

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

TINA YETTER,
Complainant

v,

NO. 1 CYCLE CENTER H-D, INC.,
Respondent

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PHRC CASE NO. 201303456

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. In September, 2006, the Complainant Tina Yetter, (hereinafter "Yetter"), a female, became an employee of No. 1 Cycle Center, H-D, Inc., (hereinafter "Cycle Center"). (N.T. 24)
2. Cycle Center, a dealership that sells and services Harley Davidson motorcycles, is owned by Gov Yearick. (N.T. 45, 62, 65)
3. At all relevant times, Cycle Center's General Manager was Fred Yearick. (N.T. 62)
4. Fred Yearick was also Cycle Center's Sales, Service and Maintenance Manager. (N.T. 87)
5. At the time Yetter was hired, she worked as a Motorcycle Sales Associate with the starting salary of between \$8.50 and \$9.00 per hour. (N.T. 24)
6. Yetter only worked as a Motorcycle Sales Associate for approximately 4 weeks at which time Yetter, having 15 years retail experience, requested reassignment to fill an opening in Cycle Center's general merchandise department (hereinafter "Motor Clothes Department"). (N.T. 24)
7. The Cycle Center operation is located in one large building where there are 5 separate departments: Sales; Service; Parts and Accessories; Motor Clothes, and Maintenance. (N.T. 28, 65)

* 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. Commission's Exhibit

8. Service was performed on motorcycles in a back room work area. (N.T. 79)
9. Both the parts and accessories and motor clothes departments had their own stations on the sales floor with each work station utilizing computers that operated under the same system. (N.T. 28, 32)
10. In an upstairs area, Cycle Center maintained a merchandise clearance room. (N.T. 65)
11. Additionally, Cycle Center had a parts room area where smaller parts were stored. (N.T. 65, 82)
12. Cycle Center's business would slow down during the winter. (N.T. 26)
13. Between October 2006 and August 2008, Yetter worked in the motor clothes department under the supervision of the General Merchandise Manager, Vicky Calhoon. (N.T. 43)
14. Prior to Calhoon leaving, Calhoon was asked if Yetter could handle being made the Manager of the motor clothes department, to which Calhoon responded "absolutely." (N.T. 44)
15. In August 2008, Yetter became the Manager of the Cycle Center motor clothes department. (N.T. 25)
16. At the time, Gov Yearick instructed Yetter to "do what you need to keep the department running." (N.T. 25, 43)
17. Upon assuming the job as Manager, Yetter was neither given a written job description nor an increase in pay. (N.T. 36, 43)
18. At various times, as the Manager of the motor clothes department, Yetter supervised as many as three employees, however, as employees left, they were not replaced. (N.T. 26, 45, 46)

19. During Cycle Center's slow time, November through March, Yetter ran the motor clothes department alone. (N.T. 46)
20. Yetter was not limited by a set budget with respect to stocking motor clothes merchandise for sale at the Cycle Center. (N.T. 56)
21. Yetter was given both the freedom and discretion to order the merchandise she thought Cycle Center needed. (N.T. 56, 85-86)
22. Yetter purchased and stocked merchandise from various manufacturers of such items as clothing, boots, helmets and jewelry. (N.T. 81)
23. Yetter would both order merchandise from various catalogs and schedule meetings with vendor representatives and decide which products to purchase for resale by Cycle Center. (N.T. 33, 36, 83)
24. On her own, Yetter set up an inventory system for the motor clothing department. (N.T. 52-53)
25. When ordered merchandise was delivered, Yetter manually created parts numbers for each item, tagged and priced the items and entered the items into the computer for inventory control. (N.T. 30, 33, 59)
26. Although she was often first to arrive to Cycle Center, Yetter was not given keys to the dealership. (N.T. 57)
27. Yetter was instructed to work with other departments as a team. (N.T. 26, 29, 37)
28. When customers were waiting and the need arose, Yetter worked sales and, daily, when the parts person was at lunch, Yetter frequently worked the parts desk. (N.T. 28, 30)

