COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON, Complainant v. CONCERN PROFESSIONAL SERVICES, Respondent	:	PHRC CASE No. 200200400

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING PANEL

FINAL ORDER

FINDINGS OF FACT *

1. Complainant, Ezekiel V. Wilson, (hereinafter "Wilson"), is an African American individual. (N. T. 1 at 26-28).

2. Respondent, Concern Professional Services (hereinafter "Concern"), provided services for adjudicated youth in a unit called the Concern Treatment Unit for Boys II ("CTUB II") located at a facility in Westfield, Pennsylvania. (N. T. 1 at 285).

3. Concern employed two types of counselors at this location: full time and supplemental. Full time counselors worked a regular schedule; supplemental counselors worked as-need. Supplemental counselors worked unplanned shifts in response to the immediate coverage needs of the program, including replacing sick employees and in emergency situations. (N. T. 2 at 96, 111; N. T. 3 at 51, 57).

4. Wilson was hired on or about May 10, 2000, as a supplemental counselor at the Concern's Westfield location. (C. E. 9: N. T. 1 at 123-124).

5. Wilson was the only African American counselor hired by Concern. (N. T. 1 at 65-66).

*** To the extent that the Opinion which follows develops facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:**

N.T. 1	**Notes of Testimony – Volume 1**
N.T. 2	**Notes of Testimony – Volume 2**
N.T. 3	**Notes of Testimony – Volume 3**
C.E.	**Complainant's Exhibit**
R.E.	**Respondent's Exhibit**

6. Wilson also told his supervisors he would like a promotion to a new position as a "fitness instructor" in a gym he owned. (N. T. 2 at 94-95, 107-108).

7. Andrew Hirak (hereinafter "Hirak") was employed as a Case Manager at Concern, from February 1999 to September 2001. (N. T. 1 at 257).

8. Case Managers were responsible for all aspects of a client's stay with the program. (N. T. 1 at 261).

9. Hirak testified that Concern filled many open positions after oral applications and that Concern did not require applications for employment to be in writing. (N. T. 1 at 69, 274). (N. T. 1 at 781.

10. Hirak testified that Wilson informed him of his desire for a promotion to full-time counselor. Hirak and other managers had discussed Wilson's desire for a full-time position at meetings. (N. T. 1 at 173).

11. Employees in administrative positions such as the Home Group Director, Assistant Home Group Director, and Case Managers were primarily responsible for scheduling supplemental counselors. Occasionally, senior full time counselors took on this duty. (N. T. 1 at 230).

12. The criteria used to call supplemental counselors included determining which supplemental counselor would most readily come into work and which counselor they perceived appropriate for a given situation. (N. T. 1 at 259).

13. On a weekly basis, administrators rotated the duty of calling in supplemental counselors. However, Hirak took on this duty more often than others. (N. T. 1, at 258).

14. Hirak was familiar with Wilson's availability. (N. T. 1 at 258).

15. Hirak testified that from May 2000, the date of Wilson's hiring, until September 2001, the date that Hirak's employment ended, Wilson was available to work 90-100% of the time. (N. T. 1 at 258).

16. David Niles (hereinafter "Niles") worked for Concern as a full-time counselor from February 1999 until 2005. (N. T. 1 at 209).

17. As a shift-supervisor, Niles sometimes called supplemental counselors into work. (N. T. 1 at 230).

18. Niles estimated that Wilson was available for work 75% of the time. (N. T. 1 at 214).

19. Cathy Merengo (hereinafter "Merengo") worked as a senior full-time counselor from June 21, 2000 until May 6, 2001, when she voluntarily became a supplemental counselor. (N. T. 1 at 237).

20. Merengo testified that when she would call Wilson was available 80% of the time. (N. T. 1 at 238).

21. Wilson frequently volunteered time at Concern by coming into work even when he was not scheduled. He not only volunteered during his employment but also after his employment ended. (N. T. 1 at 264; N. T. 3 at 132).

