

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JASON SCOTT,	:	
Complainant	:	
	:	
v,	:	PHRC CASE NO. 201402479
	:	EEOC CHARGE NO. 17F201560296
SALES AND MARKETING GROUP, INC.,	:	
Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. On December 8, 2014, Complainant, Jason Scott (hereinafter “Scott”), filed a PHRC Complaint against Sales and Marketing Group, Inc. (hereinafter “Sales and Marketing Group”) In his Complaint, Scott alleged that Sales and Marketing Group terminated Scott because of his race, African American and his sex, male. (N.T. 8-9, 19-20; O.D. 3)
 2. On December 23, 2014, the PHRC Philadelphia regional office served Sales and Marketing Group with a copy of Scott’s PHRC Complaint. (O.D. 3)
 3. On February 4, 2015 and again on March 6, 2015, the PHRC Philadelphia regional office wrote letters to Sales and Marketing Group advising Sales and Marketing Group that if an Answer to Scott’s PHRC Complaint was not filed, Sales and Marketing Group would be found liable for Scott’s allegations. (O.D. 3)
 4. On March 30, 2015, the PHRC’s Philadelphia regional office filed a Petition for a Rule to Show Cause. (O.D. 3)
- 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. | Commission Exhibit |

5. On April 23, 2015, PHRC Motions Examiner Carl H. Summerson issued a Rule to Show Cause which, in effect, notified Sales and Marketing Group that it had until May 4, 2015, to file an Answer to Scott's Complaint. (O.D. 3)
6. A Sales and Marketing Group employee signed a PS Form 3811, indicating receipt of the certified mailing of the Rule to Show Cause. (O.D. 3)
7. To date, Sales and Marketing Group neither filed an Answer to Scott's Complaint nor responded to the April 23, 2015, Rule to Show Cause. (N.T. 9, 10; O.D. 3)
8. On May 5, 2015, Motions Examiner Summerson recommended to the full PHRC that Sales and Marketing Group be found liable for Scott's allegations. (O.D. 3)
9. By Order dated May 18, 2015, the PHRC found Sales and Marketing Group liable for Scott's allegations. (N.T. 10; O.D. 3)
10. Under cover letter dated September 16, 2015, Sales and Marketing Group filed a Motion for Extraordinary Relief to Re-Open Pre-Conciliation Proceedings and Excuse for Failure to Timely Answer and to Show Cause. (O.D. 3)
11. Under cover letter dated October 29, 2015, the PHRC Philadelphia regional office filed a Reply in Opposition to Respondent's Motion for Extraordinary Relief to Re-Open Pre-Conciliation Proceedings and Excuse for Failure to File a Timely Answer and to Show Cause. (O.D. 3)
12. Under cover letter dated October 29, 2015, Scott's private attorney filed a Response to Respondent's Motion for Extraordinary Relief. (O.D. 3)

13. By letter dated November 9, 2015, Sales and Marketing Group replied to both the PHRC Philadelphia response and Scott's private attorney's response to Sales and Marketing Group's Motion for Extraordinary Relief. (O.D. 3)
14. By Interlocutory Order dated November 10, 2015, Sales and Marketing Group's Motion for Extraordinary Relief was denied. (O.D. 3)
15. On November 10, 2015, the parties were notified that this case was approved for a Public Hearing on the limited issue of appropriate damages. (O.D. 3)
16. On November 24, 2015, Sales and Marketing Group filed with the Commonwealth Court a Petition For Review. (O.D.3)
17. By Order dated February 29, 2016, Commonwealth Court Judge Brobson, dismissed Sales and Marketing Group's Petition For Review.
18. On August 5, 2016, a public hearing on the issue of what, if any, damages are appropriate was held in Norristown, Pennsylvania.
19. Scott began employment with Sales and Marketing Group in 2012 until his last day of employment on June 20, 2014. (N.T. 19)
20. Scott began his employment with Sales and Marketing Group as a project manager until December 2013, when Scott was promoted to General Manger of Sales and Marketing. (N.T. 42-43)
21. At the time of Scott's termination from Sales and Marketing Group Scott's earnings were between \$70,000.00 and \$80,000.00 per year. (N.T. 41)
22. Scott's earning at the time of his termination included salary, commissions and revenue sharing. (N.T. 41)