29. Yetter was never offered training to work the parts desk and Yetter testified that, in her opinion, no special skills were needed to work in the parts and accessories department. (N.T. 29, 34)
30. While initially working as a sales associate, Yetter generally learned about the various motorcycle models and motorcycle parts. (N.T. 51, 64)
31. Customer requests for parts and accessories that were not in stock could be filled by ordering from marked catalogs separated by motorcycle brands and years which Yetter had used to both look for and order parts for customers. (N.T. 48, 51)
32. Yetter was never told that she had given the wrong advice to a parts and accessories customer or that her performance working that area fell short in some way. (N.T. 31)
33. When Cycle Center was busy, Yetter was expected to and did assist in the shipping and receiving department checking in merchandise to get the items to the sales floor quicker. (N.T. 36-38, 60, 62, 66, 139)
34. When Yetter was made Manager of the motor clothes department, Eric Richner (hereinafter "Richner") was the Parts & Accessories Manager, and had been since January 2008. (N.T.109)
35. Richner supervised Brian Kerstetter who worked as a Parts Counter Associate. (N.T. 27, 93)
36. Kerstetter was given a key to the dealership. (N.T. 144)
37. Unlike Yetter's discretion on what to order and independently creating parts numbers and pricing items, the Harley Davidson manufacturing company recommended what parts to order and, upon parts automatically being sent to Cycle Center, parts already had their own parts numbers and set prices. (N.T. 59)

38. Harley Davidson dealerships used an inventory management system that enabled Harley Davidson to see a particular dealership's inventory of parts and accessories and to automatically make suggestions regarding what to either stock or not stock. (N.T. 141)
39. When Cycle Center received Harley Davidson parts and accessories, they were already priced and tagged for inventory purposes. (N.T. 59)
40. In approximately April 2010, Cycle Center hired William Arndt (hereinafter "Arndt") as a Motorcycle Sales Associate. (N.T. 89)
41. When hired, Arndt was paid a salary and commissions on his sales. (N.T. 41, 148)
42. In approximately January 2011, Richner left Cycle Center at which time, Kerstetter was named Manager of the parts and accessories department. (N.T. 93, 109)
43. In or about October 2011, after approximately a year and a half in sales, Arndt replaced Kerstetter as Manager of Cycle Center's parts and accessories department. (N.T. 89, 93, 153)
44. Arndt had a key to the dealership. (N.T. 152)
45. While Cycle Center's Parts & Accessories Manager, Arndt supervised Kerstetter. (N.T. 150)
46. While Parts & Accessories Manager, Arndt did not install any parts. (N.T. 158)
47. Parts were installed by Cycle Center's service department employees. (N.T. 158)
48. Initially, when Arndt became Parts & Accessories Manager, he attempted to negotiate being paid a salary and commissions, however, this did not happen for a few months. (N.T. 148, 155)

49. Once Arndt successfully negotiated being paid a salary and commissions as Parts & Accessories Manger, in order to receive commissions, Arndt had to exceed the sales goals from the prior year. (N.T. 157)
50. Approximately ½ the time, Arndt was able to exceed the prior year's sales goals and in those periods, he received commissions. (N.T. 157; C.E. 4)
51. On June 8, 2013, Yetter left Cycle Center's employ. (N.T. 109; (C.E. 1)
52. Approximately 2 months before Yetter left Cycle Center's employ, while working in the parts area, she happened upon one of Arndt's Parts & Accessories Manger pay stubs. (N.T. 39)
53. Yetter thought that all Cycle Center Managers were being paid the same. (N.T. 23)
54. Yetter became upset to learn that her rate of pay as General Merchandise Manager was \$13.00 per hour and Arndt's pay as Parts & Accessories Manager was \$20.00 per hour.
55. The following depicts Yetter's rates of pay while employed with Cycle Center:
- 10/6/06 – 12-15/06 - \$8.00 per hour
 - 12/15/06 – 5/4/07 - \$8.50 per hour
 - 5/4/07 – 9/21/07 - \$9.00 per hour
 - 9/21/07 – 4/18/08 - \$10.00 per hour
 - 4/18/08 – 9/19/08 - \$11.00 per hour
 - 9/19/08 – 3/19/10 - \$11.35 per hour
 - 3/19/10 – 9/30/11 - \$12.50 per hour
 - 9/30/2011 – 6/08/13 - \$13.00 per hour.
- (C.E. 2)

56. At times, Yetter worked up to 60 hours per week and was paid overtime for hours she worked that were over 40. (N.T. 40, 100)

57. The following depicts Arndt's pay from his date of hire until August 13, 2014:

5/13/2011 – 9/30/11 - \$588.00 bi-weekly plus commissions

(\$15,288 per year)