22. Connie Wilson, Wilson's spouse, testified that she called Concern bimonthly to inquire about the shifts Concern made available for her husband. (N. T. 3 at 105-109).

23. She further testified that invariably she answered calls coming into the household and that she always returned calls right away upon finding a message left on the answering machine. (N. T. 3 at 105-109).

24. Wilson supplied Concern with phone numbers at home and at his gym to facilitate contact for supplemental duty. (N. T. 1 at 57).

25. Concern's Home Group Director Byron Lee (hereinafter "Lee") passed Wilson's gym on his commute to and from work. Lee would sometimes stop at the gym if he needed to talk to Wilson. (N. T. 2 at 129).

26. Jeff Persing, (hereinafter "Persing") became Assistant Home Group Director in May, 2001.

27. Concern's time records show that Wilson worked an average of 29 hours per week in 2000 and 19 hours per week in January and February of 2001. (N. T. 1 at 128).

28. After February 2001, 12 consecutive weeks passed where Wilson did not work. (R. E. 11, 12; N. T. 1 at 130).

29. In terms of job performance, Wilson enjoyed a great rapport with the adjudicated youths with whom he worked. (N. T. 1 at 239).

30. Universally, Supervisors considered him one of their best supplemental counselors. (N. T. 238)

31. Merengo testified that Wilson was one of the top 2 or 3 strongest counselors with regard to behavioral situations. (N. T. 1 at 238).

32. Niles thought very highly of Wilson, considering him to be highly effective in disciplinary matters. N. T. at 215).

33. Hirak considered Wilson's job performance outstanding. (N. T. 1 at 261).

34. Merengo testified that Concern conducted weekly staff meetings. Full time counselors were generally expected to attend; supplemental counselors rarely, were not expected to attend and did. (N. T.1 at 253)

35. Concern circulated daily reports at staff meetings. (N. T. 1 at 251).

36. Edgar Allen (hereinafter "Allen") was hired as a full-time counselor on January 3, 2002. (N. T. 2 at 108-109).

37. Marc Case (hereinafter "Case") was promoted to full-time counselor from supplemental counselor on January 27, 2002. C. E. 11, N. T. 3 at 65, 67, 69).

38. After Case's promotion, he worked 40 hours per week at a rate of $10.05 per hour. (N.T. 3 at 67-69)

39. Both Allen and Case are white individuals. (N. T. 3 at 67-69).

40. Department of Public Welfare (hereinafter "DPW") regulations required Concern to retain employee medical records, each employee needed to submit biannually as a condition of their employment. Concern exercised discretion in allowing employees to turn in their required medical form beyond the two year deadline. (N. T.1 at 227-228).

41. Merengo returned her requisite medical past the two-year deadline. Merengo testified that Persing permitted her to turn it in late. (N. T. 1 at 245).

42. Jamie Martin (hereinafter "Martin") worked as a full-time counselor from December 2000 to July 2005. (N. T. 1 at 279).

43. Martin testified that it was not an employee's responsibility to procure the medical form. Rather, Concern would inform employees when it was time for an employee to renew their required medical information. (N. T. at 279).

44. Concern informed employees both orally and in writing. (N. T. 1 at 279).

45. On May 2, 2002, Julie Franey (hereinafter "Franey"), Human Resources Officer for Concern, issued Wilson a memo informing him that he was to be prohibited from being scheduled until such time as his medical form was received . (R. 15, N. T. 2 at 16).

46. On May 3, 2002, Franey issued another memo to Wilson telling him of his termination purportedly because of his unavailability, failure to communicate with supervisors, failure to turn in required medical forms, and the administrative burden of keeping supplemental counselors on the payroll system. Franey's memo characterized the termination as a "voluntary resignation". (R. E. 16; N. T. 2 at 24).

