COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	**PHRC CASE NO. 200200400**
v.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL	:	
SERVICES	:	
Respondent	:	

SUPPLEMENTAL FINDINGS OF FACT

SUPPLEMENTAL CONCLUSIONS OF LAW

SUPPLEMENTAL OPINION

RECOMMENDATION OF HEARING PANEL MEMBER

SUPPLEMENTAL FINAL ORDER

* SUPPLEMENTAL FINDINGS OF FACT

1. On May 3, 2002, the Complainant, Ezekiel V. Wilson (hereinafter "Wilson"), was informed that he was terminated from his position as a supplemental counselor at Concern Professional Services' ("CTUB III") (Concern Treatment Unit for Boys III) located in Westfield, Pennsylvania. (NT 1 130).
2. By Final Order dated October 26, 2010, the PHRC found that Concern Professional Services (hereinafter "Concern"), had terminated Wilson because of his race, African American, but failed to either restore Wilson to his status as supplemental counselor or award Wilson back pay. (SRH 1)
3. The PHRC's October 26, 2010 Final Order also found that the Public Hearing record reflected that Wilson "was available for work and had communicated that fact to his supervisors" and "[t]he only logical conclusion is that Concern simply did not want to retain the only Black counselor employed at the facility." (P.H.B. A).

To the extent that the Opinion which follow 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.1	Notes of Testimony, May 17, 2010
N.T.2	Notes of Testimony, May 18, 2010
N.T.3	Notes of Testimony, April 26, 2012 (2nd Remand Hearing)
J.E.	Joint Exhibits
SRH	Supplemental Rehearing Exhibit
P.H.B.	Exhibit to PHRC Post-Hearing Brief

4. By Order dated December 22, 2011, the Pennsylvania Commonwealth Court affirmed the PHRC's finding that Wilson had been terminated because of his race, but remanded the case back to the PHRC to either restore Wilson to his status as supplemental counselor or explain why he was not so restored and to take additional evidence so that the PHRC could make an informed decision as to whether Wilson is entitled to an appropriate back pay award. (SRH 1).
5. The PHRC's October 26, 2010 Final Order did not restore Wilson to his status as supplemental counselor because, in August 2005, Concern closed its Westfield facility and permanently laid off all of Concern's Westfield facility's employees. (NT 2 112; P.H.B. A).
6. At the time of his termination, Wilson had been earning $10.43 per hour as a supplemental counselor. (J.E. 32 K).
7. When first hired by Concern, Wilson's immediate supervisor was Orin Moore. (N.T.3 45).
8. In the first 11 months following his hire, Wilson was supervised by Moore and worked a total of 1,166.25 hours (975.75 regular hours, 150.25 overtime hours, and 40.25 double time hours). (J.E. 32).
9. Moore left the employment of Concern and when he did, Wilson's hours began to drop as Byron Lee, (Caucasian), the facility's Group Home Director began to take over the responsibility to call in supplemental counselors. (N.T.1 45; N.T.2 111, 117, 140).
10. After 3 or 4 months scheduling supplemental counselors, Lee made Jeff Persing, (Caucasian),the Assistant Group Home Director. (N.T.1 176; N.T.2 104-141).

11. After Persing took over the principal responsibility of calling in supplemental counselors, Wilson's hours dropped even further. (J.E. 32).

12. Wilson remained available for supplemental counselor work at all times after March 2001 through his termination on May 3, 2002. (N.T.3 52).

13. Following Wilson's termination, Concern continued to offer work opportunities to numerous supplemental counselors. (N.T.3 35; J.E. 34, 35).

14. Typically, supplemental counselors were short-term employees. (N.T.3 36; J.E. 34).

15. Some individuals worked as supplemental counselors while attending college and others simply used the position as an interim job until they found permanent employment. (N.T.3 38).

16. Conversely, Wilson had been and continued seeking to obtain a full-time job as a counselor with Concern as he consistently had expressed his desire to Moore, Lee and Persing that he wanted full-time employment. (N.T.1 48, 57; N.T.2 124).

17. Following his termination, Wilson communicated that he had not wanted to resign and wanted to be on the following week's schedule.(N.T.1 96; J.E. 18).

18. After his termination and continuing through the closure of the Westfield facility, Wilson remained available for work as a supplemental counselor and would have accepted any opportunity extended to him by Concern to work as a supplemental counselor. (N.T.3 40).

