COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELAITONS COMMISSION

SOPHIE MARIE WEBER, Complainant

v.

CANTEEN CORPORATION DIVISION OF COMPASS GROUP, Respondent

DOCKET NO. E90886AH

STIPULATIONS OF FACT

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RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

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STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. Sophie Marie Weber (hereinafter "Complainant") is an adult, female.
2. Complainant has a disability, back-related, within the meaning of the Pennsylvania Human Relations Act (PHRC).
3. Canteen Corporation, Division of Compass Group (hereinafter "Respondent") is an employer that, at all times relevant to the case at hand, has employed four or more persons within the Commonwealth.
4. On or about May 13, 1985, the Complainant was hired by the Respondent as an Accounting Clerk.
5. Beginning on or about February 1987 and continuing until July 20, 1987, the Complainant was unable to work due to an injury unrelated to work which resulted in her undergoing back surgery to remove a herniated lumbar disc.
6. On or about July 8, 1987, Dr. Pedro Polakoff, M.D. informed the Respondent that the Complainant was recovering from back surgery and authorized the Complainant to return to work on July 20, 1987, to light duty with no heavy lifting, pushing, pulling and straining anything greater than 25 lbs.
7. Prior to February 22, 1999, Respondent made the decision to cross train various personnel to perform the Cash Room job duties in the event of an absence of any Cash Room employees.
8. On or about February 22, 1999, the Respondent informed the Complainant that she would need to be cross-trained to perform the Cash Room job duties.
9. Subsequently, the Complainant expressed to the Respondent concerns regarding the additional job duties associated with the Cash Room due to her prior back surgery and work restrictions.
10. The Respondent requested the Complainant to obtain at her expense a doctor's note regarding her work restrictions to update Dr. Pedro P. Polakoff II's note dated July 8, 1987.
11. On or about February 26, 1999, the Complainant was examined by Dr. David A. Cautilli, M.D.

12. On or about February 26, 1999, Dr. David A. Cautilli, M.D. provided a note to the Complainant which stated that the Complainant had a :permanent restriction of sedentary type work, previous discherniation and significant arthritis in her lumbar spine."
13. On or about March 1, 1999, the Respondent informed the Complainant that it was not able to allow her to continue work, and that she was laid off.
14. On or about March 5, 1999, Steven Gaber, Respondent Human Resources Director for Zone II, sent the Complainant, via certified mail, Family and Medical Leave Act forms.
15. On or about March 8, 1999, Dr. David A. Cautilli completed a physician's certification form noting that the Complainant "should avoid work that requires repeated lifting and bending activities" but did not complete the other Family and Medical Leave Act forms.
16. On or about March 31, 1999, the Complainant returned to Steven Gaber, via certified mail, the Family Medical Leave Act forms, including the physician's certification form completed by Dr. David A. Cautilli.
17. On or about March 3, 1999, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Commission docket number E-90886AH. A copy of the complaint will be included as a docket entry in this case at time of hearing.
18. On or about May 10, 1999, Respondent filed an Answer in response to the complaint. A copy of the response will be included as a docket entry in this case at time of hearing.
19. In correspondence dated May 15, 2001, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that the Commission believed that probable cause existed to credit the allegations found in the complaint.
20. Subsequent to the determination of probable cause, Commission staff and the parties attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but were unable to do so.
21. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.

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FINDINGS OF FACT *

1. The Complainant is Sophie Marie Weber, (hereinafter "Weber"). (S.F. 1).
2. The Respondent is Canteen Corporation Division of Compass Group, (hereinafter "Canteen"). (S.F. 3).
3. Canteen provides contract food services and vending and dining services in the Philadelphia area from its facility located at 9801 Roosevelt Boulevard in Northeast Philadelphia. (N.T. 138, 166, 258, 297).
4. Weber was first hired by Canteen in May, 1985. (N.T. 34, S.F. 4.)
5. Weber began her employment with Canteen as a receptionist/secretary, but for most of Weber's employment, Weber held the position of accounting clerk. (N.T. 34).
6. As an accounting clerk the majority of Weber's duties were performed at her desk where she answered the telephone and processed a variety of invoices, company records, and reports. (N.T. 34, 78, 174, 184, 272).
7. In addition to working at her desk, Weber also filed various documents in a series of 4 – 5 drawer filing cabinets. (N.T. 74-75, 80, 124).
8. Weber also handled air-borne envelopes, each of which normally weighed approximately two to five pounds. (N.T. 78).

*The foregoing Stipulations of Facts" are hereby incorporated herein as if fully set forth. 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 Fact for reference purposes:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit
S.F. Stipulations of Fact

9. Periodically, Weber had to lift several large binders to enable her to make entries, reload the office copier, and get supplies from various locations in a supply room. (N.T. 37, 79, 82, 83).
10. At the end of each year, Weber had to transfer files from filing cabinets into boxes for storage. (N.T. 84).
11. As she performed these general office tasks, Weber had to bend and lift items approximately twelve times each day. (N.T. 36).
12. Between February 1987 and July 20, 1987, Weber was unable to work due to a non-job related back injury which resulted in the surgical removal of a herniated lumbar disc. (N.T. 45; S.F.5).
13. Following her surgery, Weber gave Canteen a doctor's note dated May 26, 1987 from her surgeon, Dr. Pedro Polakoff. (N.T. 45; C.E.6).
14. Dr. Polakoff's May 26, 1987 note generally advised Canteen of Weber's condition and that Weber was not yet ready to return to work. (C.E.6).
15. Subsequently, Canteen asked Weber to have another examination and made arrangements for Weber to be seen by Dr. E. Michael Okin, who, by letter dated June 26, 1987, advised Canteen that he agreed with Dr. Polakoff's May 26, 1987 assessment of Weber and that in his opinion Weber would soon be able to return to work. (N.T. 50; C.E.8).

16. Prior to returning to work, Weber was again seen on July 8, 1987 by Dr. Polakoff who provided Weber with another Doctor's Note dated July 8, 1987,
which states: The following patient was seen in my office today, she is recovering from back surgery. As of Monday July 20, 1987 she may return to work, on light duty. No heavy lifting, pushing, pulling, and straining anything greater than 25 lbs. If you have any questions, please feel free, to contact me. (N.T. 48-49; C.E.7).