47. On from February 2, 1993, Glenn Godshall, former Human Resource Director, notified employees of a new policy establishing that any employee who did not work for six consecutive pay periods would be removed from the payroll. (N. T. 1 at 302; R. E. 13).

48. Franey testified that she based her determination of Wilson's alleged unavailability solely on her discussions with Persing and an application of the "6 Month Rule" to Wilson. (N. T. 2 at 58).

49. This policy was commonly known as the "6 Month Rule". (N.T. 2 at 58)

50. However, this policy was not strictly adhered to. In practice, many employees were not removed from the payroll, even though they had not worked in over six pay periods. (N. T. 1 at 305).

51. In a letter dated May 9, 2002, Wilson requested reinstatement. He wrote that he was not familiar with the medical form deadline. (C. E. 7; N. T. 2 at 33).

52. Soon after becoming aware of the requirement to submit medical information, Wilson obtained and forwarded the requisite physician's medical certificate to Concern. (N. T. 1 at 206).

53. Wilson's request for reinstatement was denied. (N. T. 2 at 33; C. 7; R.17).

54. The Westfield facility was closed in August 2005. (N. T. 1 at 285).

55. With the exception of working for one month at Eagle Foods, subsequent to his termination, Wilson testified that he earned no other income. (N. T. 1 at 154).

56. Wilson testified that he registered with an employment agency, sought employment through placing phone calls, made personal visits, sent letters of interest, and submitted applications for employment. (N. T. 1 at 169).

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties, and the subject matter of the complaint under the Pennsylvania Human Relations Act (hereinafter "PHRA").
2. The parties have fully complied with the procedural prerequisites to a public hearing in this matter.
3. Wilson is an individual within the meaning of PHRA.
4. Concern is an employer within the meaning of the PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. The PHRA prohibits employers from discriminating against individuals because of their race.
7. Wilson established a *prima facie* case of a failure to promote based on race by establishing:
    a. that he is a member of a protected class;
    b. that he was qualified for and sought a promotion to a full-time counselor position;
    c. that he was not promoted
    d. that others who were similarly situated and not members of his protected class were promoted.
8. Concern met its burden of production by articulating that Wilson was not promoted because he did not apply for a full time position.

9. Wilson has established by a preponderance of the evidence that Concern's articulated reason for failing to promote Wilson to a position of full-time counselor was pretextual.

10. Wilson established a *prima facie* case of a race based discharge by establishing:

    a. that he is a member of a protected class;

    b. that he was qualified for the position;

    c. that he was subjected to an adverse employment decision; and

    d. that the adverse action occurred under circumstances which give rise to an inference of discrimination.

11. Concern met its burden of production by articulating legitimate non-discriminatory reasons for terminating Wilson that included:

    a. Unavailability;

    b. Communication shortcomings; and

    c. Failure to timely provide a health certificate.

12. Wilson established by a preponderance of the evidence that Concern's reasons are pretextual.

13. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC may issue a cease and desist order and order such affirmative relief as in its judgment will effectuate the purposes of the PHRA.

OPINION

This case arises on a complaint filed by Ezekiel V. Wilson (hereinafter "Wilson") against Concern Professional Services (hereinafter "Concern") on or about July 23, 2001 at PHRC Case No. 2002020400. In his complaint, Wilson alleges that Concern unlawfully discriminated against him based on his race both when it failed to promote him and when it subsequently discharged him. Wilson alleges that Concern's actions violated Section 5(a) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 774, 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 Wilson's allegations of discrimination. Subsequently, the PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation, and persuasion. However, these efforts were unsuccessful. This case was approved for public hearing. The Public Hearing was held before a three member panel of Commissioners on January 24, January 25, and June 27, 2007. Reverend James Earl Garmon, Sr., was the Hearing Panel Chairperson, and the other two panel members were Commissioner David A. Alexander and Commissioner Toni M. Gilhooley. The parties submitted post-hearing briefs, including a pro se brief filed by Ezekiel Wilson, received on September 10, 2007.

