

FINDINGS OF FACT*

1. On or about December 29, 2006, Complainant, William Scott, (hereinafter "Scott"), filed a PHRC Complaint against Freshwater of Harrisburg, LLC, (hereinafter "Freshwater"), in which Scott alleged that he had been paid unequal wages because of his race, African American and his sex, male. Scott also alleged that he had been harassed because of his race and then discharged in retaliation for his expression of opposition to discrimination. (O.D. 1).
 2. The Complainant's initial complaint was served on January 26, 2007. (O.D. 1)
 3. On January 27, 2009, Scott verified an Amended Complaint that added James Behrend, owner (hereinafter "Behrend") to the named Respondent. (O.D. 1; N.T. 5)
 4. The Complainant's Amended Complaint was served on both Freshwater of Harrisburg, LLC and Behrend on January 27, 2009. (O.D. 1)
 5. Under cover letter date April 1, 2009, the PHRC's Harrisburg regional office filed a Petition for Rule to Show Cause. (O.D. 1).
 6. On April 6, 2009, PHRC Motions Commissioner Dr. Raquel O. Yiengst, issued a Rule to Show Cause which, in effect, notified Freshwater and Behrend that they had until May 6, 2009 to file a properly verified answer to Scott's complaint. (O.D. 2).
- 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:

O.D. Official Docket
N.T. Notes of Testimony
C.E. Commission Exhibit

7. Neither Freshwater nor Behrend filed an answer. (O.D. 3).
8. On May 27, 2009, Motions Commissioner Yiengst recommended to the full PHRC that Freshwater and Behrend be found liable for Scott's allegations. (O.D. 3).
9. By Order dated June 22, 2009, the PHRC found Freshwater and Behrend liable for paying Scott unequal wages because of his race and his sex, and for harassing Scott because of his race and for terminating Scott in retaliation for his expression of opposition to the discrimination. (O.D. 3).
10. A public hearing on the issue of what, if any, damages are appropriate was held on January 11, 2010 in Harrisburg, Pennsylvania. (N.T.1)
11. Scott worked 40 hours a week for Freshwater. (N.T. 19).
12. On June 1, 2006, Scott was promoted to the position of painter where his wages were \$9.50 per hour. (N.T. 8, 20).
13. On or about June 29, 2006, Freshwater hired Brandy (LNU), a female, as a painter and began to pay her \$11.00 per hour. (N.T. 20).
14. Scott was terminated on August 23 2006. (O.D. 1; N.T. 11).
15. After being terminated by Freshwater, Scott found part-time employment in 2008 with MEF Commercial Services, Inc.. where he earned a total of \$1,334.00. (N.T. 16; C.E. B).
16. In 2008, following his employment with MEF Commercial Services, Inc., Scott worked for Continental Health Equipment, where he earned a total of \$11,281.00. (N.T. 14, 17).
17. Until January 14, 2009, Scott's hourly wage with Continental Health Equipment, Inc. was \$10.35. (N.T. 14, 16; C.E. B)

18. On January 14, 2009, Scott's hourly wage was increased to \$12.20 per hour.

(N.T. 16; C.E. B).

19. Scott continues to work for Continental Health Equipment, Inc.. (N.T. 16).

20. Scott did not ask to be reinstated.

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, Freshwater and Behrend’s failure to file a properly verified answer resulted in the entry of a judgment for Scott on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.
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 a complaint filed by William Scott, against Freshwater of Harrisburg, LLC. Scott's complaint alleged that Freshwater paid Scott unequal wages because of his race and his sex. Scott's complaint also alleged that he was harassed because of his race and that on August 23, 2006, Freshwater terminated Scott because he had expressed opposition to discrimination. Scott's complaint states claims under Sections 5(a) and (d) of the Pennsylvania Human Relations Act ("PHRA"). Additionally, on January 27, 2009, Scott verified an Amended Complaint that added James Behrend.

By correspondence dated April 1, 2009, the Pennsylvania Human Relations Commission ("PHRC") Harrisburg regional office petitioned Motions Commissioner Yiengst for a Rule to Show Cause, indicating that Freshwater and Behrend had not answered Scott's complaint. The petition declared that Freshwater and Behrend had been served with Scott's complaint. The petition further indicated that by letter dated March 12, 2009 an effort had been made to obtain an answer from Freshwater and Behrend.

On April 6, 2009, a Rule to Show Cause was issued, directing Freshwater and Behrend to respond on or before May 6, 2009. After Freshwater and Behrend failed to file a properly verified answer, on May 27, 2009, Motions Commissioner Yiengst recommended a finding of liability to the full PHRC. On June 22, 2009, the full PHRC determined that Freshwater and Behrend paid Scott unequal wages because of his race and his sex and also harassed him because of his race. The full PHRC also found that Freshwater and Behrend terminated Scott in retaliation for Scott's expression of opposition to discrimination.