17. Weber needed Dr. Polakoff's July 8, 1987 note to be permitted to return to work. (N.T. 18, 42).
18. When Weber returned to work, she was able to perform the essential functions of her accounting clerk position as well as to be subsequently cross-trained to perform other office duties. (N.T. 35, 54, 276).
19. Canteen regularly cross trains employees to facilitate the substitution of an absent employee. (N.T. 40, 72).
20. Since her surgery, Weber did not miss work because of any back problems and had only complained about periodic back pain to her family doctor. (N.T. 54, 86).
21. Between July, 1987, and March 1, 1999 Weber was a good employee who did not complain and based on her performance received merit-based pay increases. (N.T. 42, 73, 216, 276; C.E. 3 and 4).
22. During this extended period, on January 23, 1999, Weber received only one disciplinary warning after she had accumulated six absences in twelve months. (N.T. 43; C.E. 5).
23. In the twelve-month period, prior to the warning, Weber had been in intensive care following a heart catheterization and had also undergone cataract surgery. (N.T. 43-44).
24. In 1999, Weber was not the only accounting clerk. (N.T. 138, 153, 200, 275, 290, 302; R.E. 5 and 8).
25. At Canteen's Northeast Philadelphia facility, at the end of each day, Canteen's route personnel delivered to a location called the cash room, both paper currency and coins they had retrieved from Canteen vending machines. (N.T. 54, 145, 167).
26. Route personnel brought in canvas bags of coins usually weighing under 25 pounds but could weigh up to 50 pounds. (N.T. 146, 168).
27. The coin room was staffed with two people, Catherine Doherty, (hereinafter "Doherty"), the lead cashier and a cashier. (N.T. 140, 144).
28. The cash room personnel sorted coins, counted the coins and bills, and readied the money for deposits. (N.T. 56, 145).
29. Cash room personnel also frequently gave route drivers bags of money weighing up to 50 pounds. (N.T. 146, 154).
30. The cash room job entailed bending and lifting bags of money all day. (N.T. 146-147).
31. In 1999 Weber's direct supervisor was Kelly McCluskey, (hereinafter "McCluskey"). (N.T. 298), and McCluskey's supervisor was Ed Delasandro, (hereinafter "Delasandro"). (N.T. 271-272).
32. In 1999, Canteen's Philadelphia facility's general manager was Thomas Britten. (hereinafter "Britten"). (N.T.166).
33. In about January/February 1999, Britten, in combination with Delesandro and McCluskey decided that employees needed to be cross-trained in the cash room. (N.T.178, 274, 302).
34. Other employees who had been previously cross-trained to work in the cash room no longer worked for Canteen. (N.T. 48, 149).

35. Before Britten, previous general managers had excluded Weber from cross-training in the cash room due to restrictions relating to her back condition. (N.T.149).
36. In February, 1999, unaware of Dr. Polakoff's notes in Weber's file, Britten decided Weber would be the first to be cross-trained as the coin room relief person. (N.T.74, 202, 203, 218-219).
37. Britten selected Weber to be cross-trained first because Weber's duties were considered less complex and less vital and that her duties could be easily absorbed by others. (N.T. 202, 302).
38. As Doherty was the designated cross-trainer for cash room duties, Britten went to Doherty to tell her there was to be cross-training and it would begin with Weber. (N.T. 150, 155).
39. Doherty informed Britten that as far as she knew, Weber had a Doctor's note in her file, to which Britten responded, "we'll see about that". (N.T.155).
40. McCluskey informed Weber that she had to be cross-trained in the cash room. (N.T.56).
41. After being informed that she was to be cross-trained in the cash room, Weber waited for Britten to come in and when he did, she informed him she had been asked to cross-train in the cash room and expressed concerns about the lifting requirements of the cash room. (N.T.56,180).
42. Coincidentally Delasandro arrived at Britten's door with Dr. Polakoff's July 8, 1987 note. (N.T.56).
43. At some point, Britten telephoned Stephen Gaber, (hereinafter "Gaber"), Canteen's Human Resource Director, located in Monroe Township, New Jersey, about Weber's July 8, 1987 doctor's note. (N.T.203,225,254).
44. Britten also discussed with McCluskey and Delesandro whether the July 8, 1987 restrictions would prevent Weber from performing the cash room relief person duties. (N.T.203).
45. Following Britten's review of Weber's July 8, 1987 note, Britten instructed Delesandro to tell Weber to get an updated doctor's note. (N.T.56-57, 277).
46. Weber asked Delasandro who would pay for the new exam and could it be done on company time, to which Delesandro informed Weber that he thought the company would pay for the exam and that he would check. (N.T.57).
47. Canteen did not pay for Weber's doctor appointment to update the July 8, 1987 note. (N.T.81).
48. Weber was also told that a new note was needed "as soon as possible". (N.T.57).
49. Weber was referred to Doctor David A. Cautilli, (hereinafter "Cautilli"), by her family doctor. (N.T.125, 141).
50. When Weber appeared for an examination by Cautilli, she informed him that Canteen wanted her to be cross-trained in the cash room and she wanted a note to take to work which addressed whether she could or could not do the cash room duties. (N.T.125-126).
51. Weber's examination by Cautilli was very short lasting perhaps less than five minutes during which time Weber did several stretching and bending exercises. (N.T.58, 92).
52. Weber was also x-rayed. (N.T.58).
53. Cautilli presented Weber with a note dated February 26, 1999, which states:

DX: Lumbar spondylosis - This patient is to be doing a permanent restriction of sedentary type work, and she should avoid any lifting or bending activities secondary previous disc herniation and significant arthritis in her lumbar spine. (N.T. 58; C.E.9).