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

> It shall be an unlawful discriminatory practice . . . for any employer because of the . . . race 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)).

Generally, Complainants may prove race-based disparate treatment in two ways: (1) by presenting direct evidence of discrimination under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); or (2) by presenting indirect evidence of discrimination under McDonnell Douglas Corp., v. Green, 411 U.S. 792 (1973). See Sarullo v. United States Postal Services, 352 F. 3d 789, 797 (3d Cir. 1003) Because there was no direct evidence, we will proceed under the McDonnell Douglas framework.

Under the familiar McDonnell Douglas three-step analytical framework for proving intentional disparate treatment racial discrimination, Wilson must first demonstrate a *prima facie* case of discrimination for the failure to promote and the termination. Once such a showing has occurred, the burden of production shifts to Concern to articulate a legitimate non-discriminatory reason both for its decision to terminate and for its failure to promote Wilson. If Concern meets its burden of production, Wilson must then demonstrate that Concern's articulated reasons are pretextual. Ultimately it is always the Complainant's burden of persuading the fact finder by a preponderance of the evidence that the employer intentionally discriminated. Drew v. Pennsylvania Human Relations Commission, 686 A 2d 274 (Pa. Cmwlth. 1997), citing Allegheny Housing Rehabilitation Corp., v. Commonwealth, Pennsylvania Human Relations Commission, 516 Pa. 124, 532 A 2d 315 (1987).

Both Wilson and Concern's post-hearing briefs reference the McDonnell Douglas scheme for each count of the complaint: (1) failure to promote and (2) termination. We will address each count separately.

A. Failure to Promote

In order to establish a *prima facie* case of a race based failure to promote claim, Wilson must show:

a) that he is a member of a protected class;

b) that he sought and was qualified for a full-time counselor position and applied;

c) that he was not promoted; and

d) others who were similarly situated and not members of his protected class were promoted.

First, as an African American, Wilson clearly is a member of a protected class. Secondly, Wilson meets the second prong of the *prima facie* showing because he is qualified and continually sought a full-time position. The record reflects that Wilson was considered a "valued employee" by his supervisors and co-workers. A critical duty of a counselor was attending to needed discipline of those under Concern's care and Wilson was considered very good in resolving disciplinary matters and having great rapport with the adjudicated youth. (N. T. 1 at 215, N. T. 1 239). It is abundantly clear from the record that Wilson was qualified for the position.

In regard to whether Wilson sought the position, the record is equally clear. Wilson creditably testified that he, throughout his employment, repeatedly told his supervisors of his desire to be promoted to a full-time counselor. Andrew Hirak (hereinafter "Hirak"), a case manager for Concern, testified that Concern not only did not require applications for employment to be in writing, but Concern filed many positions following oral requests. (N. T. 1, 69, 274). Hirak also testified that Wilson repeatedly spoke to him about his desire to be promoted to

full time counselor. Accordingly Wilson was qualified and did seek for a full time position.

Next, Wilson meets the third prong of the *prima facie* showing. He did suffer an adverse employment action when he was not promoted to a full time counselor. In order to constitute an adverse action, an employment decision must be "serious and tangible enough to alter an employee's compensation, terms, conditions or privileges of employment." Grande v. State Farm Mutual Auto Insurance Co., 83 F. Supp 2d 559, 564 (E. D. Pa. 2000), quoting Robinson v. Pittsburgh, 120 F 3d. 1286, 1300 (3rd Cir. 1997). After repeated requests by Wilson, Concern did not promote him. Therefore, Wilson has met the third prong of the *prima facie* showing.

Wilson meets the final element of the requisite *prima facie* showing in that Concern continued to consider and promoted individuals outside of Wilson's protected class. For example, a white co-worker, Marc Case, was promoted to full-time counselor from supplemental counselor on January 27, 2002. In addition another white person, Edgar Allen was directly hired as a full-time counselor on January 3, 2002. The record before the Commission certainly reflects that at the very least, Wilson is qualified as Case and Allen. Based on the all of the above, Wilson has met his burden of establishing a *prima facie* case of failure to promote because of race.

