



## FINDINGS OF FACT\*

1. On or about October 13, 2010, Complainant, Amildar Contreras-Esquivel, (hereinafter "Contreras"), filed a PHRC Complaint against Mehadrin Kosher Poultry, d/b/a G&G Poultry, (hereinafter "Mehadrin"), in which Contreras alleged that Mehadrin threatened Contreras with termination and then terminated Contreras from his position as a Supervisor because of Contreras' national origin, Guatemala. (O.D. 1)
2. On January 25, 2011, the PHRC's Harrisburg regional office filed a Petition for a Rule to Show Cause. (O.D. 1)
3. On February 2, 2011, PHRC Motions Commissioner Dr. Raquel O. Yiengst issued a Rule to Show Cause which, in effect, notified Mehadrin that it had until March 4, 2011 to file an answer to Contreras' complaint. (O.D. 2)
4. Mehadrin neither filed an answer to Contreras' complaint nor responded to the February 2, 2011, Rule to Show Cause. (O.D. 4)
5. On March 9, 2011, Motions Commissioner Yiengst recommended to the full PHRC that Mehadrin be found liable for Contreras' allegations. (O.D. 4)
6. By Order dated March 29, 2011, the PHRC found Mehadrin liable for terminating Contreras because of his national origin, Guatamala. (O.D. 4)

\* 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 Facts. The following abbreviations will be utilized throughout these Findings of Fact for reference purposes:

N.T. Notes of Testimony  
O.D. Official Docket  
C.E. Complainant's Exhibit

7. A public hearing on the issue of what, if any, damages are appropriate was held on July 29, 2011, in Birdsboro, Pennsylvania. (N.T. 1)
8. As a Supervisor with Mehadrin, Contreras worked between 35 to 40 hours per week. (N.T. 13-14)
9. Contreras' last day of work at Mehadrin was June 29, 2010. (O.D.1)
10. At the time of his termination, Contreras was earning \$9.00 per hour. (N.T. 14,20)
11. Following his termination, Contreras began to search for a job. (N.T. 18-19)
12. On November 28, 2010, Contreras began employment with Tactical Services where he initially earned \$9.50 per hour. (N.T. 17, 22; C.E. 2)
13. For the first two months as an employee of Tactical Services, Contreras worked 30 hours per week. (N.T. 22)
14. During the public hearing, PHRC Attorney Bednarik declared that, in effect, subsequent to December 23, 2010, Contreras began to earn more than he would have earned had he remained employed with Mehadrin. (N.T. 22)
15. Contreras does not seek reinstatement. (N.T. 23)

## CONCLUSIONS OF LAW

1. A combination of Section 9(b)(3) of the Pennsylvania Human Relations Act and 16 Pa. Code §42.31(c) requires a Respondent to file a written, verified answer to a complaint within thirty days of service of the complaint.
2. 16 Pa. Code §42.31(d) declares that the failure of a Respondent to timely answer a complaint places a Respondent in default.
3. Under 16 Pa. Code §42.33, when a Respondent has not answered a complaint, a Rule to Show Cause may be issued.
4. Under Pa. Code §42.33(d)(4), when a Respondent does not respond to a Rule to Show Cause, the Pennsylvania Human Relations Commission ("PHRC") may make a finding of probable cause and enter a judgment for a Complainant on the issue of liability, to be followed by a public hearing on the issue of damages.
5. In this matter, Mehadrin's failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for Contreras on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.
7. The Commission may also order a Respondent to cease and desist from discriminatory practices and to take affirmative action as, in the judgment of the Commission, will effectuate the purposes of the PHRA.

## OPINION

This case arose on a complaint filed by Amildar Contreras-Esquivel, (hereinafter "Contreras"), against Mehadrin Kosher Poultry, d/b/a G&G Poultry, (hereinafter "Mehadrin"). Contreras' complaint alleged that he was threatened with termination and then terminated because of his national origin, Guatemala. Contreras' complaint states a claim under Sections 5(a) of the Pennsylvania Human Relations Act ("PHRA").

By correspondence dated January 25, 2011, the Pennsylvania Human Relations Commission ("PHRC") Harrisburg regional office petitioned Motions Commissioner Yiengst for a Rule to Show Cause, indicating that Mehadrin had not answered Contreras' complaint. The petition declared that Mehadrin had been served with Contreras' complaint on November 4, 2010. The petition further indicated that by correspondence dated January 5, 2011, an effort had been made to obtain an answer from Mehadrin.

On February 2, 2011, a Rule to Show Cause was issued, directing Mehadrin to respond on or before March 4, 2011. After no response was filed, on March 9, 2011, Motions Commissioner Yiengst recommended a finding of liability to the full PHRC.

On March 29, 2011, the full PHRC determined that Mehadrin unlawfully threatened to terminate Contreras and then terminated Contreras because of his national origin, Guatemala.

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

The public hearing on the issue of appropriate damages was held July 29, 2011, in Birdsboro, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Joseph T. Bednarik, PHRC Assistant Chief Counsel. Mehadrin failed to attend the public hearing.

Since liability had been found after Mehadrin failed to file an answer, the only question at the public hearing was what damages Contreras could establish.