19. Wilson testified that he registered with an employment agency, briefly operated a website, wrote a book and worked for Eagle Foods for one month after his race-based termination from Concern. (NT 1 97-100)

20. Wilson further testified that his attempts to seek employment included making personal visits, writing letters of interest and filling out applications for employment. (NT 1 97-100)

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties, and subject matter of Wilson's 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 case.
3. Wilson is an individual within the meaning of PHRA.
4. Concern is an employer within the meaning of PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. Wilson was not reinstated to the status of supplemental counselor because at the time of the PHRC's October 26, 2010 Final Order, Concern had closed its Westfield facility and all of the employees there had been permanently laid off as of August 2005.
7. Pursuant to Section 9(f)(1) of the PHRA, Wilson is entitled to an appropriate back pay award.

SUPPLEMENTAL OPINION

This case arose out of a complaint filed by Ezekiel V. Wilson (hereinafter "Wilson") against Concern Professional Services (hereinafter "Concern") on or about July 23, 2002 at PHRC Case No. 20020400. A public hearing was originally held on January 24 and 25 and June 27, 2007 before a three Commissioner panel. Rev. James Earl Garmon Sr was the Hearing Panel Chairperson and the other two panel members were Commissioner Toni M. Gilhooley and Commissioner David A. Alexander. Prior to presenting the full Commission with a recommendation from the three member panel, Commissioner Gilhooley resigned from the Commission to pursue a seat in the United States Congress. Also Commissioner Alexander resigned from the Commission after becoming an employee of the Commonwealth. On July 22, 2007 the PHRC issued a Final Order in favor or Wilson based only on the recommendation of Commissioner Garmon. Subsequently, Concern appealed the Final Order to Commonwealth Court. On May 28, 2009, Commonwealth Court issued an Order vacating the Commission's decision and remanding the case to the Commission for a new hearing because the Final Order had been based on the recommendation of only one of the assigned three Hearing Panel Commissioners.

The rehearing of the matter on remand was held on May 17 and May 18, 2010. The case was heard by a new three Commissioner Panel. Commissioner Gerald S. Robinson served as the Hearing Panel Chairperson. The other two panel members were: Commissioner Sylvia A. Waters and Commissioner Dr. Raquel O. Yiengst. Phillip A. Ayers, Permanent Hearing Examiner, served as Panel Advisor. The case on behalf of the complaint was presented by PHRC Assistant Chief Counsel, William Fewell, and G. Thompson Bell, Esquire appeared on behalf of Concern. Following the public hearing, all

parties were given an opportunity to file post hearing briefs. The Commission, Concern and Wilson filed post hearing briefs on July 16, 2010.

On October 26, 2010, the PHRC found that Concern had terminated Wilson because of his race. However, the PHRC's Order neither restored Wilson to his status as supplemental counselor nor awarded Wilson any back pay. Wilson appealed the PHRC's October 26, 2010 Order and the Commonwealth Court affirmed the finding that Wilson had been terminated because of his race, African American, but remanded the case back to the PHRC to either fashion an award that restores Wilson to his status as supplemental counselor or explain the reasons for not restoring Wilson as a supplemental counselor. Additionally, the Commonwealth Court's remand directed the PHRC to take additional evidence to allow for an informed decision as to whether Wilson is entitled to an appropriate back pay award.

Consistent with the Commonwealth Court's remand, an additional day of Public Hearing was held on April 26, 2012 in Wellsboro, Pennsylvania. The Hearing Panel for the additional day of Public Hearing was the same as the Hearing Panel that heard the case in May 2010. The Hearing Panel was assisted on this occasion by Panel Advisor, Carl H. Summerson. The case on behalf of the state's interest in Wilson's complaint was presented by PHRC Chief Counsel Michael Hardiman, Esquire. G. Thompson Bell, III, again represented Concern. Following the additional day of Public Hearing, all parties were given an opportunity to file post hearing briefs. The Commission and Concern filed post hearing briefs. Wilson filed a reply brief to Concern's post-hearing brief.