10/11/2011 – 8/13/2014 - \$1,538.46 bi-weekly plus periodic commissions

(\$39,999.96 per year)

(C.E. 4)

58. The following depicts Kerstetter's Pay from September 2006 until September, 2013:

6/8/2006 – 8/24/2007 - \$13.40 per hour

8/24/2007 – 8/22/2008 - \$13.80 per hour

8/22/2008 – 9/18/2009 - \$14.25 per hour

9/18/2009 – 8/6/2010 - \$14.50 per hour

8/6/2010 – 9/2/2011 - \$15.50 per hour

9/2/2011 – 9/14/2012 - \$16.00 per hour

9/14/2012 – 9/13/2013 - \$16.80 per hour

(C.E. 3)

59. Cycle Center maintained job descriptions for the positions of General Merchandise Manager and Parts & Accessories Manager. (C.E. 5 and 6)

60. The two job descriptions generally summarized the jobs as "manages employees and operations" of the separate departments, however, the job description for General Merchandise Manager included "coordinates sales promotions and advertising." (C.E. 5 and 6)

61. Similarly, both job descriptions listed the same three "Key Results Areas" as Operations; Management; and Customer Service, however, the job description for General Merchandise Manager included as a Key Result: Promotions. (C.E. 5 and 6)
62. The "Major Duties and Responsibilities" listed on the two job descriptions were broken down into the Key Result Areas listed in the two job descriptions. (C.E. 5 and 6)
63. Under "Operations," both job descriptions, in effect, list the same expectations, however, the Parts and Accessories Manager job description has the additional listed duty of ensuring that the service department's needs are being met and the General Merchandise Manager job listing lists as additional duties; Design displays for merchandise by making effective use of fixtures, show cases, mannequins, wall displays, glass cubes & towers and window displays; regulates seasonal promotions and coordinates them with other departments; coordinates orders with P&A Manager, if possible; Interacts with suppliers of credit card verification and check guarantee machine/service vendors and assist staff with such devices to ensure smooth operation; restocking merchandise; ensure employees keep merchandise appealing to customers; set-up and maintain a smooth running, efficient, appealing retail environment for the General Merchandise department; and purchase product assortments, gauge stock movement, and devise promotions, when necessary. (C.E. 5 and 6)
64. Under "Management" duties, the two job descriptions are virtually identical with the exception that the General Merchandise Manager job description has the additional management duty of taking care of all business promotions. (C.E. 5 and 6)

65. Under "Customer Service" duties the two job descriptions are the same except the Parts & Accessories Manager job description lists "estimate length of time to receive any back-ordered parts and clearly communicate it to customer and to avoid setting high customer expectation levels in situations where expectations are not likely to be met." (C.E. 5 and 6)
66. Only the General Merchandise Manager job description lists "Promotions" as a major duty and responsibility. (C.E. 5 and 6)
67. Under the general heading "Supervisory Responsibilities," both job descriptions set forth similar expectations, however, under the category of "training," the General Merchandise Manager job description lists various training expectations that exceed the expectations of the Parts & Accessories Manager. (C.E. 5 and 6)
68. Both job description's "Commitments" and "Qualifications & Job Requirements" are virtually identical. (C.E. 5 and 6)
69. Under "Physical Demands," the Parts and Accessories Manager job description has the additional listing of "the noise level in the work environment is occasionally loud." (C.E. 6)
70. Under "Working Conditions," the Parts and Accessories Manager job description lists potential exposure to battery acid, gasoline, chemical cleaning materials or other toxic materials commonly found in a motor vehicle service department, and occasional exposure to exhaust fumes or other airborne particles and the General Merchandise Manager job description lists some outdoor work is required. (C.E. 5 and 6)
71. Yetter testified that she assumed that the motor clothes department's sales exceeded the sales of the parts and accessories department. (N.T. 54)

72. Yetter testified that the total sale of merchandise goal was 50% and her sales were around 47% of the gross margin while the parts and accessories department's sales were around 35%. (N.T. 54)

73. As General Merchandise Manager, Yetter did not have access to the sales figures of Cycle Center as the money information was kept by the General Manager and the Owner. (N.T. 55)

74. When Yetter left Cycle Center, the male individual she had been supervising, Andrew Miller, was made the Manager. (N.T. 132)

75. Miller did not have anywhere near the same discretion and authority that Yetter had been given as the Owner assisted Miller with decisions about what to order. (N.T. 128)