Since Wilson has met his burden of establishing a *prima facie* case, a burden of production shifts to Concern to "articulate a legitimate non-discriminatory reason for its action" in failing to promote Wilson. Concern asserts that the reason for failing to promote Wilson was that Wilson never formally

applied for a full time position. Concern, by articulating this reason for its action, has successfully met its burden of production.

Since Concern has met its burden of production, in order to prevail, Wilson must demonstrate that Concern's articulated reason is a pretext for discrimination. Also, Wilson retains the ultimate burden of establishing by a preponderance of the evidence that he is the victim of unlawful discrimination.

As aforementioned, Concern's stated reason for not promoting Wilson is that he never applied for a full-time position. Concern's post-hearing brief attempts to selectively read the record in this regard. Concern cites the testimony of Byron Lee as evidence that "Wilson would have absolutely been seriously considered for a full-time position, had he only applied for one." (N. T. 2 at 112-113). However, the record reflects that Wilson repeatedly told his superiors he wanted a full-time position. The record is clear that Concern filled positions after employees expressed interest without submitting a written application. In fact Lee admitted that Wilson may have indeed expressed interest in a full-time counselor position. (N. T. 2 at 108).

Jeffrey Persing, one of Wilson's later supervisors, testified that Wilson told him he did not want a full-time position. (N. T. 3 at 21). However, the record considered as a whole indicates that Persing's testimony is simply not credible on this point. There is substantial credible testimony that Wilson made numerous requests for a full time position and was constantly rebuffed. Accordingly Wilson has shown that Concern's proffered reason for failing to promote him is pretextual.

B. Unlawful Discharge

Next, we move to Wilson's second count alleging that Concern's termination of him constitutes a race-based discharge under the PHRA. In order to establish a *prima facie* case of race based discharge, Wilson must show:

1) that he is a member of a protected class;

2) that he was qualified for the position;

3) he was subjected to an adverse employment decision; and

4) the adverse action occurred under circumstances giving rise to an inference of discrimination.

The record before the Commission reflects that Wilson, an African American male, is a member of a protected class and was qualified for the job he was performing. Wilson was certainly subjected to an adverse employment decision when he was discharged. Lastly Wilson was terminated under circumstances that give rise to an inference of discrimination. In the instant case, a review of the record indicates that Concern created the scenario where Wilson was not considered available for work and did not communicate with supervisors. The circumstances herein reflect that Wilson was available and creates an inference of discrimination.

Since Wilson has met his burden of establishing a *prima facie* case, the burden of production shifts to Concern to "articulate a legitimate non-discriminatory reason" for the discharge. Concern asserts that Wilson was terminated because he was unavailable for work, he failed to communicate with his supervisors and Wilson failed to timely provide a health certificate. These articulated reasons meet Concern's burden of production in this case.

Since Concern has met its production burden, the burden of persuasion shifts back to Wilson. Wilson retains the ultimate burden of proving by a preponderance of the evidence that he is a victim of discrimination. Wilson may accomplish this by showing that Concern's proffered reasons are pretextual.

In regard to Wilson allegedly being unavailable for work, the record is replete with evidence of his availability. Employees in administrative positions such as the Home Group Director, Assistant Home Group Director, and Case Managers were primarily responsible for scheduling supplemental counselors. Occasionally, senior full time counselors also took on this duty. (N. T. 1 at 230). Administrators had discretion to call supplemental counselors into work. Their criteria included determining which supplemental counselor would most readily come into work and which counselor they perceived appropriate for a given situation. (N. T. 1 at 259). Administrators rotated the duty of calling in supplemental counselors. However, Hirak took on this duty more often than others. Accordingly, of all Concern Administrators, Hirak was in the best position to provide credible evidence regarding whether Concern had an issue with Wilson's availability. (N. T. 1 at 258).

