

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

FRANCIS C. SHAW, Complainant

v.

SHAW BROS., INC., Respondent

DOCKET NO. E83544A

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainant, Francis Shaw, a thirty-eight year employee of Shaw Bros., Inc., was fifty-seven years old in August 1998. (NT 13, 16.)
2. In October 1996, the Respondent, Shaw Bros., Inc., was a wholesale meat packing company. (NT 15.)
3. On October 18, 1996, Shaw Bros., Inc. laidoff Francis Shaw because of his age. (PHRC Order dated January 27, 1998.)
4. At the time of his layoff from Shaw Bros., Inc., Francis Shaw's average gross weekly salary was \$550. (NT 9.)
5. Francis Shaw's position at Shaw Bros., Inc., was supervisor of the shipping department. (NT 8.)
6. While employed at Shaw Bros., Inc., Francis Shaw paid approximately \$100 per month to be fully covered by Blue Cross/Blue Shield hospitalization. (NT 10, 18.)

7. Following Francis Shaw's layoff, Francis Shaw was unable to find alternate employment until approximately February 15, 1997. (NT 11.)

* The following abbreviation will be utilized throughout these Findings of Fact for reference purposes:

NT Notes of Testimony

8. On or about February 15, 1997, Francis Shaw found employment as a driver for a local hospital. (NT 16.)

9. Francis Shaw's weekly gross pay as a driver was approximately \$225. (NT 12.)

10. Between October 18, 1996 and approximately mid-May 1997, Francis Shaw paid \$400 per month for replacement Blue Cross/Blue Shield hospitalization coverage. (NT 10.)

11. For the ten-year period prior to Francis Shaw's layoff, Shaw Bros., Inc.'s business had been in decline. (NT 17.)

12. On August 1, 1997, Shaw Bros, Inc. closed, as one of Shaw Bros., Inc.'s large customers dropped Shaw Bros., Inc. (NT 17.)

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 16 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, the Respondent's failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for the Complainant on the issue of liability.

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

7. The Complainant is entitled to lost wages, plus six percent interest.

OPINION

This case arose on a complaint filed by Francis C. Shaw against Shaw Bros., Inc., which alleged an age-based layoff. The alleged layoff occurred on or about October 18, 1996. Francis Shaw's complaint states a claim under Section 5(a) of the Pennsylvania Human Relations Act ("PHRA").

Francis Shaw's verified, amended complaint was filed on or about May 20, 1997. By correspondence dated November 13, 1997, the Pennsylvania Human Relations Commission ("PHRC") Harrisburg regional office petitioned Motions Commissioner Howell for a Rule to Show Cause, indicating that Shaw Bros., Inc. had not answered Francis Shaw's complaint. The petition declared that Shaw Bros., Inc. had been served with the complaint on July 2, 1997. The petition further indicated that, by correspondence dated September 22, 1997, Shaw Bros., Inc. was notified that its failure to answer Francis Shaw's complaint could result in a judgment being entered for Francis Shaw.

On November 14, 1997, a Rule to Show Cause was issued, directing Shaw Bros., Inc. to respond on or before December 12, 1997. After no response was filed, on January 6, 1998, Motions Commissioner Howell recommended a finding of liability to the full PHRC. On January 27, 1998, the full PHRC determined that on or about October 18, 1996, Shaw Bros., Inc. laidoff Francis Shaw because of his age.

After the finding of liability, 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 August 3, 1998 in Hollidaysburg, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. Francis Shaw was represented by James C. Eberly, Sr., Esquire. The state's interest in the complaint was overseen by Joseph T. Bednarik, PHRC Assistant Chief Counsel. Shaw Bros., Inc. did not attend. Francis Shaw's post-hearing brief was initially due on September 30, 1998. An extension was granted, and Francis Shaw's post-hearing brief was received on October 16, 1998.

Since liability had been found after Shaw Bros., Inc. failed to file an answer, the only question at public hearing was what damages Francis Shaw could establish. Under Section 9(f)(1) of the PHRA, the PHRC is empowered to award backpay and "any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice. . ."

Courts have recognized that one purpose of an award of backpay is to restore an injured party to his pre-injury status, making him whole. *Consolidated Rail Corp v. PHRC*, 136 Pa. Commonwealth Ct. 147, 582 A.2d 702 at 709 (1990) citing, *Williamsburg Community School District v. PHRC*, 99 Pa. Commonwealth Ct., 206 512 A.2d 1339 (1986). Here, Francis Shaw's "pre-injury status" was that he grossed an average income of \$550 per week. Accordingly, the calculation of a backpay award will begin there.