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. Cycle Center is an employer within the meaning of the PHRA.
4. To establish a *prima facie* case of wage disparity, Yetter must prove by a preponderance of the evidence that:
 - a. She is a member of a protected class;
 - b. She was paid less than a male employee;
 - c. She performed work substantially equal to that of a male who was similarly situated to her.
5. Yetter established a *prima facie* case of wage disparity.
6. Cycle Center articulated that Yetter was paid less than a male because the jobs held by Yetter and the male with whom she seeks to compare herself were different and Yetter's replacement, a male, was paid less than Yetter.
7. Yetter established that Cycle Center's articulates reasons for paying her less than a male are pretextual.
8. The PHRC has broad discretion in fashioning a remedy.

OPINION

This case arises on an Amended Complaint filed by Tina M. Yetter (hereinafter "Yetter") against No. 1 Cycle Center H-D, Inc. (hereinafter "Cycle Center"), on or about January 31, 2014, at PHRC Case Number 201303456. Generally, Yetter's Amended Complaint alleged three Counts: (1) that she was sexually harassed; (2) that she was paid unequally because of her sex; and (3) that she was laid off because she opposed what she believed to have been sexual harassment. After an investigation, probable cause was found only on Yetter's unequal pay claim. Yetter's claim of unequal pay because of her sex alleges a violation 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").

Because the Pennsylvania Human Relations Commission (hereinafter "PHRC") staff only found probable cause to credit Yetter's unequal pay claim, the case moved forward only on that claim. The PHRC and the parties attempted to eliminate the alleged unlawful practice of unequal pay through conference, conciliation and persuasion. The efforts were unsuccessful, and that portion of the Complainant's Amended Complaint was approved for public hearing. The hearing was held on October 6, 2016, in Belfonte, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Consistent with Section 959(e) of the PHRA, the case in support of the complaint was presented by Assistant Chief Counsel Corey S. Smith, Esquire. (See: 43 P.S. 959(e)) Jeremy Snyder represented Cycle Center. Post-Hearing briefs were submitted by the parties on February 15, 2017. Subsequently, Cycle Center requested and was granted the opportunity to file a reply brief. Cycle Center's reply brief was received on May 8, 2017.

Cycle Center's reply brief incorrectly cites to the Equal Pay Act, 29 U.S.C. §206(d)(1) (2000)("EPA"). There are key differences between the EPA and Section 5(a) of the PHRA. Similarly, the present allegation does not come under Title VII, 42 U.S.C. §2000e (1982). Fundamentally, the analysis of this case is controlled by the language found in the PHRA and not the language of either the EPA or Title VII. While we may find useful certain legal principles that arise out of case precedent that address disparity in pay claims under either the EPA or Title VII, fundamentally, the controlling law in this case is the PHRA.

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

It shall be an unlawful discriminatory practice...for any employer because of the...sex...of any individual...to ... discriminate against such individual ...with respect to compensation...if the individual...is the best able and most competent to perform the services required...(43 P.S. 955(a))

Generally, this case alleges a theory of disparate treatment on the question of whether a pay disparity resulted from intentional sex-based discrimination. In disparate treatment cases the evidence should be viewed through the lens of the oft repeated *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), three part allocation proof formula. Under this familiar shifting obligations allocation, initially, a Complainant must first establish a *prima facie* case. If a Complainant is able to sufficiently establish a *prima facie* case, the burden of production shifts to a Respondent to attempt to articulate a legitimate non-discriminatory reason for the existence of unequal compensation. Finally, a burden of persuasion shifts back to a Complainant to prove by a preponderance of the evidence that the reasons offered are a pretext and that an unlawful discriminatory reason caused the disparity in pay. The value of this model for ordering and presenting proof lies in the fact that it is "a sensible, orderly way to

evaluate the evidence in light of common experience as it bears on the critical question of discrimination.” *Fumco Construction Co. v. Waters*, 438 U.S. 567 (1978).

The Complainant’s post-hearing brief correctly observes that, absent direct evidence, to establish a *prima facie* case of sex-based unequal pay under the PHRA, a Complainant must prove that: (1) she is a member of a protected class; (2) she was paid less than someone not in the Complainant’s protected class; and (3) that she performed work substantially equal to a similarly situated individual who was not in her protected class. *County of Allegheny v. Wilcox, et al*, 75 Pa. Commw. 584 (1983), *see also, Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074 (3rd Cir. 1996) *quoting Hohe v. Midland Corp.*, 615 F. Supp. 210 (E.D. Mo. 1985), *aff’d*, 786 F.2d 1172 (8th Cir. 1986), *and Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518 (11th Cir. 1992).

