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PROTHONOTARY

June 28, 2023

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

**Kyle Rodin,
Complainant,**

v.

**Wilkes Barre Chicken LLC,
Respondent.**

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PHRC Case No. 202002152

EEOC Charge No. 17F202161121

STATEMENT OF THE CASE

FINDINGS OF FACT

CONCLUSIONS OF LAW

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

STATEMENT OF THE CASE

TAMARA SHEHADEH-COPE, HEARING EXAMINER. A public hearing in this matter on the issue of what, if any, damages are appropriate was held on April 6, 2023, in Hazleton, Pennsylvania. Complainant Kyle Rodin filed a verified Amended Complaint in PHRC Case. No. 202002152 on or about March 22, 2021, against Respondent Wilkes Barre Chicken, LLC. The Complainant alleged that from September 2020 through February 4, 2021, the Respondent failed to provide the Complainant a workplace free from sexual harassment. Complainant further alleged that Respondent terminated the Complainant because of his sex and in retaliation for the Complainant opposing sexual harassment in the workplace. A Finding of Probable Cause and Liability Order was issued on August 23, 2021, following Respondent's failure to file a verified Answer to the Complaint. Conciliation failed on February 23, 2022, and this case was placed on the Public Hearing docket on November 2, 2022.

FINDINGS OF FACT¹

1. On or about March 22, 2021, Complainant Kyle Rodin (hereinafter "Rodin"), filed a verified amended PHRC Complaint against Wilkes Barre Chicken, LLC (hereinafter "Wilkes Barre Chicken"), in which Rodin alleged that from September 2020 through February 4, 2021, he was subjected to harassment at his place of employment based upon his sex, and was ultimately terminated because of his sex. C.E. 1
2. On or about June 30, 2021, PHRC Assistant Chief Counsel Kelly M. Matos of the Harrisburg Regional Office petitioned for a Rule to Show Cause. C.E. 2.

¹ Abbreviations
Tr.= Hearing Transcript
C.E.= Commission Exhibit

3. On July 1, 2021, PHRC Motions Examiner Carl Summerson issued a Rule to Show Cause which, in effect, notified Wilkes Barre Chicken that it had until July 28, 2021 to file a properly verified answer to Rodin's complaint. C.E. 2.
4. Wilkes Barre Chicken did not file an answer. C.E. 2.
5. On August 23, 2021, Motions Examiner Summerson recommended to the full PHRC that Wilkes Barre Chicken be found liable for Rodin's allegations. C.E. 2.
6. By Order dated August 23, 2021, the PHRC found Wilkes Barre Chicken liable for failure to provide Rodin with a workplace free from sexual harassment based upon his sex and sexual orientation between September 2020 through February 4, 2021. Additionally, the Commission determined that on February 4, 2021, Wilkes Barre Chicken terminated Rodin because of his sex and in retaliation for Rodin opposing sexual harassment in the workplace. C.E. 2.
7. A public hearing on the issue of what, if any, damages are appropriate was held on April 6, 2023, in Hazleton, Pennsylvania. Tr. 1.
8. Rodin worked as a general preparer for Wilkes Barre Chicken. Tr. 13.
9. Rodin's total annual earnings in 2020 while employed with Wilkes Barre Chicken totaled approximately \$33,040.00. C.E. 3.
10. Rodin's employment with Wilkes Barre Chicken was terminated on February 4, 2021. C.E. 1.
11. After being terminated by Wilkes Barre Chicken, Rodin actively looked for employment online. Tr. 14.
12. On January 4, 2021, Rodin began working with Infocision where he earned approximately \$7,603.21. Tr. 15, 17.

13. Rodin eventually left his employment with Infocision and again applied for other positions. Tr. 16, 17.
14. Rodin began his employment with IHOP in August of 2022. Tr. 18.
15. Rodin earns \$2.83 per hour plus tips at IHOP and is paid on a biweekly basis. He continues to work at IHOP. Tr. 19
16. In 2022, Rodin earned approximately \$10,441.04 from working at IHOP. C.E. 5.
17. Rodin also began working for the Olive Garden approximately one month before the public hearing was held. Tr. 20
18. Rodin earns \$2.83 per hour plus tips at Olive Garden and is paid weekly. Tr. 21; C.E. 6
19. Rodin testified, because of discrimination similar to that experienced at Wilkes Barre Chicken, he reduced the number of hours worked at IHOP and began working at Olive Garden two weeks later. Tr. 23.
20. Rodin testified that he would not accept a future position with Wilkes-Barre Chicken if offered, due to the mistreatment he experienced while there. Tr. 21, 22.

