

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

**Timothy Foster
Complainant**

v.

**Newco Resources LLC
Respondent**

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PHRC CASE NO. 202101974

STATEMENT OF THE CASE

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

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STATEMENT OF THE CASE

Darlene Hemerka, Permanent Hearing Examiner. A public hearing was held in this matter on October 23, 2023, in Harrisburg, Pennsylvania. The only issue was what, if any, damages were appropriate. Complainant, Timothy Foster, (hereafter Foster or Complainant) filed a verified complaint in PHRC Case No. 202101974 on or about March 22, 2021, against Respondent, Newco Resources LLC (hereafter Newco or Respondent). Foster alleged that Newco discriminated against him, based on his sex, by not paying him timely for days he worked and that two other male employees had pay discrepancies but that the only female employee did not. Foster also alleged that he complained to the finance manager about the discrimination on or around December 9, 2021, and was discharged a few weeks later.

The Pennsylvania Human Relations Commission (hereafter PHRC or Commission) issued an Order on July 25, 2022, finding probable cause and liability following Newco's failure to file a verified answer to the complaint. Conciliation failed on October 12, 2022, and the case was placed on the Public Hearing docket on June 26, 2023.

FINDINGS OF FACT¹

1. On or about March 15, 2022, Foster filed a complaint against Newco alleging that Newco discriminated against him because of his sex, male, and fired him after he complained about the discrimination to the finance manager. C.E. 1.
2. By Order dated July 25, 2022, the PHRC issued a finding of probable cause and judgment for Foster on the issue of liability based on Newco's failure to file an answer to the complaint. C.E. 2
3. Conciliation failed on October 12, 2022. O.D.
4. The instant case was placed on the public hearing docket on June 26, 2023. O.D.
5. A public hearing on the issue of what, if any, damages are appropriate was held on October 23, 2023, in Harrisburg, Pennsylvania. Tr. 1.
6. Complainant began working for Respondent on November 26, 2021. Tr. 14
7. Foster's starting weekly salary was \$850.00 a week. C.E. 3
8. According to the confirmation of employment letter, Foster's weekly salary would increase to \$1,250.00 a week after working ninety (90) days at Newco. *Id.*
9. Complainant's employment with Respondent was terminated in the first or second week of February 2022. Tr. 21.
10. Foster's last paycheck from Newco was dated February 11, 2022, and indicated that it was for February 6, 2022, through February 12, 2022. C.E.4.

¹ Abbreviations

Tr.= Hearing Transcript

C.E.= Commission Exhibit

O.D.= Official Document

11. After being terminated by Newco, Foster actively searched for employment by registering with an employment agency and applying for positions online and in person. Tr. 21.
12. Foster received unemployment benefits until July 2022 in the amount of \$6,422.00. Tr. 24.
13. Foster went on multiple job interviews and received a couple of job offers. Tr. 22.
14. Complainant was offered a job at Mitsubishi Chemical Corporation. Tr. 23
15. However, the job offer was rescinded after Human Resources contacted Newco and Newco made negative comments about Foster and his work ethic. *Id.*
16. Complainant testified that he would not accept a position with Respondent if offered one in the future, due to the mistreatment he experienced while there. Tr. 21-2.
17. Complainant fell behind on rent and had to move out of his home in December of 2022. Tr. 26.
18. Foster rented a U-Haul to move. Tr. 27
19. The cost of the U-Haul was \$175.80. C.E. 6 at 14.
20. Foster put items in a storage unit when he moved. Tr. 27.
21. Foster paid a monthly storage fee from November 28, 2022, through the date of the public hearing. C.E. 6 at 1-13.

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (PHRC or Commission) has jurisdiction over Complainant, Respondent, and the subject matter of the Complaint under the Pennsylvania Human Relations Act (hereafter PHRA).
2. Foster, Newco, and the PHRC have fully complied with the procedural prerequisites to convene a public hearing.
3. In this matter, Newco's failure to file a properly verified answer resulted in the entry of a judgment for Foster on the issue of liability.
4. The PHRC has broad discretion in fashioning a remedy.
5. In an employment discrimination case, the PHRC may award affirmative action, including, but not limited to, reimbursement of certifiable travel expenses, compensation for loss of work, hiring, reinstatement and verifiable out of pocket expenses.
6. This purpose is not only to restore the injured party to [his] pre-injury status and make [him] whole but also to discourage future discrimination.
7. The question of mitigation of damages lies within the sound discretion of the Commission.
8. It is the respondent's burden to establish that the complainant failed to mitigate [his] damages in order to limit a complainant's entitlement to an award.
9. A duty to mitigate is met even if complainant could have more aggressively searched for employment.
10. Respondent is not entitled to an offset of back pay because of Complainant's receipt of unemployment compensation.