54. When Weber read Cautilli's note, she did not see a need to get clarification as she understood the note to say she could still do her accounting clerk duties but could not perform the cash room duties. (N.T59, 96).
55. On Friday February 26, 1999, Weber gave Britten Cautilli's note. (N.T.59-60).
56. Britten read Cautilli's note and stated, "We have a problem". (N.T.60, 96).
57. Weber reacted by telling Britten that she never refused anything anyone asked her to do the entire time she worked there but medically, she felt she could not do the cash room duties. (N.T.61).
58. Weber returned to her desk having no idea Britten's "problem" would be focused on her duties as an accounting clerk. (N.T.96).
59. Britten discussed the note with McCluskey who offered her opinion to Britten that Weber could not do her job with the note. (N.T.311-312, 314).
60. Britten also faxed the note to Gaber and then discussed with Gaber whether Weber could continue to safely perform her job. (N.T.185, 205).
61. Based solely on Cautilli's February 26, 1999 note, Britten concluded that Weber could not safely perform any of her accounting clerk job duties. (N.T.183, 205).
62. Britten strictly interpreted Cautilli's note to require Weber to avoid lifting and bending completely. (N.T.183).
63. Subsequently, on February 26, 1999, Weber was called back to Britten's office where Gaber was on the speaker phone and Delesandro, McCluskey, Britten, and John Eastlack were also present. (N.T.61,185, 207,261,314-315).
64. Eastlack was Canteen's Philadelphia facility District Operations Manager who had been in Britten's office on a separate matter. (N.T.261).
65. Gaber read Cautilli's note to Weber and related that Britten had gathered from Cautilli's note that Weber could not lift a pencil or pick up a piece of paper. (N.T.61, 183, 211, 236).
66. Gaber asked Weber if she did bending and lifting in her current job to which Weber said yes. (N.T.236).
67. Generally, Gaber expressed concerns about the scope of Cautilli's restrictions. (N.T.100).
68. During the meeting that lasted between five to ten minutes, Gaber did most of the talking and Weber merely listened. (N.T.101,185, 208, 334).
69. Neither Gaber nor Britten asked Weber to get another note. (N.T.62, 187, 237, 286, 329).
70. The meeting ended by Weber being told that the matter would be discussed and Britten would get back to her after he made a decision. (N.T.62, 186, 208, 238).
71. Confused, Weber left the meeting thinking that the discussion had been about whether she would be cross-trained for duties in the cash room. (N.T.100,329).
72. At one point after the meeting, Gaber decided he needed more information from Weber regarding the scope of the restrictions. (N.T.238-239).
73. Gaber spoke with an individual at Canteen's Corporate. (N.T.238).
74. Gaber and Britten decided to strictly interpret Cautilli's note and, without seeking additional information, concluded Weber was unable to perform the job of accounting clerk safely. (N.T.186, 209, 233, 234, 241).

75. When Weber arrived at work on Monday, March 1, 1999, her timecard had been removed and Britten was standing there waiting for her. (N.T.62, 152).
76. Britten took Weber to his office where he told her that since she came prepared for work, she would be paid for the day. (N.T.63, 101).
77. Britton informed Weber that Canteen did not have anything she could do safely. (N.T. 191, 210).
78. Weber then asked if she could get her personal effects to which Britten replied, "like what"? (N.T.63, 122).
79. Again, Britten did not tell Weber to get a new doctor's note. (N.T.210).
80. Believing she had been terminated, Weber was devastated and not knowing what to do, Weber simply went to her car and cried. (N.T.63, 64-65,110, 331).
81. Under a cover memorandum dated March 5, 1999, Gaber sent Weber Family Medical Leave Act forms. (N.T. 67,127) 252; R.E.6).
82. Gaber's March 5, 1999 cover memorandum stated: Due to your illness, you may be entitled to family/medical leave. Please complete the enclosed form and return to my attention as soon as possible. . .
83. On March 29, 1999, Weber returned to Gaber the FMLA form uncompleted. (N.T.192; C.E.11).
84. On a form document entitled Request for Family or Medical Leave Weber responded to the phrase "I am requesting" by indicating: "Employer (Canteen Corp.) has told me I am disabled even though I am capable of performing my job set forth in my job description". (C.E.11).
85. Also, on the bottom of this form Weber wrote: "I did not quit my job on March 1, 1999, I was terminated". (C.E.11).
86. Along with the returned FMLA documents Weber included a Physician's Certification prepared by Cautilli. (N.T. 68; 120; (C.E.11).
87. Question #5 on the Physician's Certification asked, "Do you consider the patient able to accept employment as of. . . , to which Cautilli wrote February 28, 1999, and marked the box designating "Yes". (C.E.11).
88. Question 7 asks about a patient's limitations to which Cautilli replied, "Should avoid work that requires repeated lifting and bending activities". (C.E.11).
89. The Physician's Certification further stated that Weber had only been seen once by Cautilli on February 26, 1999, and that "she has chronic complaints of lower back pain and has degenerative arthritis and previous lumbar disc herniation with significant decompression. Repeated bending and lifting activities will exaggerate her symptoms and should be avoided". (C.E.11).
90. Cautilli's indication that he considered Weber able to accept employment as of February 28, 1999 did not affect either Britten's or Gaber's conclusion that Weber was unable to do her job. (N.T. 94, 243).
91. Although Gaber knew he needed specifics about Weber's limitations and a quantitative review of her job duties, neither Gaber nor Britten contacted either Weber or Cautilli regarding the scope of limitations expressed in Cautilli's Physician's Certification. (N.T. 196,243).
92. Canteen merely sent Weber a follow up letter saying that the FMLA documents were incomplete. (N.T.253).

93. Canteen's policies provide that in certain circumstances Canteen will seek second and third medical opinions. (N.T.196, 209, 216, 245).
94. Although, Gaber agreed that maybe in Weber's case there would have been more clarification about Weber's limitations if Canteen had obtained second and third medical opinions, such opinions were never obtained in Weber's case. (N.T.217, 245).
95. Canteen's records indicated that as of April 23, 1999 Weber was officially terminated for a medical reason. (N.T.198; C.E.18).
96. Weber applied for and was granted unemployment compensation. (N.T.69; C.E.12).
97. For approximately six months, Weber looked for work in the Northeast Philadelphia area. (N.T.70, 113, 128, 136).
98. Weber checked two local newspapers for job listings and sent out approximately 10 resumes. (N.T.113,136).
99. After approximately six months, Weber decided to do volunteer work. (N.T. 70).
100. Weber's self-esteem was low and she did not feel useful anymore. (N.T.70).
101. Weber also perceived she would have difficulty finding a job because, at the time, she was sixty years old. (N.T.70).
102. Further, Weber felt she would have difficulty explaining the circumstances of her termination to prospective employers. (N.T.70).
103. At the time of her termination, Weber was earning $11.35 per hour and worked 40-hour work weeks. (N.T.176).
104. After her termination, Weber received short-term disability for the period March 7, 1999 through March 20, 1999, in the amount of $817.20 plus benefit dollars in the amount of $30.60. (N.T.325).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and subject matter of this case.
2. The parties have fully complied with the procedural prerequisites to a public hearing in this case.
3. Weber is an individual within the meaning of the Pennsylvania Human Relations Act (hereinafter "PHRA").
4. Canteen is an employer within the meaning of the PHRA.
5. An employer will be liable under the PHRA for failing to engage an employee with a disability in an interactive process.
6. Good faith participation in an interactive process promotes the policies which underline the disability protections afforded under the PHRA.
7. Canteen failed to engage Weber in a good faith interactive process after Weber initiated the process by presenting Canteen with a doctor's note which generally outlined Weber's limitations.
8. The PHRC has broad discretion in fashioning a remedy.
9. Weber is entitled to six months of lost wages, plus interest.