Once established, a *prima facie* case raises an inference of discrimination only because we presume an existing pay disparity, if otherwise unexplained, is more likely than not based on consideration of impermissible facts. *Teamsters v. United States*, 431 U.S. 324 (1977). More often than not, in a business setting, people do not act in a totally arbitrary manner without underlying reasons. Therefore, once all legitimate reasons for a pay disparity have been eliminated, it is more likely than not that an employer based a pay decision on an impermissible consideration such as sex.

Considered as a whole, the evidence in this case clearly establishes that Yetter, as a female, is a member of a protected class. Equally clear, Yetter has established that she was paid considerably less than William Arndt, (hereinafter “Arndt”) a male Manager with Cycle Center. Yetter has also shown that she was paid much less than Brian Kerstetter, (hereinafter “Kerstetter”) another Cycle Center employee who held the position of Manager for a short period of time.

In an effort to establish the second element of the requisite *prima facie* showing, Yetter has chosen to compare her pay only with Arndt and Kerstetter, however, Yetter needs to only show discrimination in pay against one employee of the opposite sex. *EEOC v. White and Son Enterprises*, 881 F.2d 1006 (11th Cir. 1989) citing *Brock v. Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985). If there were other appropriate “comparators” that were wrongly excluded from the comparison, Cycle Center was obliged to offer evidence with respect to them. *Id.* In this regard, Cycle Center offers the pay received by Andrew Miller, the male that purportedly replaced Yetter when she left the employ of Cycle Center. On this point, Miller’s low pay can easily be attributed to significantly reduced responsibilities. When Yetter left, the evidence reveals that the owner had to assist Miller while, in effect, Yetter had performed the responsibilities of Manager unsupervised. (N.T. 128) Yetter was told to just do what she needed to keep the department running. (N.T. 25) Yetter did not even have a budget, she was simply told to exercise her own discretion and to get what she thought the department needed. (N.T. 56, 85-86)

At this point, the evidence shows that Yetter was paid less than two men, Arndt and Kerstetter. When Kerstetter took over as Manager of the parts and accessories department his hour wage was between \$3.00 and \$4.00 an hour more than Yetter’s \$13.00 per hour salary. Even before Kerstetter became the parts and accessories Manager, his wages were higher than Yetter who was performing as a Manager. When Yetter’s wages are compared with Arndt’s, we find that Arndt initially received a bi-weekly salary of \$1,538.44. After a few months Arndt also received commissions on sales. Clearly, Yetter has shown that there were two men who were paid higher wages than she had been paid.

Regarding the third element of the requisite *prima facie* showing, Cycle Center's Reply Brief incorrectly argues that the jobs performed in the management positions held by Yetter, Arndy and Kerstetter were required to be "equal." Under the EPA, to establish a case, there is a general restriction that jobs must involve equal work, the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions. However, this seemingly strict standard was significantly relaxed. To be compatible under the EPA, the jobs in question must only be substantially identical. *Shultz v. Wheaton Glass Co.* 421 F.2d 259 (3rd Cir. 1970), *cert denied* 398 U.S. 905 (1970); *Hodgson v. Fairmont Supply Co.* 454 F.2d 490 (4th Cir. 1972).

Under Title VII, in order to establish a *prima facie* case of wage discrimination, a Complainant needs to show that she performed "equal work" to that of higher paid males. See *Sprague v. Thom Americas, Inc.* 129 F.3d 1355 (10th Cir. 1997) *citing* *County of Washington v. Gunther*, 452 U.S. 161 (1981). However, under Title VII, this means that a Complainant only needs to show that she occupied a job "similar" to that of the higher paid males. *Sprague* at 1363.

Under the PHRA, Yetter has successfully presented evidence that she performed similar work that was substantially equal to the work performed by Arndt and Kerstetter and therefore meets the third element of the requisite *prima facie* showing. Here, when an orderly analysis of both the written job descriptions and actual duties of motor clothes manager and parts and accessories manager are evaluated, pragmatically, we see that the core functions and general purpose of these two positions are substantially similar.