Consistent with the Commonwealth Court's remand we observe that Section 9(f)(1) of the Act provides in pertinent part:

> If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged 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 or upgrading of employees with or without back pay…and any reasonable, verifiable out-of pocket expenses caused by such unlawful discriminatory practice…

After careful consideration of the hearing record of the rehearing on May 17 and 18, 2010, and the additional evidence submitted during the additional day of Public Hearing, it is my recommendation that Wilson be awarded back pay. The PHRC found that Wilson was discriminatorily terminated, thereby sustaining an economic loss. Normally, back pay should be awarded unless special circumstances are present and the difficulty in determining the exact amounts is not such a special circumstance. *See Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974). When calculating a back pay award, it is fundamental that the calculation does not have to be mathematically precise. A reasonable degree of accuracy is sufficient. *PHRC v. Transit Casualty Insurance Co.,* 340 A.2d 624 (Pa. Cmwlth. Ct. 1975), *See also U.S. v. United States Steel Corp.*, 6 EPD ¶9042 (D.C. Ala. 1973).

We begin with the general principle that the measure of damages is the amount that Wilson would have earned absent the unlawful discriminatory race-based termination, reduced by interim earnings or amounts earnable with reasonable diligence. Uncertainties in determining what an employee would have earned absent a discriminatory termination should be resolved against the discriminating employer. *See Green v. USX Corp.,* 46 FEP Cases 720 (3rd Cir. 1988); and *Johnson v. Goodyear Tire & Rubber, Synthetic Rubber Plant*, 491 F.2d 1364 (5th Cir. 1974).

Here, there is a question regarding precisely how much Wilson would have earned but for his race-based termination. On this point, a combination of Attorney

Hardiman's post-hearing brief and supplemental submission correctly summarizes the twofold purpose of a remedy: (1) to ensure that the Commonwealth's interest in eradicating a discriminatory practice is vindicated; and (2) to both restore the victim of discrimination to his pre-injury status and make the victim whole and to discourage future discrimination. *Williamsburg Community School District v. PHRC,* 512 A.2d 1339 (Pa. Commw. Ct. 1986); and *Consolidated Rail Corp. v. PHRC*, 582 A.2d 702, 708 (Pa. Commw. Ct. 1990).

The task of making Wilson whole must begin with the Commonwealth Court's affirmation that Concern's termination of Wilson was because of Wilson's race, African American. With this critical factor in mind, the fundamental question becomes, what is the most reasonable way to calculate an appropriate award?

Initially, we must address the question of what are the amounts of pay Wilson lost as a result of the discriminatory termination? To reasonably assess his loss, several significant points must be made. First, during Wilson's employment, three distinct periods are readily apparent: (1) the significant number of hours Wilson worked when supervised by Orin Moore; (2) the reduced number of hours Wilson worked after Moore left and Byron Lee took over the principal responsibility of calling in supplemental counselors; and (3) the further dramatic reduction in the number of hours Wilson worked after Concern elevated Jeff Persing to the position of Assistant Group Home Director.

Second, the Commonwealth Court affirmed the PHRC conclusion in its October 26, 2010 Order which stated, "[t]he preponderance of the evidence shows that Wilson was indeed available for work when needed and had continuously communicated with his supervisors." On this point, the record reveals that Wilson's wife testified that when Moore was Wilson's supervisor, she would call every other Thursday before the

supplemental counselor schedule was prepared and Moore would share with her the upcoming scheduling needs. (N.T.2 42-43). After Moore left, she continued to call, however, at that time, she was told that the process had changed and she was simply informed what the upcoming schedule was. (N.T.2 43-44, 297-298, 301).

Clearly, once Moore left, the opportunities for Wilson to work dropped under Lee and then dramatically dropped to a mere trickle under Persing. Combining this factor with the PHRC finding, affirmed by the Commonwealth Court, that Wilson's termination was discriminatory, we arrive at the inescapable conclusion that Wilson's race contributed to the decline in the number of hours offered to Wilson after Moore left.

Attorney Hardiman's post-hearing brief and supplemental submission similarly observes that in the two year period Wilson worked for Concern, during the first 11 months as a supplemental counselor under Moore's supervision, Wilson worked a significant number of hours per month but during the last 13 months Wilson worked for Concern under the supervision of first Lee and then Persing, his opportunities to work declined significantly.

Attorney Hardiman offers the suggestion that, under the circumstances present in this case, the reasonable way to project what Wilson would have earned had he not been discriminatorily terminated would be to look to the hours Wilson worked for the 11 month period under Moore's supervision. Once these hours have been determined, a monthly average can then be calculated in three categories: (1) regular hours; (2) overtime hours; and (3) double time hours. Then, using the monthly average figures in these three categories, Wilson's rate of pay at the time of his termination can be multiplied by the average number of hours worked each month during the 11 month

period under Moore's supervision times the number of months between his termination and the time the facility closed (May 3, 2002 until August 5, 2005 – 39 months).