OPINION

This case arises on a complaint filed by Sophie Marie Weber (hereinafter "Weber") against Canteen Corporation Division of Compass Group, (hereinafter "Canteen"), on or about March 3, 1999, at Docket Number E-90886-AH. Generally, Weber's complaint alleged that Canteen discriminated against her because of her age and non-job–related handicap/disability when Canteen failed to provide Weber with a reasonable accommodation and then on March 1, 1999, terminated her. At the Pre-Hearing Conference held on April 27, 2001, the PHRC regional attorney indicated that this matter would proceed on Weber's disability allegations only. Weber claims that Canteen's actions violate 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").

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit the allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and this case was approved for public hearing. The hearing was held on August 9, 2001, in Philadelphia, Pennsylvania, before Carl H. Summerson, Permanent Hearing Examiner. Briefs were submitted by the parties. Canteen's brief was received on November 27, 2001, and the brief on behalf of the complaint was received on November 28, 2001.

Turning to the general issue arising from the substance of Weber's handicap/disability allegations, we note that the ultimate question for resolution here is whether Canteen failed to reasonably accommodate Weber's disability and whether Canteen terminated Weber in violation of 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. . . non-job-related handicap or disability. . . of any individual. . . to discharge from employment such individual. . . or to otherwise discriminate against such individual. . . with respect to compensation, hire, tenure, terms, conditions or privileges of employment,. . . if the individual. . . is the best able and most competent to perform the services required. . . (43 P.S. 955(a))

Section 4(p) and 4(p)(1) provide the Act's only clarification of the reach of the cited portion of Section 5(a). Section 4(p) states: The term "non-job-related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in. . .

Section 4(p)(1) states: The term "handicap or disability", with respect to a person, means:

(1) a physical or mental impairment which substantially limits one or more of such person's major life activities;

(2) a record of having such an impairment; or

(3) being regarded as having such an impairment. . . (43 P.S. 954(p) and (p.1))

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which provide: Handicapped or disabled person includes the following:

(I) A person who:

(a) has a physical or mental impairment which substantially limits one or more major life activities;

(b) has a record of such an impairment; or

(c) is regarded as having such an impairment.

(ii) As used in subparagraph (i) of this paragraph, the phrase:

(a) "physical or mental impairment" means a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine or mental or psychological disorder, such as mental illness, and specific learning disabilities.

(b) "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) "has a record of such an impairment" means has a history of or has been misclassified as having a mental or physical impairment that substantially limits one or more major life activities.

(d) "is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but that is treated by an employer or owner, operator, or provider of a public accommodation as constituting such a limitation; has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or has none of the impairments defined in subparagraph (i) (a) of this paragraph but is treated by an employer or owner, operator, or provider of a public accommodation as having such an impairment.
(16 Pa. Code §44.4.)

General prohibitions

(b) Handicapped or disabled persons may not be denied the opportunity to use, enjoy or benefit from employment and public accommodations subject to the coverage of the act, where the basis for such denial is the need reasonable accommodations, unless the making of reasonable accommodations would impose an undue hardship. (16 Pa. Code §44.5).

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. Pennsylvania State Police v. PHRC, 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983); and see Pennsylvania State Police v. PHRC, 85 Pa. Commonwealth Ct. 621, 483 A.2d 1039 (1984), reversed on other grounds, 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

Another regulation found at 16 Pa. Code §44.2 provides general guidance which will be extremely useful to the resolution of the issues presented by the facts of this case. §44.2 states:

(a) The provisions of this chapter shall be construed liberally for the accomplishment of the purposes of the act.
(b) The provisions of this chapter will be construed consistently with other relevant Federal and State laws and regulations except where such construction would operate in derogation of the purposes of the act and this chapter.

§44.2 (a) is a continuation of the PHRA's mandate that the provisions of the PHRA be liberally construed, (Section 12(a) of the PHRA), and simply requires the regulations in support of the PHRA to also be construed liberally. §44.2 (b) states by regulation what the PHRC and Pennsylvania courts have consistently done, and that is to interpret the PHRA consistent with federal interpretations of parallel provision in the Americans with Disabilities Act (ADA), 42 U.S.C.S. §§12101-13 and relevant federal regulations. See Harrisburg Area School District v. PHRC, 466 A.2d 760 (Pa. Comwlth Ct. 1983); Gomez v. Allegheny Health Services, Inc., 71 F.3d 1079 (3rd Cir.1995), cert. denied 116 S. Ct. 2524 (1996); and Chmill v. City of Pittsburgh, 488 Pa. 470, 412 A.2d 860 (Pa. 1980). Moreover, the PHRA definition of "handicap or disability" is substantially similar to the definition of "disability" under the ADA. Fehr v. McLean Packaging Corp., 860 F. Supp 198 (E.D.Pa. 1994). Accordingly, this opinion will look at how federal courts have handled an issue of first impression here in Pennsylvania.

Both post-hearing briefs filed in this case suggest that this case should be analyzed using the traditional three-part burden shifting analysis originally developed in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). However, Weber has not stated a claim of disparate treatment. Her claim is based solely on the general responsibility of an employer to make accommodations to an employee's disability unless making an accommodation poses an undue hardship.

Weber's claims that she was a qualified employee with a disability and that Canteen's failure to accommodate her disability resulted in her termination. Such a claim alleges that the facts of this case directly establishes a violation of the PHRA. Thus, if we find that Canteen should have reasonably accommodated Weber and did not, Canteen will be found to have discriminated against Weber. Accordingly, the analysis that will be used is his case will be a reasonable accommodation analysis.

Before beginning this analysis, mention is made of the fundamental issue of whether Weber has a disability within the meaning of the PHRA. While the parties have stipulated that Weber is "disabled" within the meaning of the PHRA, under the facts of this case, Weber is "disabled" not only because of either her medical condition or history of medical conditions, Weber is also disabled under the "regarded as" provision of the PHRA, (§4(p.1)(3)), as well as by action of 16 Pa. Code §44-4 (i)(D). Under the facts present here, Britten and Gaber treated Weber's condition as substantially limiting the major life activities of lifting and bending regardless of whether her medical conditions actually substantially limited her or not. In any event, we find that Weber had a disability within the meaning of the PHRA.