For purposes of the third element of the *prima facie* showing, Yetter, Arndt and Kerstetter are deemed to have been similarly situated. Under the liberal mandate of Section 12(a) of the PHRA, the comparison of jobs must be accomplished in the light of the

broad remedial purposes of the PHRA. First, Yetter and Arndt supervised approximately the same number of employees. Also, the reporting structure for both Managers finds that both management positions were supervised by the Owner of Cycle Center. Indeed, the overall management functions and general responsibilities of the two separate departments were similar in more ways than not. Both Managers were generally accountable to sell Cycle Center items. Fundamentally, a significant portion of the two jobs were identical.

The evidence presented establishes that, in addition to Yetter almost daily performing the duties of parts and accessories manager over each lunch period, in many respects, Yetter's had significantly more duties than either Arndt or Kerstetter. She not only performed the same core duties performed by Arndt and Kerstetter, importantly she independently decided what items to stock in her department, then she priced and marked all replacement merchandise coming into her department. Yetter also created an independent inventory system for her department and also coordinated sales promotions and advertising for Cycle Center. Additionally, only Yetter designed displays in coordination with other departments, and interacted with suppliers. The effort needed to sell either merchandise or parts and accessories was nearly the same. Both departments used reference books to look up the appropriate items to meet the needs of a customer. Yes the subject matter being sold was different, but, the bottom line for both departments was simply that items were being sold by the departments.

On the issue of the degree of skill necessary to operate the two departments, the evidence reveals that the different skills needed for the two departments were something that could have been gained with on-the-job experience. Yetter had sold motorcycles and was generally familiar with the parts associated with a motorcycle. She worked the parts

and accessories department desk frequently without complaint from either customers or other staff. Indeed, Yetter's overall performance seems to have been exemplary.

Cycle Center submits that the knowledge and skill to work the parts and accessories department was extensive. In reality, the parts department would be told by the service department what parts they needed to service a given motorcycle. The parts and accessories department would then look up the needed part and, if not in stock, order the parts. The evidence shows that Yetter could do this basic task. Also, Cycle Center submits that the parts and accessories department assisted customers to upgrade motorcycles purchased at Cycle Center. On this point, one would imagine that motorcycle owners have more than a passing knowledge of exactly the types of upgrades they might be interested in. Again, looking up parts to accommodate such customer needs would have been something Yetter would have been able to do with some additional training.

These noted differences are not sufficient to declare that the positions are not sufficiently similar and to declare that the managers were not similarly situated. Under the given circumstance of this case, Yetter, Kerstetter and Arndt are found to have been similarly situated.

Yetter having established a *prima facie* case, the next step is for Cycle Center to attempt to articulate a non-discriminatory reason for paying Yetter less than Arndt and Kerstetter. In response to this burden of production, Cycle Center generally makes conclusory claims that the departments are vastly different in size and scope and that more skill and knowledge are required to work in the parts and accessories department.

It is observed that in Cycle Center's Post-Hearing Brief, Cycle Center attempts to assert facts not in evidence. The record evidence regarding the comparative size of two departments did not go into the purported details asserted in Cycle Center's Post-Hearing

Brief. Similarly, during the Public Hearing, the comparison of department sales was either abbreviated or based on hearsay. For instance, when Yetter testified that she had been told that the inventory of merchandise in her department was close to 1 million dollars, (N.T. 56), this evidence is clearly hearsay and cannot be used.

Next, Cycle Center offers that Yetter's replacement, a male, continues to be paid less than Yetter was paid. Additionally, Cycle Center submits that the duties of the parts and accessories department were greater than Yetter's department. Cycle Center notes that the parts and accessories department is responsible for shipping and receiving and for opening and closing the dealership. Collectively, these articulated reasons meet Cycle Center's burden of production.

Next, we turn to the question of whether Yetter can establish by a preponderance of the evidence that the reasons offered by Cycle Center for the pay disparity are a pretext and that either the reasons offered are unworthy of credence or that discrimination was more likely the reason for the pay disparity.

In this regard, the limited admissible evidence regarding which department was the better producer reveals that, next to motorcycle sales, Yetter's department sales were always higher than the parts and accessories department sales. The expectation for sales in Yetter's department was a goal of 50% of the merchandise. Yetter's department accomplished sales up to 47% of the gross margin. The sales percentage for the parts and accessories department only achieved 35% (N.T. 54).