Using Attorney Hardiman's suggested approach, the following calculations are made:

Straight hours worked between May 2000 and March 31, 2001 =	975.75
Overtime hours worked in this period	150.25
Double time worked in this period	40.25

The following calculations depict the average number of hours worked each of the 11 months under Moore in the three separate categories:

975.75 ÷ 11 = 88.70 - average regular hours worked per month

150.25 ÷ 11 = 13.66 – average overtime hours worked per month

40.25 ÷ 11 = 3.66 – average double time hours worked per month

Completing Attorney Hardiman's proposed system to calculate an award, the following calculations reflect amounts he suggests were lost by Wilson in the 39 month period following his termination until the facility closed:

88.70 regular hours x 39 months @$10.43 per hour =	$36,080.50
13.66 overtime hours x 39 months @$15.65 per hour =	$8,337.38
3.66 double time hours x 39 months @20,86 per hour =	$2,977.56
Total earnings lost as a result of discrimination	$47,395.44

The fundamental problem with the proposed calculations is that during the period after Wilson's termination until the facility closed, the total amounts earned by all supplemental workers who were employed by Concern totals $37,567.28, nearly $10,000.00 less than the figure Attorney Hardiman suggests should be awarded to

Wilson. Accordingly, some amount less than $37,567.28 would be what Wilson would have earned had he not been discriminatorily denied hours and terminated.

Keeping in mind the two purposes of a back pay award, and considering that Wilson showed that he wanted to work a considerable number of hours and even wanted to be made full-time, a conclusion that Wilson lost $30,000.00 as a result of his unlawful termination is appropriate.

From this amount, we deduct Wilson's interim wages and any amount determined to have been earnable with reasonable diligence. Here, the record shows that in the summer of 2002, after his termination, Wilson did secure a temporary job through an employment agency working for Eagle Foods. At this temporary assignment, Wilson worked approximately one month until the assignment ended. At this assignment, Wilson indicated that he worked 40 hours a week and earned $9.00 per hour. Accordingly, Wilson's interim wages are calculated as $9.00 per hour x 40 hours = $360.00 per week x 4.4 weeks = $1,584.00 interim earnings.

As to the question of whether Concern established that Wilson failed to adequately mitigate his damages, we find that Concern did not. First, the burden of proving a failure to mitigate damages is placed on the discriminating employer. *See Robinson v. SEPTA, Red Arrow*, 982 F.2d 892 (3rd Cir. 1993). To meet this burden, an employer must demonstrate that substantially equivalent work was available and that a Complainant did not exercise reasonable diligence to obtain available work.

In this regard, Concern made no effort to establish that substantially equivalent work was available. For this reason, Concern cannot show a failure to mitigate.

The record indicates that during his employment, Wilson was generally considered by Concern supervisors to have been an individual they recommended to be

called in as a supplemental counselor. (N.T.1 133) One of Wilson's supervisors acknowledged that Wilson was able to keep problems down when he was present and that Wilson related extremely well to the minority children served by Concern. (N.T.1 118) Yet another counselor similarly acknowledged that Wilson worked well with the troubled youth. (N.T.1 167). Indeed, throughout the facility, everyone acknowledged that Wilson volunteered his time to the needs of the children when he was not working. Upon being terminated, Wilson immediately attempted measures designed to be considered for reinstatement. Further, from the time of his termination, Wilson remained ready and available to work as a supplemental counselor. When assessing Wilson's conduct after his termination, he is to be given every benefit of doubt. *See EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919 (S.D.N.Y. 1976).

As far as attempting to find alternate work, Wilson testified of efforts made to market and sell various things from a newly created website. Wilson crated an exercise video and unsuccessfully attempted to sell the video and a variety of clothing and other items via the internet. Additionally, Wilson testified that after his termination, he applied for work and took his resume to various employers seeking employment. (N.T.2 34) Wilson's wife confirmed that she observed Wilson looking for work through newspapers, making phone calls seeking employment and going out on interviews. (N.T.2 62-63).