23. For a short period following his termination, Scott was in back and forth communication with Sales and Marketing Group in an attempt to get his job back. (N.T. 50)
24. In July, 2014, Scott began seeking alternate employment. (N.T. 76)
25. Scott's attempts to find alternate employment principally utilized social media sites including LinkedIn, Monster and Career Builder. (N.T. 22, 62)
26. In September, 2014, Scott attempted to start a company that would be an independent contractor that would attempt to expand the business of an existing larger company, Lyft, a ride share service company. (N.T. 20, 22, 54)
27. On September 26, 2014, Scott filed incorporation documents creating the business entity Lyft Marketing, LLC. (N.T. 20; C.E. 1)
28. After a period of approximately two months, Scott came to the conclusion that Lyft Marketing, LLC was not profitable so Scott began to look for other employment. (N.T. 22-24; C.E. 2)
29. Between October 2014 and December 30, 2014, Scott applied for numerous sales and marketing positions. (N.T. 24, 76; C.E. 2)
30. By letter dated December 30, 2014, Indochino Apparel (US) Inc., (hereinafter "Indochino") offered Scott employment as an Assistant Showroom Manager. (N.T. 25-26; C.E. 3)
31. The work Scott performed at Indochino differed from the work Scott had done at Sales and Marketing Group. (N.T. 77)
32. Scott began work for Indochino on January 5, 2015 and was paid \$22.60 per hour. (N.T. 27)

33. After approximately two months, Scott left Indochino because the work he performed did not match the work he had been offered to perform and expected training was lacking. (N.T. 28, 67)
34. Between February 2015 and the end of July 2015, Scott applied to a significant number of potential employers seeking alternate employment. (N.T. 24; C.E. 2)
35. On July 21, 2015, Scott entered an Employment Agreement with Zapper Marketing (USA), Inc. (hereinafter "Zapper"). (N.T. 28; C.E. 4)
36. Scott's position with Zapper was a Senior Account Executive where Scott was to earn a base salary of \$35,000.00 per year plus commissions. (N.T. 28-30, 67)
37. In December 2015, Scott's employment with Zapper ended when, as a result of a global reorganization, Scott was laid off. (N.T. 32, 68)
38. In 2015, combining his earnings from both Indochino and Zapper, Scott earned \$19,241.00. (N.T. 33; C.E. 5)
39. On December 14, 2015, Scott next began employment as a Business Development Manager with Orth Cleaners (hereinafter "Orth"). (N.T. 34; C.E. 6)
40. Scott's base salary with Orth was \$48,000.00 per year plus commissions. (N.T. 35-36, 69)
41. In April 2016, Scott left Orth after receiving a job offer from Rent-A-Center, Inc. (hereinafter "Rent-A-Center"). (N.T. 38)
42. Scott's employment with Rent-A-Center began on May 23, 2016 at an annual salary of \$70,000.00 plus commissions. (N.T. 38-39)
43. At the time of the Public Hearing of this case, Scott was still an employee of Rent-A-Center. (N.T. 40)

44. Scott incurred approximately \$56.00 in certifiable travel expenses. (N.T. 48-49).

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, Sales and Marketing Group’s failure to answer or respond to a Rule to Show Cause resulted in the entry of a judgment for Scott on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy. *Murphy v. Pa. Human Relations Commission*, 486 A.2d 388 (1985).
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 Jason Scott, (hereinafter “Scott”), against Sales and Marketing Group, Inc. (hereinafter “Sales and Marketing Group”). In Scott’s Complaint, Scott alleged that on June 19, 2014, that Sales and Marketing Group terminated Scott because of his race, African American and his sex, male. Scott’s Complaint states claims under Sections 5(a) of the Pennsylvania Human Relations Act (“PHRA”).

By correspondence dated March 30, 2015, the Pennsylvania Human Relations Commission (“PHRC”) Philadelphia regional office petitioned Motions Examiner Summerson for a Rule to Show Cause, indicating that Sales and Marketing Group had not answered Scott’s Complaint. The petition declared that Sales and Marketing Group had been served with Scott’s Complaint on December 23, 2014. The petition further indicated that by correspondence dated February 4, 2015 and March 6, 2015, efforts had been made to obtain an answer from Sales and Marketing Group.

In this case, it is clear that Sales and Marketing Group was served with a copy of the Complaint and did not file an Answer. On May 18, 2015, because Sales and Marketing Group failed to Answer Scott’s Complaint, the PHRC found probable cause and entered judgment for Scott on the issued of liability. After the finding of liability in this case, conciliation efforts were unsuccessful. Subsequently, this matter was approved for a public hearing on the issue of appropriate damages.

The public hearing on the issue of appropriate damages was held August 5, 2016, in Norristown, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Lisa M. Knight, PHRC Assistant Chief Counsel. Neelima Vanguri, Esquire, appeared at the Public Hearing on behalf of Scott. David M. Koller, Esquire appeared on behalf of Sales and Marketing Group. Subsequently, post-hearing briefs were filed by the parties.

Since liability attached to Sales and Marketing Group's failure to file an answer, the only question at the public hearing was what damages Scott 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 Scott 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 (11th 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 (3rd Cir. 1988).