11. 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 out of a complaint filed by Timothy Foster, (hereafter Foster or Complainant) against Newco Resources LLC (hereafter Newco or Respondent). Foster alleged that Newco discriminated against him, based on his sex, by not paying him timely for days he worked and that two other male employees had pay discrepancies but that the only female employee did not have pay discrepancies. Foster also alleged that he complained to the finance manager about the discrimination on or around December 9, 2021, and was discharged a few weeks later.

Foster's verified complaint was filed on or about March 22, 2021. After Newco failed to file a properly verified answer, the PHRC found Respondent liable for discrimination. After the finding of liability in this case, conciliation efforts were attempted but were unsuccessful. Subsequently, this matter was approved for a public hearing on the issue of appropriate damages.

The Commission has jurisdiction over Complainant, Respondent, and the subject matter of the Complaint under the Pennsylvania Human Relations Act (hereafter PHRA). The public hearing on the issue of appropriate damages was held on October 23, 2023, in Harrisburg, Pennsylvania, before Permanent Hearing Examiner Darlene Hemerka. Michelle Smith, Esq, represented Foster. Although duly notified, no one appeared at the public hearing on behalf of Newco. Since liability had been found after Newco failed to file a properly verified answer, the only question at the public hearing was what damages, if any, Foster 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 Commission is given wide discretion in fashioning remedies where unlawful discrimination has been proven. *Pa. Human Rels. Comm'n, v. Alto-Reste Park Cemetery Association*, 306 A.2d 881 (1973). 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 she would have been absent the discriminatory practice. See *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975); *Pa. Human Rels. Comm'n, v. Alto-Reste Park Cemetery Association*, 306 A.2d 881 (1973).

The first aspect we must consider regarding making Foster whole is the issue of the extent of financial losses suffered. 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...” *Pa. Human Rels. Comm'n, v. Transit Casualty Insurance Co.*, 340 A.2d 624 (Pa Cmwlth 1975).

In this case, Foster began his employment on Friday, November 26, 2021. During his employment with Newco, Foster testified that he initially earned \$850.00 per week and was to be given a raise after 90 days of employment to \$1,250.00 per week. Tr. 14. This information is also reflected in Commission Exhibit 3, Foster’s offer letter from Newco.

The amount Foster lost in wages because he was illegally terminated on or about February 11, 2022, is calculated as follows:

February 11, 2022 – through February 24, 2022, = 2 weeks @850.00 per week =
\$1,700.00

February 25, 2022- through October 23, 2023, = approximately 87 weeks @ 1,250.00 =
\$108,750.00

Total Lost Wages = \$1,700.00 + 108,750.00 = \$110,450.00

Foster is entitled to back pay, less the amount earned in subsequent employment and reinstatement or future wage loss payments. It is the respondent's burden to establish that the complainant failed to mitigate [his] damages in order to limit complainant's entitlement to an award. *Raya & Haig Hair Salon v. Pa. Human Rels. Comm'n*, 915 A.2d 728, 735 (Pa Cmwlth 2007). A duty to mitigate is met even if complainant could have more aggressively searched for employment. See *Merrell v. Chartiers Valley School District*, 51 A.2d 286 (Pa. Cmwlth 2012).

In the instant case, Newco failed to appear and failed to introduce any evidence to establish that Foster failed to mitigate his damages. Respondent produced no evidence demonstrating whether jobs were available at Complainant's previous wage that he failed to apply to and failed to establish Foster acted unreasonably in any way. Therefore, the Commission finds that Newco failed to meet its burden that Foster failed to mitigate his damages.

Notwithstanding, Newco is entitled to offset its back pay obligations with interim earnings received after Foster's discharge. Foster presented sufficient evidence that following his termination, he made reasonable attempts to mitigate his damages. The evidence shows that after being terminated by Newco, Foster diligently searched for subsequent employment registering with an employment agency and applying for jobs online and in person. Complainant went on multiple job interviews and received a couple of job offers including one for a job at Mitsubishi Chemical Corporation. Tr. 22-3. However, the job offer was rescinded after human resources

contacted the Respondent and Newco made negative comments about Foster and his work ethic. *Id.* Foster testified that he continues to diligently seek employment. Tr. 24. He receives job postings once or twice a week from the employment agency, however, most of the positions are four hours away. Tr.24-5.