Hirak testified that from May 2000, the date of Wilson's hiring, until September 2001, the date that Hirak's employment ended, Wilson was available to work 90-100% of the time. (N. T. 1 at 258). Of the several criteria used regarding which person to call, Hirak not only was impressed with Wilson's work performance, he also knew that, of potentially available supplemental counselors, Wilson would most likely be available. Others in a position to schedule supplemental counselors for work gave equally laudable assessments of Wilson's availability. David Niles (hereinafter "Niles") worked for Concern as a

full-time counselor from February 1999 until 2005. (N. T. 1 at 209). As a shift-supervisor, he sometimes called supplemental counselors into work. (N. T. 1 at 214). Niles testified that Wilson would be available at least 75% of the time he called him. This percentage of availability was considered satisfactory. Niles' favorable appraisal is especially relevant because he was often the one who called Wilson throughout the entire duration of Wilson's employment.

Cathy Merengo (hereinafter "Merengo") worked as a senior full-time counselor from June 21, 2000 until May 6, 2001, when she voluntarily became a supplemental counselor. She resigned on October 17, 2002. Merengo testified that she would typically call in supplemental counselors when she worked as a full-time counselor. (N. T. 1 at 237). Merengo testified that Wilson was available 80% of the time when she would call. (N. T. 1 at 238).

As a side issue with respect to availability, Wilson frequently volunteered time at Concern by coming into work even when he was not scheduled. He volunteered not only during his employment but also after his employment was terminated. (N. T. 1 at 264; N. T. 3 at 132). Connie Wilson, Wilson's spouse, testified that she called Concern bimonthly to inquire about the shifts Concern made available to her husband. She further testified that she normally answered calls in the household and that she always returned calls right away upon finding a message left on the answering machine. (N. T. 3 at 105-109).

Wilson furnished Concern with phone numbers at home and at his gym so that he might more readily be contacted for supplemental duty. Lee would sometimes stop at the gym if he needed to talk to Wilson.

The preponderance of the evidence shows that Wilson was indeed available for work when needed and had consistently communicated with his

supervisors. In regard to Wilson's initial failure to provide a health certificate, Wilson clearly notified Concern, through Franey, that he was unaware of the need for the medical form. In addition, once notified, he indicated his willingness to complete the form as soon as possible. It is interesting to note that when Franey initially provided Wilson with written reasons for his termination, she did not include the medical form issue. However, at the Public Hearing, she offered this issue for the first time. Upon review of the entire record in this matter, Wilson has met his ultimate burden of persuasion by showing that Concern's proffered reasons are pretextual.

Having found that Wilson has shown unlawful discrimination under the Act, we now move to the issue of determining the appropriate remedy in the instant case. The Commission has broad discretion in fashioning of an appropriate remedy. Section 9(f)(1) of the Act provides, in pertinent part:

> upon all the evidence at the hearing, the Commission should find that a Respondent has engaged in or is engaging in any unlawful discriminatory practice as decided that this Act, the Commission shall state its findings of fact and shall issue and cease to be served on such a 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 or upgrading of employees with or without back pay . . . and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice.

The remedy serves two purposes. The first purpose is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. That interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injury party to his/her status before the discriminatory actions and make him/her whole. Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582

A.2d 702, 708 (1990): Williamsburg Community School District. v. Pennsylvania Human Relations Commission, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986).

In the instant matter, the specific nature of the first prong of remedy is very clear. Concern Professional Services should be ordered to cease and desist from discriminating against individuals because of their race in regard to promotion and termination from employment.