Initially, we turn to wages lost as a result of Scott’s termination. On the question of lost earnings, the PHRC post-hearing brief on behalf of the state’s interest in the Complaint observes that at the time of Scott’s termination he was earning approximately \$70,000.00 per year as Sales and Marketing Group’s General Manager of Sales and Marketing. For the 18 week period following Scott’s promotion to General Manager in December 2013 until May 2, 2014, Scott earned \$24,348.41. This figure can be used to estimate Scott’s weekly earnings at the time of his termination. The calculation of this weekly figure is as follows:

$$\text{\$24,348.41 divided by 18 weeks} = \text{\$1,352.69 per week}$$

This weekly figure can then be used to calculate the amount of earnings lost from the date of Scott’s termination until May 23, 2016. The post-hearing brief on behalf of the state’s interest in the Complaint submits that as of May 23, 2016, Scott began earning a salary comparable to what he had been earning when employed by Sales and Marketing Group. Accordingly, any liability for lost wages would end as of May 23, 2016.

The calculations of Scott’s lost earnings from June 19, 2014 until May 23, 2016 are as follows:

2014 - \$1,352.69 per week x 27.5 weeks =	\$37,198.98
2015 - \$1,352.69 per week x 52 weeks =	\$70,339.88
2016 - \$1,352.60 per week x 21.5 weeks =	<u>\$29,082.84</u>
Total lost earnings June 19, 2014 – May 23, 2016 =	\$136,621.70

During the public hearing, Scott offered both compelling testimony and documentation that he attempted to mitigate his damages. Additionally, the burden to establish a failure to mitigate rests with a Respondent. See *Wheeler v. Snyder Buick, Inc.* 794 F.2d 1228 (7th Cir. 1986). Here, there has been no showing that Scott failed to mitigate his damages. Amounts earned by Scott during the period June 19, 2014 until May 23, 2016 are calculated as follows:

Employment with Indochino and Zapper in 2015	=	\$19,241.00
2016 employment with Orth (Scott worked for Orth for approximately 18 weeks (\$48,000.00 per year @ \$923.00 per week)	=	<u>\$16,614.00</u>
Total mitigation earnings	=	\$35,855.00

Given these calculations, Scott's total lost earnings are calculated as follows:

Lost wages following termination	=	\$136,621.70
Minus earnings in mitigation	=	<u>\$35,855.00</u>
Total lost earnings	=	\$100,766.70

In addition to lost wages and lost overtime, Scott generally testified that he incurred expenses traveling both to the PHRC Philadelphia offices and to his private attorney's offices to attend meetings and conferences approximately 4 times. Scott testified that he incurred expenses in this regard in the amount of \$56.00. Accordingly,

Scott should also be awarded \$56.00 as certifiable travel expense incurred in pursuit of this claim.

Finally, the PHRC is authorized to award interest on the back pay award at the rate of six percent per annum. *Goetz v. Norristown Area School Dist.*, 328 A.2d 579 (Pa. Cmwlth. Ct. 1975).

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

JASON SCOTT, Complainant	:	
	:	
v,	:	PHRC CASE NO. 201402479
	:	EEOC CHARGE NO. 17F201560296
SALES AND MARKETING GROUP, INC., Respondent	:	
	:	

RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, I find that Jason Scott 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

December 21, 2016
Date

By: _____
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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SALES AND MARKETING GROUP, INC.,	:	
Respondent	:	

FINAL ORDER

AND NOW, this _____ day of _____, 2017 after a review of the entire record in this matter, the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Findings of Fact, Conclusions of law, and Opinion of the Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the complaint and hereby.

ORDERS

1. That Sales and Marketing Group Inc. shall cease and desist from discriminating against employees because of their race and sex.
2. That Sales and Marketing Group Inc. shall cease and desist from failing to timely file an Answer to any future PHRC Complaint filed against it.

3. That Sales and Marketing Group Inc. shall pay Scott the lump sum of \$100,766.70 which amount represents lost earnings between June 19, 2014 and May 23, 2016.
4. That Sales and Marketing Group Inc. shall pay additional interest of 6% per annum on the award in paragraph 3 above, calculated from June 19, 2014, until payment is made.
5. That Sales and Marketing Group Inc. shall reimburse Scott \$56.00, which amount represents travel expenses incurred by Scott to pursue his PHRC Complaint and attend the Public Hearing.
6. That, within thirty days of the effective date of this Order, That Sales and Marketing Group Inc. shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Lisa M. Knight, Esquire, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 801 Market Street, Suite 6121. Philadelphia, PA 19107.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:

M. Joel Bolstein, Esquire
Interim Chairperson

Attest:

Dr. Raquel O. Yiengst
Vice Chairperson