We therefore turn to the questions which will be used to resolve the issue of liability in this case. While the PHRA and relevant regulations require some "reasonable accommodation", these provisions do not specify whether the employer or the disabled employee has the burden of proving the availability or lack thereof of a reasonable accommodation. 16 Pa. Code §§44.13 and

44.14 generally require both equipment and job modifications as reasonable accommodations, but again, these provisions do not specify who is responsible to determine and identify the appropriate reasonable accommodation.

One particular provision of the EEOC's regulations enforcing the ADA helps us understand the question of how an employer might gain knowledge of an appropriate reasonable accommodation to enable an employer to assess whether making an accommodation would create an undue hardship.

That regulation is 29 C.F.R. §16 30.2(o)(3) which states:

To determine the appropriate reasonable accommodation it may be necessary for [an employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Similarly, interpretive guidance found at 29 C.F.R. 1630 Appendix states:

. . . the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. . .

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

> (1) Analyze the particular job involved and determine its purpose and essential functions;
> (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;
> (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform to essential functions of the position; and
> (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

We note that 29 D.F.R. §1630.2(o)(3) uses the word "may" with respect to an employer's participation in an interactive process which might specifically identify limitations and potential reasonable accommodations. Additionally, in the interpretive guidance the word "should" is used with respect to the four-part process available to evaluate limitations and possible reasonable accommodations.

Since we have not previously addressed the issue of employer participation in an interactive process, we turn to courts that have reviewed this issue and we find a variety of approaches have been taken. Because the EEOC regulations only strongly recommend cooperation by both

employers and employees in identifying limitations and reasonable accommodations, the question becomes does an employer's failure to participate in an interactive process create liability independent from a resulting failure to accommodate a disabled employee. The regulatory recommendation has resulted in conflicting positions over whether an employer should be required to participate in an interactive process designed to determine if there can be a reasonable accommodation.

Courts that have not required employer participation in the interactive process have, in effect, given no deference to ADA regulations suggesting such participation. See Barnett v. U.S. Air, Inc., 157 F.3d 744 (9th Cir. 1098); Willis v. Conopco, Inc., 108 F. 3d 282 (11th Cir. 1997); White v. York Int'l Corp, 45 F. 3d 357 (10th Cir. 1995); Moses v. American Nonwovens, Inc., 97 F. 3d 446 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997), and Staub v. Boeing Co., 919 F. Supp. 366 (W.D.Wash. 1996). These cases indicate that the ADA and its regulations do not create independent liability for an employer's failure to engage in an interactive process with an employee in order to find a reasonable accommodation. Collectively they conclude that the regulations only recommend an interactive process but do not require one.

Conversely, other courts have, in effect, held that an employer does have an obligation to participate in an interactive process. See Beck v. University of Wisconsin Board of Regents., 75 F. 3d 1130, 5 ADC 304 (7th Cir. 1996); Taylor v. Principal Financial Group., 93 F. 3d 155, 5 ADC 1653 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996); Mengine v. Runyn., 114 F.3d 415, 6 ADC 1530 (3rd Cir. 1997), (Same analysis applied to a federal employee under the Rehabilitation Act of 1973, 29 U.S.C. §§701 et. seq. (1994)); Gerdes v. Swift Eckrich Inc., (N.D. Iowa 1996); Hendricks–Robinson v. Excel Corp., 154 F. 3d 685 (7th Cir. 1998); Baert v. Euclid Beverage, 8 ADC 973 (7th Cir. 1998); McAlpin v. National Semiconductor Corp., 5 ADC 1047 (N.D. TX. 1996); Breiland v. Advance Circuits, Inc., 976 F. Supp. 58 (D.C. Minn. 1997); and Stewart v. Happy Herman's, 6 ADC 1834 (11th Cir. 1997). Such courts defer to the ADA regulations which recommend an interactive process. The opinions may differ regarding whether the employer or employee bears the initial burden of beginning the interactive process, but all agree that courts should require employers and employees to participate in an interactive process.

A summary review of several of the cases which have faced the issue of the required degree of employer involvement in an interactive process illustrate that resolution of the question is dependent on the particular facts of a given circumstance. An early case that addressed this issue was Beck v. University of Wisconsin Board of Regents., supra.

Beck was a university employee from 1967 to 1993, who, during the latter part of her employment, suffered from osteoarthritis and depression. In August 1991, Beck began a three-month medical leave for conditions described to the University as "multiple medical conditions" and "post viral fatigue". When Beck returned in October 7, 1991, she was reassigned to a position where for one month she was only required to learn and practice a word processing program. Thereafter, Beck suffered from osteoarthritis aggravated by repetitive keyboarding. A February, 1992 doctor's note stated, " I would recommend, if possible, that she avoid repetitive keyboard use, in which case, quite possibly her symptoms will resolve". In May 1992 Beck was hospitalized with severe depression and anxiety. Beck claimed that this was the result of stress from the new job and lack of training and support. On June 9, 1992, Beck returned to work with

another doctor's note which released her to return to work on June 11, 1992. The note generally stated she "may require some reasonable accommodation so that she does not have a recurrence. . ."

The University tried to have Beck sign a release so the University could get further information from her doctor. Beck did not sign the requested release, no additional information was provided, and a scheduled meeting to discuss possible accommodations never occurred.

In July 1992, Beck again took medical leave and returned on August 10, 1992 with another doctor's note which related Beck had been hospitalized for depression and medication readjustment. The note generally indicated that she may require appropriate assistance with her workload. Possible equipment modification was noted as well as tailoring of her workload. Upon her return, Beck was given a memorandum stating that her manager did not understand what accommodations were necessary and until he received more information she would be moved to another location and simply assigned work by her supervisor.

On September 25, 1992, Beck went on medical leave for the third time and received electric-shock therapy. She was given a six-month unpaid medical leave of absence which was later extended. In June, 1993 Beck filed a charge with the EEOC. Beck later requested reinstatement to a different department. This request was denied and she was told she had to return to her original department. Beck did not and was therefore, terminated.

The central issue in the Beck case was whether the University provided Beck with a reasonable accommodation. Beck claimed it did not and the University claimed that it never understood exactly what accommodations Beck required, and that it tried in vain to determine what accommodations were necessary, and that given the limited understanding of Beck's disability it did what it could.

The crux of the dispute was defined as whether the employer or the employee bears ultimate responsibility for determining what accommodations are needed? The Beck court began by noting an employee has an initial duty to inform the employer of a disability before liability will attach for a failure to provide a reasonable accommodation. In Beck, the University knew of Beck's disabilities.

The court went on to frame the issue by noting that someone, either the employer or employee, bears the ultimate responsibility for determining what specific actions an employer must take. The court then declared that employers have at least some responsibility and that 29 C.F.R. §1630.2 (o)(3) envisions an interactive process that requires participation by both employers and employees.