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 must 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, Wilkes Barre Chicken’s failure to file a properly verified answer resulted in the entry of a judgment for Rodin 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 Kyle Rodin, against Wilkes Barre Chicken, LLC. Rodin’s complaint alleged that, because of his sex and sexual orientation, from September 2020 through February 4, 2021, Wilkes Barre Chicken failed to provide him with a workplace free from sexual harassment. Additionally, Rodin alleged that Wilkes Barre Chicken terminated his employment because of his sex and in retaliation for Rodin opposing sexual harassment in the workplace. Rodin’s complaint states a claim under Section 5(a) of the Pennsylvania Human Relations Act (“PHRA”).

Rodin’s verified amended complaint was filed on or about March 22, 2021. On or about May 24, 2021, the Pennsylvania Human Relations Commission (“PHRC”) Harrisburg regional office petitioned for a Rule to Show Cause, indicating that the Respondent had not filed an answer to the Complainant’s verified Amended Complaint. The petition further indicated that

service of the Amended Complaint occurred on April 16, 2021, and that by letter dated May 24, 2021, an effort had been made to obtain an answer from Wilkes Barre Chicken.

On July 1, 2021, a Rule to Show Cause was issued, directing Wilkes Barre Chicken to respond on or before July 18, 2021. After Wilkes Barre Chicken failed to file a properly verified answer, on August 23, 2021, the full PHRC determined that, based on his sex and sexual orientation, Wilkes Barre Chicken was unable to provide a Rodin workplace free of sexual harassment, and terminated him because of his sex and in retaliation for opposing the harassment.

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

The public hearing on the issue of appropriate damages was held on April 6, 2023, in Hazleton, Pennsylvania, before Permanent Hearing Examiner Tamara Shehadeh-Cope. The state's interest in the complaint was overseen by Dana Prince, Esq., PHRC Assistant Chief Counsel. Although duly notified, Wilkes Barre Chicken failed to attend the public hearing.

Since liability had been found after Wilkes Barre Chicken failed to file a properly verified answer, the only question at the public hearing was what damages Rodin 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. PHRC 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); PHRC v. Alto-Reste Park Cemetery Association, 306 A.2d 881 (1973).

The first aspect we must consider regarding making Rodin 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...” PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975).

In this case, during his employment with Wilkes Barre Chicken, Rodin testified that he earned approximately \$33,040 annually. Tr. 14. This is also reflected in Complainant Exhibit 3, Complainant’s W-2 for the year 2020. Given this information, the following calculation reflects Rodin’s approximate weekly earnings while employed with Wilkes Barre Chicken:

$$\text{\$33,040 annually} / 52 \text{ weeks per year} = \text{\$635.38 per week}$$

The amount Rodin lost in wages because he was illegally terminated on February 4, 2021, is calculated as follows:

February 4, 2021 – through April 6, 2023 = 113 weeks

Total Lost Wages = 113 weeks @ \$635.38 per week = **\$71,797.94**

Following his termination, Rodin presented sufficient evidence that he made reasonable attempts to mitigate his damages. On this point, the evidence shows that after being terminated by Wilkes Barre Chicken, Rodin applied for and obtained a position with Infocision in January of 2022. In his testimony, Rodin did not specify how long he remained in this position, only that he departed Infocision before accepting a position with IHOP in August of 2022. During his time at Infocision, Rodin earned approximately \$7,603.21. Tr. 16, 17; C.E. 4. After he left Infocision, Rodin continued to make attempts at securing new employment, and began his employment at IHOP Restaurant (hereinafter “IHOP”) in August of 2022. Tr. 17. At the time of hearing, Rodin continues to work at IHOP. He testified that he earned \$2.83 plus tips at IHOP and that he was paid on a bi-weekly basis. Tr. 21. Rodin also testified that his total weekly payment at IHOP was usually made in cash in the approximate amount of \$600 per week. Tr. 21. In 2022, Rodin earned approximately \$10,441.04 at IHOP. C.E. 5. Given this general information, the following calculation reflects Rodin’s approximate weekly earnings while employed at IHOP:

