be fired; and if you cannot wear jeans you do not have a job. (N.T. 42, 67-68, 79) Riccardi offered that Garten expressed concern that if he made an exception for Riccardi he would have to make an exception for everyone. (R.E. 1) Riccardi also offered that Garten told

him that if he had known of Riccardi's problems, he would have never moved Riccardi to the masonry/chimney side. (C.E. 4)

Riccardi agrees that he and Garten went back and forth regarding Riccardi's medical issues and that when Riccardi asked Garten if he wanted to see the extent of the problem, Garden declined. (N.T. 39, 124) Riccardi submits that he informed Garten that by law, he could not be treated this way and that Garten became angry saying he did not care, it is his company and Riccardi should leave and not return until he was wearing jeans. Finally, Riccardi submits that Garten did not make suggestions of different options Riccardi could try. (R.E. 1) Riccardi offered that Garten did not even want to talk about it and that it would be his way or no way.

As compared to Riccardi's, Garten's credibility suffers from several telling aspects of Garten's overall testimony. First, in two places, Garten testified that Riccardi may have worn sweat pants a couple of times while doing work on the masonry/chimney side. (C.E. 6 at 52) Even more detrimental to Garten's credibility is his statements to the unemployment office when Riccardi was seeking unemployment benefits. Garten told the unemployment office that Riccardi had refused to come to work in a manner consistent with the dress code and that Riccardi had only worn sweat pants. (C.E. 6) Further, Garten told the unemployment office that Riccardi had missed as much work as he worked, that Riccardi had failed to call when he was unable to come to work and that after purchasing a house, Riccardi began missing work.

The evidence presented in this case was that Riccardi was not confronted with the wearing of sweat pants right away and that when he was, Riccardi made efforts to comply. On the question of Riccardi's work habits, there was no evidence that Riccardi missed work at all other than the week he requested off to work on his new house. Importantly, Garten

permitted Riccardi to move from landscaping to masonry/chimney work because Riccardi was thought of as a good worker who Garten planned on sending for additional training. (N.T. 59; C.E. 6 at 90) Additionally, there is evidence that Riccardi was given a raise in October 2013. (R.E 1) These discrepancies in Garten's testimony result in the decision that Riccardi's testimony was far more credible than Garten's.

Equally important to the overall questions in this case we find the PHRA guidance found in Section 12(a) of the PHRA. This section declares in part: "The provisions of [the PHRA] shall be construed liberally for the accomplishment of the purposes thereof..." Section 2(b) of the PHRA illuminates the general purpose of the PHRA "...to foster the employment of all individuals in accordance with their fullest capacities regardless of their ...disability... and to safeguard their right to ... hold employment without...discrimination, to assure equal opportunities to all individuals and to safeguard their rights ... regardless of... disability...."

Accordingly, we now turn to the application of relevant legal principles by reviewing the facts of the case in a light more favorable to Riccardi.

Above All's post-hearing brief correctly observes that, absent direct evidence, to establish a *prima facie* case of disability discrimination under the PHRA a Complainant must prove that: (1) he is a disabled person within the meaning of the PHRA; (2) he is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) he has suffered an adverse employment decision as a result of discrimination. *Lazer Spot, Inc. v. PHRC*, 184 A.3d 200 (Pa Commw. 2018), *Williams v. Philadelphia Housing Authority Police Department*, 380 F.3d 751, 10 AD Cases 1607 (3rd Cir. 2004); and *Taylor v. Phoenixville School District*, 184 F.3d 296, 9 AD Cases 1187 (3rd Cir. 1999), citing *Gaul v. Lucent Technologies*, 134 F.3d 576, 580, 7 AD Cases 1223 (3rd

Cir. 1998). The PHRC post-hearing brief on behalf of the state's interest in the case lists the same three elements that must be established, however, the PHRC post-hearing brief submits that the showing of these elements established unlawful discrimination. *Citing Canteen Corp. v. PHRC*, 814 A.2d 805 (Pa. Commw. 2003)