Clearly, Yetter was given nearly total discretion regarding what to order and how to replenish her department's stock. Replenishment of the parts and accessories department appears to have been done by the Harley Davidson Company through their ongoing

computer monitoring of inventory and what parts the company wanted Cycle Center to attempt to sell. On this account, Yetter had significantly more authority and responsibility.

On the question of the parts and accessories department's responsibility for shipping and receiving, there was unrebutted testimony that Yetter often shared in the receiving aspect as she would assist when deliveries to Cycle Center occurred. On the other hand, Yetter had numerous important responsibilities and duties that employees of the parts and accessories department never rendered assistance.

One thing that was clear, Cycle Center had no salary setting guidelines or process. Employees would have no idea what the controlling criteria is for their pay. Additionally, employees seemed to not know what their peers made. Cycle Center seems to have held this information as a monopoly. It is observed that when pay decisions are made in secret, this provides an easy opportunity to craft excuses for pay disparities and to mask discrimination by undervaluing women. Yetter testified that the times when she requested a raise, she wasn't told that her job responsibilities did not merit a raise, instead, she was told that the Owner cannot afford to give her a raise "at this time." A response like this reveals that the Owner knew that Yetter's work was valuable, but felt that he could simply pay her less because she is a woman. Here, the inequities in pay are found to be inexplicable as one would expect there to have been a strong link between performance and compensation. Without question, Yetter had done a good job.

Next, a portion of Cycle Center's Answer to Yetter's Complaint is revealing. Paragraph 21 of Cycle Center's Answer asserted that Arndt was "cross-trained in the sales department and service department and is required to fill in as needed in those positions." In this regard, Cycle Center's Answer is not consistent with the evidence in this case. Arndt's testimony revealed that only the service department installed parts. (N.T. 158) All

he did was to order the parts that others installed. (N.T. 159) With respect to assisting with sales, Yetter testified without contradiction that she too assisted with sales when Cycle Center was busy.

The conclusory claims that the parts and accessories department work is somehow more valuable and requires more knowledge and skill has been shown to be less than credible and that considered as a whole, Cycle Center's articulated reasons were not the real reason for the pay disparity that was established, but that sex discrimination is more likely the reason for the disparity.

Accordingly, we turn 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. The purpose is not to punish a Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been, absent the discriminatory practice. See *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, exact calculations are difficult in this case given the paucity of evidence presented. Clearly, we know that Yetter was paid less than both Kerstetter and Arndt. Given the circumstances present here, a reasonable estimate of Yetter's pay inequity must be made with the acknowledgment that lost pay calculations need only be reasonable and realistic and not mathematically precise.

Before getting into an effort to calculate the extent of the pay inequities, we observe several important matters. First, each time Yetter was paid an unequal

amount, a separate act of compensation discrimination occurred. Fundamentally, acts of pay disparity constitute a continuing violation. Next, there is a question regarding how far back an award can go. Cycle Center seems to point to the EPA's provision that limits an award to two years "prior to [Yetter's] separation of employment."

Turning to the PHRA, we note that if this matter had been before a common pleas court, Section 12(c)(3) indicates that "[b]ack pay liability shall not accrue from a date more than three years prior to the filing of a complaint charging violations of this act." However, this case was not heard by a common pleas court but at a PHRC Public Hearing. Accordingly, Section 9(f)(1) is the controlling provision regarding the scope of damages. Unlike Section 12(c)(3), Section 9(f)(1), does not limit the award of back pay to a 3 year period. This difference may well be attributed to the fact that a case heard by the PHRC does not allow for an award of compensatory damages while in those case heard in common pleas court, compensatory damages are available. In any event, Section 12(a) requires that the PHRC be construed liberally. Accordingly, there will be no time limit on the back pay calculations in this matter.

Clearly, there is an ending point, June 8, 2013, the date Yetter left the employ of Cycle Center. Accordingly, we can begin by a review of the circumstances that existed in August 2008, the point when Yetter was made the general merchandise Manager. At the time of her appointment, she was making \$11.00 per hour and was not given a raise until March 19, 2010. At that time, Yetter's hourly rate went to \$11.35 per hour. Then, from March 19, 2010 until September 30, 2011, Yetter's hourly wage became \$12.50 per hour. Subsequently, on September 30, 2011, Yetter's hourly wage was raised to \$13.00 per hour and stayed there until she left Cycle Center's employment.