Given the efforts made to find alternate work, the only amount that should be deducted from the amount of Wilson's lost wages is the $1,584.00 Wilson earned in the summer of 2002 from temporary employment. Accordingly, the award for back pay is calculated as follows:

Wages lost from May 3, 2002 until August 2005 ----	$30,000.00
Interim wages ----------	$1,584.00

Total award for lost wages ---------- $28,416.00

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

An appropriate Order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	**PHRC CASE NO. 200200400**
vi.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL SERVICES	:	
Respondent	:	

RECOMMENDATION OF HEARING PANEL MEMBER

Upon consideration of the entire record in the above-captioned matter, I find that Wilson has established that he suffered lost wages as a result of Concern's race-based termination of him. It is therefore, my Recommendation that the attached Supplemental Findings of Fact, Supplemental Conclusions of Law, and Supplemental Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, I recommend issuance of the attached Final Order.

June 11, 2012
Date

Sylvia A. Waters
Sylvia A. Waters
Hearing Panel Member

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON	:	
Complainant	:	**PHRC CASE NO. 200200400**
v.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL	:	
SERVICES	:	
Respondent	:	

SUPPLEMENTAL ORDER

AND NOW, this 25th day of June, 2012, after a review of the entire supplemental record in this matter, a majority of the Pennsylvania Human Relations Commission, pursuant to Section 9 of the Pennsylvania Human Relations Act, hereby approves the foregoing Supplemental Findings of Fact, Supplemental Conclusions of Law and Supplemental Opinion of Hearing Panel Member Waters. Further, the Commission adopts said Supplemental Findings of Fact, Supplemental Conclusions of Law and Supplemental Opinion as its own finding in this matter, and incorporates the same into the permanent record of this proceeding, to be served on the parties to the complaint and hereby

ORDERS

1. That within 30 days of the effective date of this Supplemental Order, Concern shall pay Wilson the amount of $28,416.00, which amount represents back pay for the period May 3, 2002 until August 2005.
2. That Concern shall pay Wilson interest at the rate of 6% per annum from August 2005 through the date of payment of this back pay award.
3. That within 30 days of the effective date of this Supplemental Order, Concern shall report to the Commission on the manner of its compliance

with the terms of the Order by letter addressed to Michael Hardiman, Chief Counsel in the Commission's Central Office.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By. _____
Gerald S. Robinson
Chairman

Attest:

_____
Dr. Daniel D. Yun
Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

EZEKIEL V. WILSON,	:	
Complainant	:	**PHRC CASE NO. 200200400**
v.	:	**EEOC CASE NO. 17FA261480**
	:	
CONCERN PROFESSIONAL	:	
SERVICES,	:	
Respondent	:	

DISSENT

* SUPPLEMENTAL FINDINGS OF FACT

1. On May 3, 2002, Concern Professional Services' ("CTUB III") (Concern Treatment Unit for Boys III), (hereinafter "Concern"), located in Westfield, Pennsylvania, notified the Complainant, Ezekiel V. Wilson (hereinafter "Wilson"), that he was terminated from his position as a supplemental counselor. (N.T.1 130).
2. By Final Order dated October 26, 2010, the PHRC found that Concern had terminated Wilson because of his race, African American. (S.R.H. 1).
3. The PHRC's October 26, 2010 Final Order neither restored Wilson to his status as supplemental counselor nor awarded Wilson back pay. (S.R. H. 1).
4. By Order dated December 22, 2011, the Pennsylvania Commonwealth Court affirmed the PHRC's finding that Wilson had been terminated because of his race. (S.R.H. 1).
5. The Commonwealth Court also remanded the case back to the PHRC to either restore Wilson to his status as supplemental counselor or explain why he was not so restored and to take additional evidence that would enable the PHRC to make an informed decision as to whether Wilson is entitled to a back pay award. (S.R. H. 1).

To the extent that the Opinion which follow 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.1	Notes of Testimony, May 17, 2010
N.T.2	Notes of Testimony, May 18, 2010
S.N.T.	Notes of Testimony, April 26, 2012
J.E.	Joint Exhibits
S.R.H.	Supplemental Rehearing Exhibit