Fundamentally, both parties to this case agree that Riccardi is disabled within the meaning of the PHRA. This brings us to whether Riccardi can, by a preponderance of the evidence, establish the second prong of the requisite *prima facie* case? Under this prong, Riccardi must show that he was qualified for the job because he was able to perform the "essential functions" of the position he held, with or without accommodation. This prong of the requisite *prima facie* showing is a two-step inquiry: first whether Riccardi satisfies the skill, experience, education and other job-related requirements of the job; second, whether Riccardi can perform the essential functions of the job with or without reasonable accommodation. *Supinski v. UPS*, 413 Fed. Appx. 536 (3rd Cir. 2011) *and Gaul v. Lucent Technologies*, 134 F.3d 576 (3rd Cir. 1998).

In this case, there is no question that Riccardi had the skill, experience and education required for the job he held. Riccardi had been performing his assigned duties satisfactorily for several months. Indeed, Riccardi was given a raise in his pay in October 2013. With no difficulty, Riccardi meets the first of the two requisite qualification standards.

In Above All's post-hearing brief, Above All argues that Riccardi fails to meet the second qualification standard. Above All submits that Riccardi is precluded from claiming he is qualified to perform his assigned duties because he did not comply with Above All's "dress code." Above All cites the 3rd Circuit Court

case of *Bellissimo v. Westinghouse Electric Corp.*, 764 F.2d 175 (3rd Cir. 1985) which generally holds that dress codes are permissible as long as they are enforced even-handedly.

Above All also cites to portions of EEOC's guidance "Applying Performance and Conduct Standards to Employees with Disabilities" in support of the argument that Above All's dress code was a "job related requirement" that Riccardi cannot satisfy. Under the heading "Dress codes" in the EEOC's guidance, the following is found: "... Sometimes employers impose dress codes to make employees easily identifiable to customers and clients, or to promote a certain image "e.g., a movie theatre requires its staff to wear a uniform; a store requires all sales associates to dress in black..."

Above All's post-hearing brief then quotes from the EEOC's guidance which states, "An employer may require an employee with a disability to observe a dress code imposed on other employees in the same job. For example, a professional office may require its employees to wear appropriate business attire because of the nature of the jobs could bring them into contact with clients, customers, and the public." Following this statement, the EEOC offers 4 specific examples to illustrate the effect of a dress code where an individual has a disability. In EEOC's first example a quadriplegic employee is unable to were a uniform because it causes discomfort. In this example, the employer and employee sit together and working together they choose an appropriate uniform from a manufacturer that specializes in making clothing for those with disabilities. In this instance, the employer had provided a reasonable accommodation. In the EEOC's second example, an employee with cancer cannot wear a uniform because it causes severe irritation.

The employee sought an exemption from the uniform requirement and, once again, as a reasonable accommodation, together the employer and employee decide on acceptable clothing that presents a professional appearance. In the EEOC's third example, an employee has difficulty wearing dress shoes because of the employee's diabetes. The employee wears sneakers which gives concern to the employer about professional appearance when the employee meets with clients. In this example, the employee only meets with clients an hour or two a week. The employee's doctor agrees that the employee could wear the dress shoes for this limited time. The employee also agreed to purchase black sneakers to wear at other times. Once again, the employee was accommodated.

Before the 4th example is listed, the EEOC declares that "If the employee cannot meet the dress code because of a disability, the employer may still require compliance if the dress code is job-related and consistent with business necessity..." The 4th example deals with a dress code that is mandated by federal law and as such, is not applicable to the circumstances of this case. However, what is applicable is the two questions the EEOC listed: (1) is the dress code job-related; and (2) is the dress code consistent with business necessity?