From August 2008 until approximately January 2011, Eric Richner was the Manager of the parts and accessories department. (N.T. 91) During the Public Hearing, no attempt was made to show Richner's wages as compared to Yetter's.

Then in approximately January 2011, Richner left and Kerstetter was made the temporary Manager of the parts and accessories department. During the time period, from January 2011 until approximately October 2011, Kerstetter's hourly rate began as \$15.50 until September 2, 2011 when his hourly rate went to \$16.00 per hour. In approximately mid-October 2011, Arndt replaced Kerstetter as Manager of the parts and accessories department. (N.T. 153)

Actual wages paid to both Kerstetter and Arndt were admitted into evidence, however, only Yetter's hourly wages were revealed as an exhibit. (C.E. 2, 3 and 4) This is significant because Yetter testified that she frequently worked overtime, sometimes as much as 20 hours a week. Exhibit 3 indicates that between January 2011 and October 2011, a few times Kerstetter worked less than 80 hours in a two week period but the record indicates that he never worked more than 80 hours during a given two week period. Between January 2011 and September 2, 2011, Kerstetter's hourly wage was \$15.50. When Kerstetter worked 80 hours in a two week period during this time frame, his earnings were \$1,240.00 bi-weekly. Between September 2, 2011 and October 2011, Kerstetter's hourly wage was \$16.00 per hour. When Kerstetter worked 80 hours in a two week period during this time frame, he earned \$1,280.00 bi-weekly. Conversely, when we calculate Yetter's hourly wages during this period, she earned \$12.50 per hour between January 2011 and September 30, 2011, and then \$13.00 per hour in October 2011. This calculates into \$1,000.00 bi-weekly from January to September 30, 2011 and \$1,040.00 bi-weekly in October 2011. Accordingly,

from January 2011 through September 2, 2011, bi-weekly, Yetter earned \$240.00 less than Kerstetter. From September 2, 2011 through September 30, 2011, bi-weekly, Yetter earned \$280.00 less than Kerstetter. Finally, until mid-October 2011, when Arndt became the Manager, Yetter earned \$240.00 less than Kerstetter.

These figures are calculated as follows:

Jan 2011 – Sept 2, 2011 – \$240 x 17 =	\$4,080.00
Sept 2, 2011 – Sept 30, 2011 - \$280 x 2 =	\$560.00
Sept 30, 2011 – Oct 2011 - \$240	<u>\$240.00</u>
Total underpaid wages	\$4,880.00

Next, we turn to the difference between Yetter's wages and Arndt's. From the time Arndt became the Manager of the parts and accessories department, his wages were \$1,538.46 bi-weekly. Additionally, after several months as Manager, Arndt also received commissions.

The calculations in the difference in pay between Yetter and Arndt is as follows:

Mid-Oct – June 8, 2013 - 43 x \$498.46 =	\$21,433.78
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The Post-Hearing Brief on behalf of the state's interest in the Complaint submits that an appropriate award for lost commissions should be \$12,208.00. In the exercise of discretion, this figure is deemed acceptable.

Accordingly, Yetter's lost wages total - \$38,521.78

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

TINA YETTER,
Complainant

v,

NO. 1 CYCLE CENTER H-D, INC.,
Respondent

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PHRC CASE NO. 201303456

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Yetter has proven that Cycle Center paid her less because she is a female 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

May 9 2017
Date

By: 

Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

TINA YETTER,
Complainant

v,

NO. 1 CYCLE CENTER H-D, INC.,
Respondent

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: **PHRC CASE NO. 201303456**
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FINAL ORDER

AND NOW, this 27th day of June, 2017 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 Cycle Center shall cease and desist from failing to pay female employees wages equal to wages paid to male employees with whom female employees are similarly situated.
2. That Cycle Center shall pay Yetter the lump sum of \$38,521.78.

3. That Cycle Center shall pay additional interest of 6% per annum on the award in paragraph 2 above, calculated from June 8, 2013, until payment is made.
4. That, within thirty days of the effective date of this Order, Cycle Center shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Corey S. Smith, Esquire, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 333 Market Street, 8th Floor, Harrisburg, PA 17101-2210.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



**M. Joel Bolstein, Esquire
Interim Chairperson**

Attest:



**Dr. Raquel O. Yiengst
Vice Chairperson**