Section 9(f) of the PHRA provides in pertinent part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to reimbursement of certifiable travel expenses in matters involving the complaint, hiring reinstatement...with or without back pay...and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice...as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The function of the remedy in employment discrimination cases is not to punish a Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which he would have been, absent the discriminatory practice. See

Albermarle Paper Co. v. Moody, 422 U.S. 405, 10 FEP Cases 1181 (1975); PHRC v. Alto-Reste Park Cemetery Association., 306 A.2d 881 (Pa. S. Ct. 1973).

The first aspect we must consider regarding making Contreras whole is the issue of the extent of financial losses suffered. When Complainants prove an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Company, Inc., 684 F2d 1355, 29 FEP Cases 1259 (11<sup>th</sup> Cir. 1982). A proper basis for calculating lost earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount [the complainant] would probably have earned..." PHRC v. Transit Casualty Insurance Co., 340 A.2d 624 (Pa. Commonwealth Ct. 1975), aff'd. 387 A.2d 58 (1978). Any uncertainty in an estimation of damages must be borne by the wrongdoer, rather than the victim, since the wrongdoer caused the damages. See Green v. USX Corp., 46 FEP Cases 720 (3<sup>rd</sup> Cir. 1988).

In this case, Contreras' termination claim involves a loss of wages less interim earnings following his termination. Had Contreras remained at Mehadrin, he would have continued to earn approximately \$615.10 every two weeks. C.E. 1 covers the 14 pay periods Contreras worked for Mehadrin between November 5, 2009 and May 7, 2010. In this period, Contreras worked a total of 837.74 hours or an average of 59.84 hours per pay period.

Here, Contreras indicated that at the time of his termination he was earning \$9.00 per hour. Accordingly, we calculate that had he remained at Mehadrin, on average, Contreras would have earned \$9.00 per hour x 59.84 hours per pay period = \$538.55 per pay period regular pay. To this we add an average amount for overtime he may have worked had he remained with Mehadrin. Over the 14 pay periods reflected in

C.E. 1, Contreras worked 79.42 hours overtime. Thus, on average, Contreras worked 5.67 hours overtime per pay period over the 14 pay periods covered by C.E. 1. If Contreras' regular pay was \$9.00 per hour at the time of his termination, his overtime rate would be \$13.50 per hour. Accordingly, Contreras would have earned \$13.50 x 5.67 hours per pay period = \$76.55 per pay period overtime pay.

Lost wages per pay period following termination are as follows:

Lost regular pay per pay period.....	\$538.55
Lost overtime per pay period.....	<u>\$76.55</u>
Total lost wages per pay period following termination.....	\$615.10

During the Public Hearing, a declaration was made that the period of lost back pay would only go until December 23, 2010, as, at that time, Contreras' earnings exceeded the amount he would have earned had he remained at Mehadrin.

Accordingly, Contreras' lost wages are calculated as follows:

12 ½ pay periods between termination and  
 December 23, 2010 @ \$615.10 per pay period ..... \$7,688.25

At the Public Hearing, Contreras established that, after his termination, he made reasonable attempts to mitigate his damages. The evidence shows that soon after being terminated by Mehadrin, Contreras began seeking alternate work. Eventually, on or about November 28, 2010, Contreras began to work with Tactical Services, Inc. The following lists Contreras' mitigation efforts and interim wages between his termination and December 23, 2010:

November 28, 2010 – December 4, 2010.....	\$285.00
December 5, 2010 – December 18, 2010.....	\$313.50
December 20, 2010 – December 23, 2010.....	<u>\$190.00</u>



TOTAL AMOUNT EARNED IN MITIGATION - ..... \$788.50

Deducting Contreras' interim wages from his lost wages, Contreras' back pay award should be \$6,899.75.

Finally, Contreras testified that he does not seek reinstatement. An appropriate order follows:

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

AMILDAR CONTRERAS-ESQUIVEL,  
Complainant

v.

MEHADRIN KOSHER POULTRY,  
d/b/a G&G POULTRY,  
Respondent

:  
:  
:  
: PHRC CASE NO. 201002217  
: EEOC Charge No. 17F201160091  
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RECOMMENDATION OF PERMANENT HEARING EXAMINER

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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

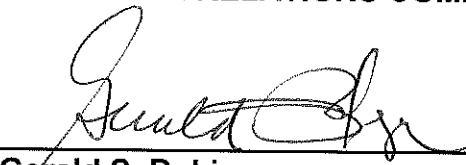
August 25, 2011  
Date

By:   
Carl H. Summerson  
Permanent Hearing Examiner




2. That Mehadrin shall pay Contreras the lump sum of \$6,899.75 which amount represents lost wages following Contreras' termination.
3. That Mehadrin shall pay additional interest of 6% per annum on the award in paragraph 2 above, calculated from December 23, 2010 until payment is made.
4. That, within thirty days of the effective date of this Order, Mehadrin shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Joseph T. Bednarik, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 1101-1125 S. Front Street, 5<sup>th</sup> Floor, Harrisburg, PA 17104-9184.

**PENNSYLVANIA HUMAN RELATIONS COMMISSION**

By:   
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**Gerald S. Robinson**  
Chairman

**Attest:**

  
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**Dr. Daniel D. Yun**  
Secretary