6. Fundamentally, the PHRC's October 26, 2010 Final Order did not order Wilson restored to his status as supplemental counselor because, on August 5, 2005, Concern closed its Westfield facility and permanently laid off all of Concern's Westfield facility employees. (N.T.2 112, 252-253; S.N.T. 43).
7. Concern had a policy that, in effect, stated that an employee that did not work for six consecutive pay periods would be terminated. (N.T.2 274: J.E. 30).
8. Prior to his termination on May 3, 2002, Wilson had not worked for six consecutive pay periods. (S.N.T. 49; J.E. 32).
9. After Wilson opened a fitness center in or around March 2001, Wilson became unavailable for work most of the time. (N.T.1 57-58, 67, 70, 206; N.T.2 126-127, 130, 192, 197-198; J.E. 8).
10. When the issue of Wilson's lack of availability was discussed with Wilson, Wilson informed both Concern's Director, Byron Lee, and Concern's Assistant Director, Jeffrey Persing, that he had other obligations that prevented him from being able to commit to a full-time shift and that he was not interested in full-time work. (N.T.2 126-127, 200).
11. In Wilson's written evaluation covering the period May 10, 2001 through November 10, 2001, Persing noted that Wilson's "entrepreneurial adventure has taken away a considerable amount of time for availability to work." (J.E. 8).
12. Although Concern attempted to utilize Wilson for the six week pay period preceding his termination, Wilson was unavailable for work. (N.T,2 192).

13. When messages were left for Wilson to have him call Concern, sometimes Wilson did not call back for two to three days. (N.T.2 194).

14. Given the nature of supplemental counselor work, Concerns' needs were immediate, therefore, Wilson was not scheduled for work. (N.T.2 194).

15. Following Wilson's termination on May 3, 2002, Wilson's only employment was a one month temporary assignment to Eagle Foods. (N.T.1 97, 211; N.T.2 30).

16. Until approximately 2003, Wilson continued to operate a fitness center, however, Wilson failed to disclose any financial records regarding either the expenses or the revenues of the fitness center. (N.T.1 139, 211; N.T.2 68).

17. Similarly, Wilson kept no financial records regarding sales of videos, clothing and other items from a website he had created. (N.T.1 99, 281, 225, 231; N.T.2 22, 57).

18. Following his termination, Wilson's business ventures contributed to his failure to exercise reasonable diligence in attempting to mitigate his damages. (N.T.1 99, 218, 225; N.T.2 20, 22, 54, 57).

19. Wilson registered with only one employment agency and with no governmental services. (N.T. 2 33-35).

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties, and subject matter of Wilson's 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 case.
3. Wilson is an individual within the meaning of PHRA.
4. Concern is an employer within the meaning of PHRA.
5. The complaint filed in this case satisfies the filing requirements found in the PHRA.
6. Because Concern closed its Westfield facility in August 2005 and all of Concern's Westfield employees were permanently laid off, Wilson could not be reinstated to the status of supplemental counselor.
7. Under the totality of the circumstances present in this case, the PHRC is justified in denying Wilson a back pay award.
8. Wilson's course of conduct while employed by Concern and following his termination was so deficient as to constitute an unreasonable failure to mitigate his damages.

SUPPLEMENTAL OPINION

We, Commissioners Robinson, Yiengst, and Bolstein, hereby dissent from the majority opinion in this case.

This case arose out of a complaint filed by Ezekiel V. Wilson (hereinafter "Wilson") against Concern Professional Services (hereinafter "Concern") on or about July 23, 2002 at PHRC Case No. 20020400. Originally, a public hearing was held on January 24 and 25 and June 27, 2007 before a three Commissioner Hearing Panel. Commissioner Rev. James Earl Garmon Sr. was the Hearing Panel Chairperson and the other two panel members were Commissioner Toni M. Gilhooley and Commissioner David A. Alexander. Prior to presenting the full Commission with a recommendation Commissioners Gilhooley and Alexander resigned from the Commission. On July 22, 2007 the PHRC issued a Final Order based only on the recommendation of Commissioner Garmon. The PHRC's July 22, 2007 Final Order found Concern liable for Wilson's allegations. Subsequently, Concern appealed the July 22, 2007 Final Order to Commonwealth Court and on May 28, 2009, the Commonwealth Court issued an Order vacating the Commission's decision and remanding the case back to the PHRC for a new hearing because the Final Order had been based on the recommendation of only one of the assigned three Hearing Panel Commissioners.

The public hearing in the matter on remand was held on May 17 and May 18, 2010. The case was reheard by a newly appointed three Commissioner Panel. Commissioner Gerald S. Robinson served as the Hearing Panel Chairperson. The other two panel members were: Commissioner Sylvia A. Waters and Commissioner Dr. Raquel O. Yiengst. Phillip A. Ayers, Permanent Hearing Examiner, served as Panel Advisor. The

case on behalf of the complaint was presented at the rehearing by PHRC Assistant Chief Counsel, William Fewell, and G. Thompson Bell, Esquire appeared on behalf of Concern. Following the rehearing, all parties were given an opportunity to file post hearing briefs. The Commission, Concern and Wilson filed post hearing briefs on July 16, 2010.