Following his layoff, Francis Shaw sought to mitigate his damages by seeking alternative employment. Another job was found and Francis Shaw began to work as a driver on or about February 15, 1997. At this alternative job, Francis Shaw earned a gross salary of approximately \$225 per week.

When computing a backpay award, the amounts earned from the alternate job are appropriate deductions from the award. Also, when making this computation of lost wages, the circumstance of Shaw Bros., Inc.'s ceasing operations as of August 1, 1997 affects the backpay award.

Because Shaw Bros., Inc. ceased business on August 1, 1997, the liability for backpay ends on that date. After August 1, 1997, Francis Shaw's loss of employment would have been attributable to the cessation of Shaw Bros., Inc.'s business, rather than Shaw Bros., Inc.'s age-based discrimination. See, *Washington v. Kroger Co.*, 27 FEP 1735 (W.D. Mo. 1981), vacated and remanded on other grounds, 29 FEP 1739 (8th Cir. 1982).

Accordingly, the lost wage calculation is as follows:

October 18, 1996 - November 17, 1996	\$550.00
November 18, 1996 - December 17, 1996	\$550.00
December 18, 1996 - January 17, 1997	\$550.00
January 18, 1997 - February 15, 1997	\$550.00
February 16, 1997 - March 15, 1997	\$325.00
March 16, 1997 - April 15, 1997	\$325.00
April 16, 1997 - May 15, 1997	\$325.00
May 16, 1997 - June 15, 1997	\$325.00
June 16, 1997 - July 15, 1997	\$325.00
July 16, 1997 - August 1, 1997	\$160.00
Total Lost Wages =	\$3,985.00

Another component of the backpay award in this matter includes insurance premiums incurred by Francis Shaw after his layoff. While employed with Shaw Bros., Inc., Francis Shaw contributed approximately \$100 per month to a group hospitalization insurance plan. Once laidoff, Francis Shaw's cost of replacement insurance totaled \$400 per month. This amount was paid until Francis Shaw had worked at his alternate job for three months. At that point, Francis Shaw's new employer had an arrangement comparable to the contribution arrangement Francis Shaw had when he worked for Shaw Bros., Inc.

Accordingly, the amount of \$300 per month for the period between October 18, 1996 and May 15, 1997 is an appropriate additional component of Francis Shaw's back-pay award. This calculation is as follows:

Insurance cost (Seven months @ \$300 per month) = \$2,100.00

Finally, an award of interest in the amount of six percent per year on the full scope of the backpay award is appropriate. See, *Brown Transport Corp. v. PHRC*, 133 Pa. Commonwealth Ct. 545, 578 A.2d 555 (1990).

The interest calculations are as follows:

Backpay award = \$6,085.00

Time period (October 18, 1996 - October 8, 1998) = 2 years

Percent of interest = 6%

Total Interest (\$6,085.00 X 0.06 X 2 years) = \$730.20

An appropriate order follows.

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RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Francis Shaw suffered damages. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

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FINAL ORDER

AND NOW, this 27th day of October, 1998, 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, within thirty days of the date of this order, Shaw Bros., Inc. shall pay Francis Shaw a total of **\$6,085.00**, which amount includes the following backpay factors:

Lost wages from 10/18/96 to 8/1/97 = \$3,985.00

Medical insurance premium reimbursement = \$2,100.00

2. That Shaw Bros., Inc. shall pay Francis Shaw, within thirty days of the effective date of this order, the sum of **\$730.20**, which amount represents interest on the backpay award at the rate of six percent per annum, calculated from October 18, 1996 until October 1998.

3. That Shaw Bros., Inc. shall pay Francis Shaw, within thirty days of the effective date of this order, an additional amount of interest on the backpay award, at the rate of six percent per annum calculated from the end of October 1998 until such time as payment of the backpay award has been made.

4. That, within thirty days of the effective date of this order, Shaw Bros., Inc. shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Assistant Chief Counsel, PHRC Harrisburg Regional Office, 2971-E North Seventh Street, Harrisburg, PA 17110-2123.

PENNSYLVANIA HUMAN RELATIONS COMMISSION