The facts of Beck reveal that there had been an interactive process between Beck and the University. Beck brought in doctor's notes which prompted the University to schedule a meeting to discuss accommodations and to direct a memo to Beck explaining the University was unclear about her limitations. The record also was clear that the interactive process broke down.

Wisely, the Beck court noted that no hard and fast rule will suffice and that Courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party to determine what specific accommodations are necessary. A party that delays or obstructs the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation of response, may also be acting in bad faith. The Beck court notes that a fact finder should attempt to isolate the cause of a process breakdown and then assign responsibility.

When the court applied these principles to the facts in Beck, the responsibility for the process breakdown fell on Beck. The University consistently responded to Beck's requests. It was Beck who failed to sign a release to allow the University to get additional information and never provided additional information after she received a memo indicating the University was unclear.

In Beck the University made multiple attempts to acquire information and Beck, it appeared, did not make reasonable efforts. The court concluded by saying that the law requires the parties to engage in an interactive process to determine what precise accommodations are necessary. In Beck the employer was left to guess what actions to take. Liability for failure to provide reasonable accommodations ensues only where an employer bears responsibility for the breakdown of the process.

In Taylor v. Principal Financial Group., supra, Taylor was an office manager who had bipolar and anxiety disorders that negatively affected his productivity at work. On discussions with his employer, Taylor simply mentioned that he suffered from mental illnesses, yet he did not indicate that this prevented him from doing his job. When Taylor was fired for non-productivity, he filed a claim alleging a failure to reasonably accommodate.

The court in Taylor stated, "it is the employee's initial request for an accommodation that triggers the employer's obligation to participate in the interactive process of determining one." Since Taylor had merely informed his employer of his disability and did not inform the employer of the limitations caused by his condition, the court determined that Taylor failed to "trigger" a duty by the employer to participate in the interactive process. In noting an important distinction between an employer's knowledge of a disability and knowledge of limitations caused by the disability, interactive process, the Taylor court held that employers only have a duty to reasonably accommodate limitations, not disabilities.

Here in the Third Circuit, the case of Mengine v. Runyon, supra, found that an employer is required to participate in the interactive process in the context of the Rehabilitation Act. Mengine was a disabled letter carrier for the U.S. Postal Service. Mengine requested reassignment to a less strenuous position. The Postal Service made employment offers that Mengine rejected because they did not meet his physical limitations. Mengine later identified possible suitable positions, but was told these positions were not vacant. Mengine filed a charge for failure to reasonably accommodate him.

Generally the court found that since the Postal Service had offered Mengine several positions and had continually worked with him to try to find a reasonable accommodation, the Postal Service had satisfied its duty to engage in the interactive process in good faith. The court

reasoned that an interactive process where both parties work together move effectively furthers the goals of both the Rehabilitation Act and the ADA.

In the case of Bultemeyer v. Fort Wayne Community Schools, 6 ADC 67 (7th Cir. 1996), Bultemeyer had a serious mental illness. After a disability leave, Bultemeyer notified his employer he was ready to return to work and toured the location where the employer intended to place him as a custodian. Bultemeyer expressed anxiety that being a custodian at a large school would be too stressful. Bultemeyer obtained a doctor's note which suggested placement at a less stressful school, but the employer had already terminated Bultemeyer for failure to return to work.

The Bultemeyer court cited Beck in requiring both parties to work together to determine a reasonable accommodation. The court went so far as to find that the employer had the duty to initiate the interactive process.

Because the employer neither considered Bultemeyer's doctor's note, nor inquired with Bultemeyer or his doctor how to reasonably accommodate him, the employer had acted in bad faith and thus caused the interactive process to breakdown. If the doctor's note was too ambiguous, the employer could have requested a clarification. The court held "if it appears that the employee may need an accommodation but does not know how to ask for it, the employer should do what it can to help". The court noted that it placed the burden on employers to "take the small step of inquiring". Further, the court noted that "it seems eminently reasonable that [the employer] would. . . call his doctor".

In McAlpin v. National Semiconductor Corp., supra, an employer repeatedly asked McAlpin to get more specific medical information the employer needed to make a reasonable accommodation determination. McAlpin failed to respond to these requests. Under such circumstances, the breakdown of the interactive process was not the fault of the employer.

Similarly, in Breiland v. Advance Circuits, Inc., supra, when the court isolated the cause of the breakdown of an interactive process, it found that since the employer had communicated both with Breiland and his doctor, the responsibility for the breakdown was the employee's.

Turning to the facts of the present case, we recognize that the circumstances present are novel. Instead of an employee developing a disability and requesting an accommodation for the job they have been performing, Weber had been successfully working in her job from July 20, 1987, until March 1, 1999, a period of over 11 years. In Weber's case, her medical condition only came up when she, in effect, asked for an accommodation by not being required to cross-train in the cash room.

When Weber raised the general concern that she could not physically handle lifting bags of coins all day, she was instructed to update the doctor's note of July 8, 1987. At this point Canteen made its first misstep. Whenever an employee is simply asked to get new information from a doctor without specific guidance, this will invariably lead to an inadequate and incomplete response from the employee's doctor. Not surprisingly the February 26, 1999, note Weber

obtained from Dr. Cautilli merely stated that Weber. . . should avoid lifting or bending activities. . ."

In Gerdes v. Swift-Eckrich, Inc., 6 A.D.C. 635, 651 (N.D. Iowa 1996), the court found that an employer who strictly reads a work restriction, in the absence of other clarification should not be penalized because it is not acting on "myths" or "stereotypes" but upon a careful, if perhaps overly cautious reading of a treating physician's restriction. Here, Canteen argues that it was literally relying on Cautilli's general restrictions when it determined Weber could no longer perform the duties of her job.

However, under the facts present here, we find that it was not reasonable for Canteen to unilaterally rush to determine that Weber could no longer do a job she had been doing successfully for over 11 years. When Weber went to Cautilli, she, in effect, asked Cautilli if she could repeatedly lift bags of coins in the coin room. Weber believed the whole purpose of being told to get an updated medical review was to assess whether she should be cross-trained in the coin room. Clearly, Weber in no way understood that a restriction prepared by Cautilli would be used to evaluate her accounting clerk duties.