On October 26, 2010, the Hearing Panel presented the PHRC with two separate recommendations: Panel Member Robinson recommended that the PHRC find that Wilson had not proven discrimination and that the case be dismissed; Panel Members Yiengst and Waters recommended a finding that Concern had terminated Wilson because of his race. A majority of the PHRC adopted Panel Members Yiengst and Waters' recommendation, however, the PHRC's Order neither restored Wilson to his status as supplemental counselor nor awarded Wilson any back pay. Subsequently, Wilson appealed the PHRC's October 26, 2010 Order. The Commonwealth Court affirmed the finding that Wilson had been terminated because of his race, African American, but remanded the case to either fashion an award that restores Wilson to his status as supplemental counselor or explain the reasons for not doing so. Additionally, the Commonwealth Court's remand directed the PHRC to take additional evidence to allow for a more informed decision as to whether Wilson is entitled to back pay.

Consistent with the Commonwealth Court's remand, an additional day of Public Hearing was held on April 26, 2012 in Wellsboro, Pennsylvania. The Hearing Panel for the additional day of Public Hearing was the same as the Hearing Panel that reheard the case in May 2010. The Hearing Panel was assisted on this occasion by Panel Advisor, Carl H. Summerson. The case on behalf of the state's interest in Wilson's complaint was

presented by PHRC Chief Counsel Michael Hardiman, Esquire. G. Thompson Bell, III, Esquire, again represented Concern.

Consistent with the Commonwealth Court's remand we observe that Section 9(f)(1) 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 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 or upgrading of employees with or without back pay...and any reasonable, verifiable out-of pocket expenses caused by such unlawful discriminatory practice...

Initially, the phrase "with or without back pay" in this section of the PHRA highlights the fact that the affirmative action measure of awarding back pay calls for the exercise of discretion by the PHRC. Section 9(f)(1) envisions situations where there has been a finding of unlawful discrimination and declares that when discrimination has been found the PHRC "shall" issue an order that requires a Respondent to cease and desist and to take such affirmative action that, in the exercise of discretion, can be with or without back pay. Clearly, this section does not mandate an award of back pay just because discrimination has been found.

We fully recognize and appreciate the general view that, ordinarily, when discrimination has been found, unless exceptional circumstances are present, back pay should be awarded. However, in the present case, we find that there are exceptional circumstances that collectively result in our declining to recommend an award of back pay to Wilson.

First, throughout the rehearing, we find numerous instances where Wilson's lack of credibility became apparent. On this account we reflect on Wilson's repeated testimony that he was always available for work. (N.T.1 72, 96, 108: N.T.2 243). Indeed, Wilson testified that the only time he was not available for work was in April/May 2002 when he traveled to Florida on vacation. (N.T.1 108, 185). In fact, the evidence is clear that in May and June 2000, and again for two weeks in September 2000, Wilson traveled to Boston to attend to legal matters regarding a case he had filed there. (N.T.1 186-187). Wilson testified that his visits to Boston were not "trips". (N.T.1 188). Clearly, he did take trips to Boston during which he was unavailable for work.

Yet another clear contradiction to Wilson's testimony about his availability was the credible testimony of two senior counselors who had occasion to call Wilson to come in to work. Both Dale P. Niles and Cathleen Marengo testified that when they called Wilson he would be available between 70 to 75% of the time. (N.T.1 114, 117, 139, 147). At least when these two senior counselors attempted to have Wilson fill in as a supplemental counselor, approximately 25% of the time he was unavailable. This directly contradicts Wilson's assertion that he was always available.

Added to the testimony of Niles and Marengo, we find the credible testimony of both Lee and Persing. Both Lee and Persing provided convincing testimony that Wilson was frequently unavailable. We credit this general testimony regarding Wilson's persistent unavailability.

On another matter, Wilson initially testified that he had no revenue coming in from the fitness center he had opened. Wilson suggested that he opened the fitness center mostly for the benefit of neighborhood children and did not charge people to join. When

Wilson's wife testified, she directly contradicted Wilson's version by stating that money did come in to the fitness center, but, in her view, the expenses exceeded revenues. (N.T.2 67-68). Throughout the rehearing, Wilson either minimized any earnings he had or simply failed to provide financial records of any business ventures he attempted.