These questions pose a delicate and often complex balancing of two separate interests: (1) an employer's right to control its image; and (2) an employee's right to a reasonable accommodation that easily provides an individual with a job opportunity. In this case, Above All suggests that the provisions of its dress code are a necessary qualification for the job. Garten testified that he wanted all masonry/chimney employees to have the same professional appearance by wearing jeans and a shirt with Above All's logo. Beyond Garten's

personal preference that all employees dress the same, Garten offered that employees work in the homes of customers when the employee is attempting to sell Above All services. In effect, Garten says that this provides a legitimate reason for the dress code. Of course, courts rarely allow discrimination based solely on customer preference. *See Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981), *see also* 29 CFR §1604.2(a)(1)(iii) (2001) indicating that no BFOQ exists based on preference of customers.

The evidence in this case shows that the dress code reveals that no customer had ever complained about what a Above All employee wore on the job. Riccardi testified that no customer had ever complained to him. (C.E. 6 at 69) Further, Riccardi was never informed that there had been a compliant from a customer. (N.T. 41) Without customer complaints, there seems to be little to no impact on the revenue stream of Above All's business. Further, the evidence reveals that Riccardi's job did not entail speaking with customers in their homes. Other employees were designated to perform this important task. (C.E. 6 at 68) Riccardi's job was as a general laborer that merely brought tools and materials to the employees who were actually doing the work. Additionally, the record is clear that Garten was fully aware that Riccardi was performing masonry jobs that were outside work and when he did so, he wore sweat pants.

Under the totality of the circumstances of this case, there is insufficient evidence to demonstrate that wearing jeans was either job-related or a business necessity. Far more convincing evidence would be needed. When Above All's intrusive dress code is weighed against speculation that a customer might see one of Above All's employees wearing sweat pants, it is a fair judgment to say that the

balance weights heavily in the favor of accommodating Riccardi by exempting him from wearing clothing that are both irritating and painful. When a dress code provision is up against the requirement to accommodate an individual with a disability, an employer does not have unfettered discretion. In summary, Riccardi has established by a preponderance the second qualification standard. Accordingly, with an accommodation, Riccardi was fully qualified to perform the essential functions of his job.

Above All next contends that Riccardi is unable to establish the third required element of the *prima facie* showing. Above All argues that Riccardi cannot show that he has suffered an adverse employment decision as a result of discrimination. Generally, Above All contends that Riccardi was not terminated but, instead, voluntarily abandoned his position. Above All argues that Garten did not fire Riccardi but merely sent him home to change pants and then return to work.

Of course, Above All's version is in direct conflict with Riccardi's version of events leading up to Riccardi's last day of employment. Previously, it was determined that Riccardi's version of events was more credible than Garten's. Given this critically important assessment, the evidence in this case reveals that when Riccardi informed Garten of his medical condition, not only did Garten not want to see Riccardi's lower abdominal region, Garten told Riccardi that he did not care about Riccardi's condition. At other times, Garten also conveyed to Riccardi that Above All was his company and Riccardi's problems were not his problems. (N.T. 118) Garten also informed Riccardi that if he cannot wear jeans, Riccardi

does not have a job. (N.T. 42) To Garten, it was his way or no way, no exceptions, no discussion.

Using Riccardi's version of events, on Riccardi's last day of work, Garten simply told Riccardi to leave because he could not comply with the requirement that he wear jeans. Importantly, at no time after Riccardi made requests for a reasonable accommodation did Garten attempt to elicit additional information about Riccardi's disability. Garten also neither contacted Riccardi's doctor nor send Riccardi to Above All's doctor for an evaluation. On these points, the PHRC post-hearing brief on behalf of the state's interest in the case correctly observes that, overall, Garten failed to engage Riccardi in the required interactive process.

Having successfully established each element of the requisite *prima facie* showing, we turn to possible defenses Above All might have. First, the defense of "undue hardship" should be considered. PHRC regulations at 16 Pa. Code §44.5(b) states, "...disabled persons may not be denied the opportunity to use, enjoy or benefit from employment ... where the basis for the denial is the need for reasonable accommodation, unless the making of reasonable accommodation would impose an undue hardship." 16 Pa. Code §44.4 lists many of the factors to be considered in determining whether there is an undue hardship. These factors include; (1) the overall size and nature of the business, including the number of employees, and financial capability shall only be a factor when raised; (2) good faith efforts previously made to accommodate similar disabilities; (3) the extent, nature and cost of the reasonable accommodation needed; (4) the extent to which the individual with the disability can reasonably be expected to need, use, enjoy or

benefit from the employment in question; and (5) authority to make the accommodation.