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

The public hearing on the issue of appropriate damages was held January 11, 2009, in Harrisburg, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by William Fewell, Esquire, PHRC Assistant Chief Counsel. Although duly notified, Freshwater and Behrend failed to attend the public hearing.

Since liability had been found after Freshwater and Behrend failed to file a properly verified answer, the only question at the public hearing was what damages Scott 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 the 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 Scott 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 Green v. USX Corp., 46 FEP Cases 720 (3rd Cir. 1988).

In this case, during his employment with Freshwater, Scott testified that until June 1, 2006 he worked 40 hours a week earning \$7.00 per hour. Given this general information, the following calculation reflects Scott’s approximate weekly earning while employed with Freshwater after June 1, 2006:

$$40 \text{ hour @ } \$9.50 \text{ per hour} = \$380.00$$

Scott testified that beginning June 1, 2006, he was promoted to the position of Painter and was paid \$9.50 per hour. Scott further testified that on or about June 29, 2006, Freshwater hired another Painter, Brandy, (LNU), a female, and paid her \$11.00 per hour. Until his termination on August 23, 2006, while the newly hired female Painter earned \$11.00 per hour, Scott continued to earn only \$9.50 per hour.

Fundamentally, the amount Scott received that was less than “Brandy” amounts to \$1.50 per hour. Accordingly, the amount Scott lost between June 1, 2006 and August 23, 2006 is calculated as follows:

$$\text{June 1, 2006 to August 23, 2006} = 12 \text{ weeks}$$

$$12 \text{ weeks} \times 40 \text{ hours per week @ } \$1.50 \text{ per hour} = \$720.00$$

The amounts Scott lost in wages after he was terminated on August 23, 2006, is calculated as follows:

August 23, 2006 to December 31, 2006 = 18 weeks

18 weeks x 40 hours per week x \$11.00 per hour = \$7,920.00

2007 – 52 weeks x 40 hours per week x \$11.00 per hour = \$22,880.00

2008 -52 weeks x 40 hrs per week x \$11.00 = \$22,880.00

Minus interim wages

MEF Commercial Services, Inc. \$1,334.00

Continental Health Equipment, Inc. \$11,281.00

Total Interim Wages – 2008 \$12,615.00

Total Lost wages 2008 - \$10,265.00

2009 – 2 weeks @ \$.65 per hour per week (this amount is calculated by noting that on January 14, 2009, Scott began to earn \$12.20 per hour – In 2009, prior to January 14, 2009, Scott earned \$10.35 per hour - \$.65 per hour less than the \$11.00 per hour he should have been earning at the time of his termination from Freshwater) = \$52.00

Total back pay award \$41,837.00

Interestingly, on the issue of interim earnings, no evidence was presented regarding Scott's mitigation efforts between the date of his termination in August 2006 and when he first found substitute employment in 2008. Despite the lack of information on the issue of the adequacy of his mitigation efforts, when considering the general duty of a Complainant to mitigate their damages, the burden of proof on the mitigation issue rests with the Respondent-wrongdoer. Becker v. ARCO Chemical Co., 90 FEP Cases 221, 227 (E.D. Pa. 1998); *See also* Prnie v. Sioux City Comm. School Dist., 82 FEP Cases 1716, 1722 (N.D. Iowa 2000), *citing* Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 591, 77 FEP Cases 1699 (5th Cir. 1998); Migis v. Pearle Vision, Inc., 135 F.3d 1041, 1045, 78 FEP Cases 1379 (5th Cir. 1998); and Booker v. Taylor Milk Co., Inc., 64 F.3d 860, 864, 71 FEP Cases 525 (3rd Cir. 1995). Here, of course, the

Respondent did not appear at the Public Hearing to make a showing on the issue of the adequacy of Scott's mitigation efforts. Accordingly, without the requisite proof that mitigation efforts were inadequate, Scott should be awarded a full back pay remedy.

The PHRC is also authorized to award interest on back pay awards. Goetz v. Norristown Area School District, 16 Pa. Cmwlth Ct. 389, 328 A.2d 579 (1975). Accordingly, interest shall also be ordered in this matter.


Further, since Scott did not ask to be reinstated, an order of reinstatement will not be issued.

An appropriate order follows:

4. That Freshwater and Behrend, shall, jointly and severally, pay Scott the lump sum of \$41,837.00 which amount represents lost wages following Scott's termination.
5. That Freshwater and Behrend shall, jointly and severally pay additional interest of 6% per annum on the back pay award calculated from August 23, 2006 until payment is made.
6. That, within thirty days of the effective date of this Order, Freshwater and Behrend shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to William R. Fewell, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 5th Floor, 1101-1125 South Front Street, Harrisburg, PA 17110.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



Stephen A. Glassman
Chairperson

Attest:



Daniel D. Yun
Secretary