Secondly, Wilson is entitled to an award of back-pay. It is axiomatic that the calculation of the back pay award need not be exact. The purpose of any remedy is to make the injured party whole. Consolidated Rail, supra. In the instant case, the only proper measurement of a back-pay award would be the earnings of a full-time counselor at Concern's Westfield site. The record reflects that Marc Case (hereinafter "Case") was hired as a full-time counselor on or about January 27, 2002. Clearly, Concern had a need for full-time counselors in January 2002. Since Wilson was not promoted, and subsequently terminated in May 2002, the relevant time period for a determination of an appropriate back pay award begins in January 2002 and ends in August 2005, the point at which Concern's Westfield facility closed. A back pay award is cut off under these circumstances, as it shows that the plaintiff would have been laid off for permissible reasons by a particular date even if there had been no discrimination. Bhaya v. Westinghouse Electric Corp., 709 F. Supp. 600, 605 (E.D. Pa. 1989).

A full-time counselor's salary was $10.05 per hour for a 40 hour week. Had Wilson been elevated to full-time in late January 2002 and not subsequently terminated, he would have potentially remained a full-time counselor until August 2005. Accordingly the back pay lost is calculated as follows:

$10.05 x 40 hours per week = $402.00 per week lost

January 27, 2002 through August 2005 = 184 weeks

184 weeks @ $402.00 per week = $73,968.00 back pay lost.

Wilson is also entitled to an award of interest on the back pay. Brown Transport Corporation v. Comwlth. Human Relations Commission, 578 A.2d 555 (1990).

On the issue of mitigation of damages, Concern has the burden to establish that Wilson failed to mitigate his damages in order to limit a back pay award. Carlin v. Westinghouse Electric Corp., 850 F. 2d 1996, 1005 (3rd Cir. 1988). The standard used in determining mitigation is whether the complaining party exercised reasonable diligence in seeking employment. The complaining party need only show an honest, good faith effort at seeking employment. Brooks v. Woodline Motor Freight, Inc., 852 F. 2d 1016 (8th Cir. 1988). In this regard, Concern failed to meet its burden.

In the instant case, Wilson testified that he registered with an employment agency, Snelling and Snelling, sought employment through phone calls, personal visits, letters of interest and applications for employment. The record before the Commission indicates that Concern failed to establish that Wilson did exercise reasonable diligence and therefore, should be awarded back pay as previously calculated.

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

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PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON, **Complainant** **v.** **CONCERN PROFESSIONAL SERVICES,** **Respondent**	:	**PHRC Case No. 200200400**

RECOMMENDATION OF THE HEARING PANEL

Upon consideration of the entire record in the above-captioned matter, it is the Recommendation of the only remaining Hearing Panel Member that the Complainant has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. Accordingly, it is the Recommendation of the remaining Hearing Panel Member that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. Accordingly the remaining Hearing Panel Member recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: Rev. J. Earl Garmon, Sr.
Reverend James Earl Garmon, Sr.
Hearing Panel Chairperson

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EZEKIEL V. WILSON, **Complainant** **v.** **CONCERN PROFESSIONAL SERVICES,** **Respondent**	:	**PHRC Case No. 200200400**

FINAL ORDER

AND NOW, this 22nd day of July, 2008, 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 Hearing Panel Member Garmon. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion as its own findings in this matter and incorporates the 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 Concern Professional Services shall cease and desist from discriminating against individuals because of their race in regard to promotions and termination from employment.

2. That Concern Professional Services shall pay the Complainant, Ezekiel V. Wilson, the lump sum of $73,968.00 within 30 days of the effective date of this Order, which represents the back pay for the period of January 27, 2002 and August 2005.

3. That Concern Professional Services shall pay interest of six percent (6%) per annum on the back pay award from January 27, 2002 until the end of August, 2005.

4. That, within 30 days of the effective date of this Order, Concern Professional Services shall report to the Commission on the manner of their compliance with the terms of the Order by letter addressed to William Fewell, Assistant Chief Counsel in the Commission's Harrisburg Regional Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Stephen A. Glassman
Chairperson

ATTEST:

_____
Dr. Daniel D. Yun
Secretary