Foster testified that the only income he received was unemployment compensation totaling \$6,422.00. Tr. 23-4. Under Pennsylvania case law, Newco is not entitled to offset its back pay obligation with the unemployment benefits that Foster received. See *Orweco Frocks, Inc. v. Pa. Human Rels. Comm'n*, 537 A.2d 987 (Pa Cmwlth 1988) (Commission did not commit legal error in declining to allow employer offset for unemployment compensation benefits collected by discharged employee); *Williamsburg Community School District v. Pa. Human Rels. Comm'n*, 512 A.2d 1339 (Pa. Cmwlth 1986) (there was no error in not deducting unemployment benefits from award of back pay). Because Foster has not earned any wages since his discharge and Newco failed to establish that he failed to mitigate his damages, we find that Foster is entitled to back pay totaling \$110,450.00.

Foster also requests front pay. With respect to front pay, the power of the Commission to award front pay was first recognized in *Williamsburg Community School District v. Pa. Human Rels. Comm'n*, 512 A.2d 1339 (Pa. Cmwlth 1986). Front pay serves to make victims of discrimination whole in cases where the factfinder can reasonably predict that the plaintiff has no reasonable prospect of obtaining comparable alternative employment. *Powers v. Grinnell Corp.*, 915 F.2d 34, 42–3 (1st Cir. 1990). We find that front pay in the amount of \$1,250.00 per week for a period of 33 weeks, which is equal to triple the number of weeks that Foster worked at Newco is warranted here for several reasons. First, Foster has been unable to secure comparable alternative employment since his employment with Newco was terminated.

Additionally, the evidence showed that Newco’s negative reference regarding Foster is the reason he has been unable to secure comparable employment. Third, the Complainant testified that he has no desire to return to work for Respondent and thus reinstatement is not feasible. The amount Foster is owed in front pay, is calculated as follows:

\$1250.00 per week x 33 weeks = \$41,250.00

Finally, Foster requests out of pocket expenses for the U-Haul truck he had to rent and the monthly storage fees he has paid since losing his home in December 2022. The Commission finds it appropriate to award payment for the U-Haul truck and the storage expenses from December 2022 through October 23, 2023, the public hearing date.² The amount Foster is owed for out-of-pocket expenses is calculated as follows:

Item	Amount
U-Haul	175.80
Storage for 11/28-11/30/2022 and 12/1-12/31/2022	149.93
Storage and Insurance for June 2023	270.64
Storage, Insurance and Late Fee for Feb. 2023	261.48
Storage, Insurance and Late Fee for March 2023	261.48
Storage, Insurance and Late Fee for May 2023	319.44
Storage, Insurance and Late Fee for July 2023	319.44
Storage, Insurance and Late Fee for April 2023	261.48
Storage, and Late Fee for Jan. 2023	249.48
Storage Supplies Purchased Nov. 29, 2023	66.09
Storage and Insurance for Aug. 2023	270.64

² In his post-hearing brief, Complainant requested that the Hearing Examiner enter an additional exhibit into the record representing storage and insurance fees incurred for November 2023.

Storage, Insurance and Late Fee for Sept. 2023	319.44
Storage and Insurance for October prorated amount	270.64- 54.13 = 216.51
Total amount	\$3,141.85

An order follows.

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PHRC CASE NO. 202101974

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, I find that Foster established damages. It is, therefore, my recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, I further recommend issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

Darlene Hemerka

**Darlene Hemerka
Permanent Hearing Examiner**

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Timothy Foster	:	
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FINAL ORDER

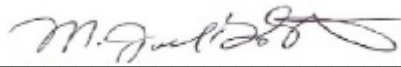
AND NOW, this 22nd day of January, 2024, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Permanent Hearing 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 Newco Resources LLC shall cease and desist from discriminating against employees because of their sex,
2. That Newco Resources LLC shall pay Foster the lump sum of \$110,450.00 which amount represents lost wages following Foster's termination,
3. That Newco Resources LLC shall pay Foster the lump sum of \$ 41,250.00 which amount represents future wage loss,

4. That Newco Resources LLC shall pay an additional \$3,141.85 which amount represents Foster's out of pocket expenses from November 2022 through the public hearing date,
5. That, within thirty (30) days of the effective date of this Order, Newco Resources LLC shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Michelle Smith, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 110 N. 8th Street, Suite 501, Philadelphia, PA 19107.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY:  _____
M. Joel Bolstein
Chairperson

ATTEST:

By:  O/B/O Commissioner Mayur Patel

Mayur Patel, Secretary