When Canteen received Cautilli's February 26, 1999 note, Gaber and Britten unilaterally concluded that Weber could not perform any job at Canteen. Instead of engaging Weber in a flexible interactive process, Weber was brought into Britten's office where she was confronted by her supervisor, McCluskey, McCluskey's supervisor, Delasandro, and the General Manager, Britten. Also in the room was another department's supervisor, Eastlack. There Weber was thinking that a decision was about to be made regarding whether she would be exempt from cross-training in the coin room. Instead, Gaber simply read Weber Cautilli's note over the speaker phone and told Weber that Britten had gathered that Weber could not lift a pencil or pick up a piece of paper. The evidence reveals all Gaber asked Weber was if she did bending and lifting in her current job and Weber replied she did.

Still, Weber understandably believed the question was whether she would have to cross-train in the coin room. At the conclusion of the meeting, Weber was merely told that Britten would get back to her after a decision had been made.

The record, considered as a whole, reveals that there was nothing about the meeting on February 26, 1999, in Britten's office, which explored issues regarding Weber's ability to continue performing the job duties of her accounting clerk position. McCluskey testified that she thought the purpose of the meeting with Weber was to be sure Weber understood Cautilli's note and to give Weber a chance to ask her doctor to be more specific. (N.T. 314). Additionally, Eastlack testified that Weber had been asked if she wanted to take the note back to her doctor to get it revised and that Weber declined. (N.T. 266).

Had Weber been requested to go back to her doctor for clarification of the February 26, 1999 note, then Weber might have some responsibility for the required interactive process breaking down. Canteen should have told Weber that it may have to read the note strictly which would mean that the question was no longer whether Weber could be cross-trained in the cash room, but even the job duties of Weber's position would be in question. However, Eastlack's testimony

was specifically contradicted by Gaber, and Delasandro, and Britten. Eastlack was merely in the room by chance and was simply a disinterested observer. Gaber, Delasandro and Britten, on the other hand, were directly involved in the matter at hand. Britten, Delasandro and Gaber each corroborated Weber's testimony that there had been no discussion about Weber obtaining an additional doctor's note. (N.T. 62, 187, 237, 286, 329). While this would have been the beginning of the reasonable thing to have done, Weber was not asked to get another doctor's note. More specifically, Canteen could have supplied Cautilli with Weber's job description identifying the essential job functions and asked for thorough information about any limitation Weber had and whether any accommodations could assist her performing her job.

Eventually clear is the fact that after receiving the February 26, 1999 doctor's note, no one from Canteen contacted Cautilli with questions and concerns. Under the circumstances, the responsibility for the breakdown of the requisite interactive process must be assigned to Canteen. During the meeting on February 26, 1999, Weber said very little. She said yes to Gaber's question regarding whether she did bending and lifting in her job. Beyond that, the evidence reveals that Canteen's managers spoke to Weber but did not engage her in thoughtful dialogue designed to make Weber aware that Canteen was looking at something far beyond whether Weber would be required to cross-train in the cash room. No one helped Weber understand how helpful it would be to have Cautilli review her job duties in the accounting clerk position and provide a clarifying note. Despite successfully performing the accounting clerk position for over 11 years, Canteen did not follow its own policy of seeking second and even third medical opinions. Finally, Canteen chose not to call Cautilli for clarification. Instead, Canteen left Weber confused and unaware of its concerns and ultimately made a unilateral decision that Cautilli's note prevented Weber from continuing as an accounting clerk.

On March 1, 1999, Weber was, in effect, terminated when she was told she would be paid for that day since she had come prepared for work but that Canteen had no job for her. While Britten testified that he told Weber that she was going out on a medical layoff and to let him know if her condition changed, his own notes written on March 1, 1999, say simply,

> "I informed Sophie Weber that due to the restrictions placed on her by her doctor, I was not able to allow her to continue work, and that she was now laid off. I also told her she would be paid for the day. She did not clock out". (C.E.16)

Britten's notes corroborate Weber's testimony that, in effect, indicates she was not told to let anyone know if her condition changed. Again, on March 1, 1999 Canteen had an opportunity to engage Weber in an interactive process but instead, Weber was sent away confused and devastated that she had been terminated from a job she had done without complaint for over 11 years.

A few days later Canteen sent Weber family medical leave forms. On March 31, 1999, Weber sent back the FMLA forms without completing them. Instead, what Weber did was to forward a physician's certification completed by Cautilli.

It is understandable that Weber would not complete the FMCA form as she did not consider herself in need of a medical leave. Cautilli's certificate dated March 8, 1999, was again general

as it related to restrictions. In effect Cautilli's note indicated that repeated bending and lifting should be avoided but that Cautilli considered Weber able to work as of February 28, 1999.

While Canteen suggests Cautilli's March 8, 1999, note was a "modest change" from his earlier note, this new note should have acted to open the interactive process that Canteen had effectively closed earlier. However, it did not. Although, after his conference call, Gaber had decided he needed more information from Weber regarding what her restrictions were, (N.T. 238-239), he failed to properly engage Weber in a meaningful interactive process. Instead, Canteen officially listed Weber as having been terminated as of April 23, 1999.

While Canteen argues that it "did nothing to prevent, obstruct or discourage [Weber] from providing information demonstrating [Weber's] ability to perform the essential job functions of an accounting clerk", after a careful fact-intensive analysis, we find that Canteen was responsible for the breakdown of the required interactive process throughout its interaction with Weber. Canteen neither worked openly or honestly with Weber to seek whether Weber's restrictions needed to be accommodated.

As of the February 26, 1999 meeting with Weber, Canteen failed to make reasonable efforts to help Weber became aware of Canteen's need for specifics with respect to Cautilli's notes about Weber's limitations.

Requiring employers to engage disabled employees in an interactive process is consistent with the remedial goals of the PHRA which attempt to ensure full participation in the workplace. Without an interactive process informational barriers will prevent an open and honest exchange of information which will enable a proper determination of whether reasonable accommodations can be made in specific situations. Here, Canteen is liable for failure to reasonably participate in the requisite interactive process. Accordingly, we consider an appropriate remedy.

Section 9(f)(1) of the PHRA generally outlines the remedies the PHRC is authorized to order. This section 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 findings 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. . . reinstatement. . . with or without back pay. . . 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 she would have been, absent the discriminatory practice. See Albemarle Paper Co. v. Moody., 422 U.S. 405, 10 FEP 1181 (1975); PHRC v. Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. S. Ct. 1973).