Here, none of the listed factors weigh in favor of Above All. Further, as noted by the PHRC post-hearing brief, Above All did not assert any of the listed factors as presenting an undue hardship. About the only thing Above All relied upon was the idea that the dress code in question would make Above All employees look more professional. In summary, the Respondent has failed to present evidence to support that it would have been an undue hardship to exempt Riccardi from wearing pants that irritated him physically and were painful.

Above All did make some effort to suggest that the wearing of sweat pants presented a threat of harm to Riccardi. 16 Pa. Code §44.4 does provide a defense if the circumstances of an individual's disability pose a demonstrable and serious threat of harm to the employee or a demonstrable threat of harm to the health and safety of others. *See Commonwealth of Pa., Pa. State Police v. PHRC*, 457 A.2d 584 (Pa. Commw. 1983).

Here, Above All speculated that sweat pants could get caught on the rungs of a ladder or caught on a drill bit during its operation. (C.E. 6 at 28, 32, 75-76) Above All also suggested the possibility of sweat pants getting caught on wire used in the stucco process or caught in a grinder that employees used to remove worn mortar from the bricks on a chimney. (C.E. 6 at 71, 72, 74). Each of these articulated concerns appear to carry minimal consequences as there was no objective evidence of either the nature or severity of the alleged potential harm.

To meet the PHRC regulatory standard, the likelihood of potential harm should be imminent and surpass a mere generalized fear. *See Cook v. State of*

Rhode Island, Dept. of Mental Health, Retardation and Hospitals, 10 F3d 17 (1st Cir. 1993). While there may be some increased risk, the evidence does not establish that the risk is at a high probability level. Accordingly, application of the defense of wearing sweat pants poses a threat of harm is unavailable to Above All.

Because we find Above All liable for failing to reasonably accommodate Riccardi's disability and terminating him because of his disability, we move to consideration of an appropriate remedy.

The PHRC has broad equitable power to fashion relief. 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.

In *Murphy v. Cmwlth. Pa. Human Relations Commission*, 506 Pa./ 549, 486 A. 2d 388 (1985), the Pennsylvania Supreme Court commented on the extent of the Commission's power by stating; "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." The expertise of the Commission in fashioning a remedy is not to be lightly regarded. The only limitation upon the Commission's authority is that its award may not seek to achieve ends other than the stated purposes

of the Act. *Consolidated Rail Corp. v. PHRC*, 136 Pa. Commonwealth Ct. 147, 152 A.2d 702, 708 (1990).

The function of the remedy in employment discrimination is twofold. First, the remedy must insure that the Commonwealth's interest in eradicating unlawful discrimination is vindicated. Vindication of this interest is non-discretionary. It necessitates entry of an order, injunctive in nature, which required the Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of any remedy focuses on entitlement to individual relief. It's purpose 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 remedy should also discourage future discrimination. *Williamsburg Community School District v. PHRC*, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986).

With respect to entitlement to individual relief, several matters must be addressed. The first aspect we must consider regarding making Riccardi 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 F2d 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 Pettway v. American Cast Iron Pipe Co.* 494 F.2d 211 (5th Cir. 1974), and *Green v. USX Corp.*, 46 FEP Cases 720 (3rd Cir. 1988).

Initially, we turn to wages lost as a result of Riccardi's termination. On the question of lost earnings, at the time of Riccardi's termination on November 20, 2013, he was working 40 hours per week, earning $13.00 per hour. Accordingly, Riccardi was earning $520.00 per week.

This weekly figure can be used to calculate the amount of earnings lost from the date of Riccardi's termination until a point 6 months later. Riccardi testified that after leaving Above All's employ, he initially collected unemployment for a period of 6 months. Riccardi testified that while on unemployment, he applied for masonry and landscaping work but was unsuccessful in obtaining employment. Riccardi also testified that at the point he stopped receiving unemployment compensation, he ceased looking for alternate work until a point in 2016 or 2017 when Riccardi started up his own landscaping business again.