Amount earned in 2022= \$10,441.04

No. of weeks between August 1, 2022 and December 31, 2022= 22 weeks

Weekly earnings at IHOP= \$10,441.04 / 22 weeks = \$474.59 per week

In or around March 2023, Rodin began working at Olive Garden, where he also earns \$2.83 plus tips. Tr. 20-21. The most recent paystub as of the date of the public hearing provided shows a weekly pay of \$396.76 per week. C.E.6. Rodin testified that approximately two weeks before beginning his employment at Olive Garden, he scaled down his hours at IHOP to two days a week due to alleged discrimination against him, and that he lost approximately three

quarters of his pay. Tr. 23. No additional detail has been provided to this tribunal relating to how much he is now making from IHOP on a biweekly basis, nor to how many pay periods had elapsed between the time that he began working reduced hours and the date of the public hearing.

The following calculations illustrate the amount to be deducted as amounts Rodin earned in mitigation of his damages:

Infocision	5-8 months employed	=	\$7,603.00
IHOP	34 weeks at \$474.59/week	=	\$16,136.06
Olive Garden	5 weeks at \$396.76/week	=	\$1,983.80
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Total replacement pay:			\$25,722.86

Given these calculations, Rodin's back pay award becomes:

Unmitigated back pay	=	\$71,797.94	
Minus replacement pay	=	\$25,722.86	
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Mitigated wage loss	=	\$46,075.08	

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.

Mitigated wage loss	=	\$46,075.08	
plus 6% simple interest	=	\$2,764.50	
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TOTAL BACK PAY AWARD =	=	\$48,839.58	

With respect to front pay, the power of the Commission to award front pay was first recognized in Williamsburg Community School District v. Pennsylvania Human Relations Commission, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (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, 42–43 (1st Cir. 1990). We find that front pay is not warranted here, because there was comparable alternative employment found by Rodin since his employment with Wilkes-Barre Chicken was terminated. Though Rodin understandably has no desire to return to work for Wilkes-Barre Chicken and thus reinstatement is not feasible, it is clear through his testimony that he has exercised due diligence in securing alternative employment and was subsequently hired multiple times since his termination, two of those times also being in the food service industry.

An appropriate order follows:

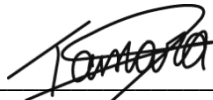
**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

Kyle Rodin,	:	
Complainant,	:	
	:	
v.	:	PHRC Case No. 202002152
	:	
Wilkes Barre Chicken LLC,	:	
Respondent.	:	EEOC Charge No. 17F202161121
	:	
	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, I find that Rodin suffered 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

BY: 

Tamara Shehadeh-Cope
Permanent Hearing Examiner

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

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FINAL ORDER

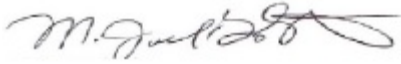
AND NOW, this 26th day of June, 2023, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approved the foregoing Findings of fact, Conclusions of law, and Opinion of the Permanent Hearing 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 Wilkes Barre Chicken, LLC shall cease and desist from terminating employees because of their sex and sexual orientation.
2. That, within forty-five (45) days of the effective date of this Order, Wilkes Barre Chicken shall pay Rodin the lump sum of \$48,839.58 which amount represents mitigated backpay and additional interest of 6% per annum following Rodin's termination.

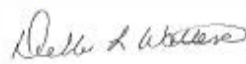
3. That, within thirty (30) days of the effective date of this Order, Wilkes Barre Chicken shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Dana Prince, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 110 N. 8th Street, Suite 501, Philadelphia, PA 19107.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 

M. Joel Bolstein
Chairperson

ATTEST:

By:  O/B/O Commissioner Mayur Patel

Mayur Patel, Secretary