First, it is clear that a general cease and desist order is appropriate. Additionally, the facts of this case present the issue of whether reinstatement is an appropriate remedy. The Respondent's brief argues that Weber chose to retire and the brief in support of the complaint argues for reinstatement. Clearly, reinstatement is not a mandatory remedy upon a finding of a discriminatory discharge, but is instead an equitable remedy whose appropriateness depends upon the discretion of the fact finder in light of the facts of each individual case. Ginsberg v. Burlington Industries, Inc., 24 EPD ¶18,115, 500 F. Supp. 696 (S.D.N.Y. 1980).

Here, Weber testified that she did not want to leave her job with Canteen. Further, Weber offered testimony that she would work for Canteen. Accordingly, reinstatement should be ordered.

This brings us to the remaining issue – back pay. Of course, the ultimate focus regarding this remedy is what is the proper amount to be awarded. We begin this inquiry by recognizing that a loss must first be shown. Clearly, had Weber continued working she would have been paid the hourly rate of $11.35 per hour for 40 hour work weeks.

However, before calculating Weber's back pay, we turn to the question of what duty a Complainant has to mitigate damages following a discriminatory discharge. See eg. Kaplan v. Int'l Alliance of Theatrical & State Employees & Motion Picture Machine Operators., 525 F. 2d 1354, 10 EPD ¶10,504 (9th Cir. 1975); 10th Cir. EEOC v. Sandia Corp., 639 F.2d 600 (1980); Thurber v. Jack Reilly's Inc., 26 EPD ¶32,109; 521 F. Supp 238 (D Mass. 1981); EEOC v. Kallir, Phillips, Ross, Inc., 12 EPD ¶11,253, 420 F. Supp 919 (S.D., N.Y. 1976); Marks v. Prattco, Inc., 24 EPD ¶31,477, 633 F. 2d 1122 (5th Cir. 1981).

In prior PHRC cases, the PHRC has exercised its discretion in the remedy area by reducing back pay awards because Complainant's mitigation efforts have been insufficient. Ore v. Albert Einstein Medical Center., Docket No. E-19935 (Pa. Human Relations Commission, February 9, 1984) affirmed, 87 Pa. Cmwlth. Ct. 145, 486 A.2d 575 (1985); Mebane v. Reading Eagle Co., Docket No. E-30222-D (Pa. Human Relations Commission, June 28, 1990); and Saidu-Kamara v. Parkway Corporation., Docket No. E-77300-D (Pa. Human Relations Commission, January 27, 2000).

Here, Canteen argues that Weber failed to mitigate her damages in two ways. First, Canteen submits that Weber limited her efforts to find a job to the Northeastern Philadelphia area. Second, Canteen submits that for the first six months after Weber's termination, her efforts were not serious and that after six months Weber decided to do volunteer work and ceased her efforts to find employment.

On the question of limiting her job search to the Northeastern Philadelphia area, Weber indicated she did this because she did not like driving to downtown Philadelphia on Interstate 95 and that parking in Philadelphia was too expensive. Canteen points out that Weber had a car and a license and that Weber's husband worked in downtown Philadelphia and drove daily to center city. Canteen asserts that Weber could have ridden to the city with her husband. In effect, Canteen asserts that Weber did not use reasonable efforts to mitigate her damages.

Administrative notice is taken of the vast area covered by the Northeast Philadelphia area. Weber worked for Canteen in Northeast Philadelphia and, under the circumstances, Weber's limiting her search to that area cannot be termed "unreasonable".

On the question of Weber's admitted abandonment of a search for other employment after six months, Weber offered that her self-esteem was low, she was 60 years of age, and she felt she was not useful anymore. Also, Weber indicated she was concerned about how she would explain to a prospective employer what had caused her to leave Canteen.

In the case of Bossalina, et al v. Lever Brothers Co., 40 EPD ¶36,250 (D.C.Md.1986), several Complainants maintained that their failures to use reasonable diligence to find employment was that they had suffered such emotional distress from their discharges that they were unfit to look for other work. The court held that such an excuse is insufficient as a matter of law.

In the present case, Canteen's back pay liability should be terminated at the point Weber abandoned her search for other employment. As a result, Weber's back pay award is calculated as follows:

$11.35 per hour x 40 hours x 26 weeks= $11,804

As to whether unemployment benefits and short-term disability payments Weber had received should be deducted, we find that they should not. In the Third Circuit, courts have carved out an exception to what has come to be known as the "collateral source rule". Under the collateral source rule, payments under Social Security, unemployment compensation and similar programs are normally treated as collateral benefits which would not ordinarily be set off against damages awards. See, Craig v. Y&Y Snacks, Inc., 721 F.2d 77, (3rd Cir. 1983); and Maxfield v. Sinclair Int'l, 766 F. 2d 788, 38 FEP 442 (3rd Cir. 1985).

Finally, the PHRC is authorized to award interest on the back pay award. Goetz v. Norristown Area School District, 16 Pa. Cmwlth. Ct. 389, 328 A.2d 579 (1975). Until January 1, 2000, interest shall be computed using that rate of six percent. For the period of calendar year 2000, the interest rate shall be eight percent and from 2001 until the back pay award is paid, the interest rate shall be nine percent. (Computation of interest penalties, Act 1982-266 Amended).

Accordingly, relief is ordered as directed with specificity in the final order which follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SOPHIE MARIE WEBER, Complainant

v.

CANTEEN CORPORATION DIVISION OF COMPASS GROUP, Respondent

DOCKET NO. E90886AH

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

UPON**,** consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Weber has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Stipulations of Fact, 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.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

SOPHIE MARIE WEBER, Complainant
v.
CANTEEN CORPORATION DIVISION OF COMPASS GROUP, Respondent

DOCKET NO. E90886AH

FINAL ORDER

AND NOW, this 22nd day of April 2002, after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Commission Act, hereby approves the foregoing Stipulations of Fact, Findings of Fact, Conclusions of Law and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the Stipulations of Fact, 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

O R D E R S

1. That Canteen shall cease and desist from failing to engage disabled employees in an interactive process.
2. That Canteen shall pay to Weber within 30 days of the effective date of this Order the lump sum of $11,804.00, which amount represents back pay lost for the six month period after Weber's termination on March 1, 1999.
3. That the Respondent shall pay additional interest of six percent per annum on the back pay award, calculated from March 1, 1999 until December 31, 1999, and interest at the rate of eight percent for calendar year 2000, and interest at the rate of nine percent thereafter.
4. That Canteen shall offer Weber instatement into the next available position of accounting clerk or an equivalent position.
5. That, within 30 days of the effective date of the Order, Canteen shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Charles L. Nier, III, Esquire, in the Commission's Philadelphia Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Carl E. Denson, Chairperson

ATTEST:
Gregory J. Celia, Jr., Secretary