Fundamentally, Complainants have a duty to attempt to mitigate their damages and to not remove themselves from attempting to secure alternate employment. By Riccardi testifying that he ceased looking for alternate work after his unemployment stopped, he, in effect, declared that he lacked the required reasonable diligence in securing alternate employment. Here, Riccardi admitted that he stopped looking for work when his unemployment benefits ran out. Accordingly, it is appropriate to find that Riccardi failed to mitigate his damages at a point 6 months after his last employment with Above All.

Because Riccardi only sought alternative employment for 6 months after leaving the employ of Above All, his back pay damages are as follows:

Nov. 20, 2013 – June 20, 2014

$520.00 per week x 26 weeks = $13,520.00

Total lost earnings November 20, 2013 – June 20, 2016 = $13,520.00

Riccardi did receive unemployment compensation benefits after his employment with Above All. Here in the Third Circuit, courts have carved out 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 damage 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 Cases 442 (3rd Cir. 1985). Applying the collateral source rule to this case, unemployment compensation amounts Riccardi received will not be deducted.

Under the PHRA, certifiable travel expenses may be awarded. Here, Riccardi testified that he incurred $20.00 parking expense when he came to the PHRC to attend a fact finding conference. This amount is an appropriate award.

Additionally, 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.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID A. RICCARDI, **Complainant**	:	
v,	:	**PHRC CASE NO. 201305895** **EEOC CHARGE NO. 17F201461492**
HAROLD RICHARD GARTEN, d/b/a ABOVE ALL CHIMNEY AND MASONRY, **Respondent**	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Riccardi has proven he was discriminatorily denied an accommodation of his disability and terminated because of his disability in violation of Section 5(a) of the PHRA. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, the Permanent Hearing Examiner further recommends issuance of the attached Final Order

PENNSYLVANIA HUMAN RELATIONS COMMISSION

March 6, 2019
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

DAVID A. RICCARDI, **Complainant**	:	
v,	:	**PHRC CASE NO. 201305895** **EEOC CHARGE NO. 17F201461492**
HAROLD RICHARD GARTEN, d/b/a ABOVE ALL CHIMNEY AND MASONRY, **Respondent**	:	

FINAL ORDER

AND NOW, this 26th day of April, 2019 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 Findings of Fact, Conclusions of law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said 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 Above All shall cease and desist from denying reasonable accommodations to employees with disabilities.

2. That Above All shall cease and desist from terminating employees because of their disabilities.
3. That within 60 days, Above All's Owner shall receive from a qualified agency, suitable to the PHRC, training on employment protections for people with disabilities in Pennsylvania.
4. That within 30 days, Above All's Owner shall provide written notice to all current employees regarding employee rights under the PHRA. Above All's Owner shall also provide any future employee written notice of employee rights under the PHRA.
5. That Above All shall pay Riccardi the lump sum of $13,520.00 which amount represents lost earnings between November 20, 2013 and June 20, 2014.
6. That Above All shall pay additional interest of 6% per annum on the award in paragraph 3 above, calculated from November 20, 2013, until payment is made.
7. That Above All shall reimburse Harrison $20.00, which amount represents expenses incurred by Riccardi to pursue his PHRC Complaint.
8. That, within thirty days of the effective date of this Order, that Above All shall report to the PHRC on the manner of its compliance with the numbers 1, 2, 4, 5, 6 and 7 of this Order by letter addressed to Lisa M. Knight, Esquire, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 110 North 8th Street, Suite 501, Philadelphia, PA 19107. Also, within 60 days of the effective date of this Order, Above All shall report to the PHRC on the manner of its compliance with number 3 above.

PENNSYLVANIA HUMAN RELATIONS COMMISION

By: _____
M. Joel Bolstein, Esquire
Chairperson

Attest:

_____
Dr. Raquel O. Yiengst
Vice Chairperson