Even on small issues, Wilson's lack of credibility was obvious. During the cross examination of Wilson, he was asked if he sat with Lee for a review of a performance evaluation. Wilson testified that he did not. (N.T.1 200-201). However, during his prior deposition, Wilson had testified that he did.

Finally, on the issue of credibility, Wilson testified that he made no money from a website that offered a variety of items for sale. (N.T.2 20, 22). However, evidence was offered in the form of testimonials from several satisfied customers who appear to have purchased merchandise from Wilson's website. (J.E. 21). These testimonials directly contradict Wilson's testimony that he made no sales from his website.

Collectively, these glaring discrepancies lead to the inescapable conclusion that Wilson was less than credible. Accordingly, much of what Wilson said about other things should not be given a full measure of credence.

Since the Commonwealth Court has now affirmed that Wilson's termination was discriminatory, Wilson must first provide information from which appropriate damages can be determined. *See EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836 (6th Cir. 1994). In most cases, the common measure of damages is the amount a Complainant would have earned absent an unlawful termination. Once this amount is established, the amount is then reduced by a Complainant's interim earnings or amounts that could have been earned with reasonable diligence.

In this case, there is an initial question regarding whether Wilson would have earned any money as a supplemental counselor at Concern had he not been terminated. The corrected supplemental post-hearing brief on behalf of the state's interest in the complaint submits that had Wilson not been terminated, a reasonable calculation of lost wages results in lost earnings of $46,290.42 in straight time, overtime and double overtime. First of all, the calculations offered in the supplemental post-hearing brief on behalf of the state's interest in the complaint are an excessive over-inflated calculation of what Wilson might have earned. If back pay were to be awarded, the proper and reasonable calculation would be to simply divide the number of hours worked by all supplemental counselors each year after Wilson's discharge by the number of supplemental counselors and come up with an average wage per year. However, it is our recommendation that no such calculation should be made because, under the circumstances present here, Wilson is not entitled to any back pay award.

When evaluating the reasonableness of a Complainant's diligence in working, the individual characteristics of a Complainant should be evaluated. *See Sellers v. Delgado College*, 54 EPD ¶40,044, 63,108 (5th Cir. 1990). The record is clear that for the six pay periods immediately prior to his termination, Wilson did not work at all because he was unavailable to work. Considered in its totality, the record reveals that once Wilson opened his fitness center, he had little interest in working at Concern. When Wilson was given his semi-annual employee evaluation covering the period May 10, 2001 through November 10, 2001, Wilson's supervisor noted that Wilson had ventured into starting a business and that by doing so, a considerable amount of time was taken away from Wilson being available to work for Concern. (J.E. 8). Indeed, Wilson's pay records show

that there were several extended periods of time that Wilson did not work at all. Had Wilson not been terminated on May 3, 2002, there is no reason to believe that Wilson would have suddenly become available for work. Just the opposite, it is likely that Wilson's pattern of unavailability for work would have continued. For this reason, we find that Wilson failed to established that he suffered an actual financial loss as a result of his termination.

When an individual is terminated, there is a duty to minimize the resultant damages. In general, a Complainant must use reasonable diligence to obtain substantially equivalent employment. *See Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). Looking at Wilson's individual characteristics when it comes to working, we observe that Wilson testified that, other than a few small jobs, the last real employment he had was in 1987. (N.T.2 36). Indeed, in the spring of 2000, Wilson did not originally actively seek out the job he had at Concern. Instead, Wilson met one of Concern's then supervisor's, Orin Moore, on the street. Moore then asked Wilson to put in an application with Concern and when Wilson did, he only partially completed the application. Never-the-less, Wilson was hired as a supplemental counselor. For the extended period between 1987 and the spring of 2000, Wilson did not have a full-time job.

Following his termination, Wilson's only employment came in the summer of 2002 when Wilson worked 40 hours a week for approximately one month for Eagle Foods. (N.T.1 97, 211). Wilson had registered for employment with a temporary agency, Snelling & Snelling, through which Wilson was assigned to the temporary position with Eagle Foods. (N.T.2 33-35). Otherwise, Wilson testified that he has not worked since. (N.T.1 97). This background information sets the stage for the

consideration of whether Wilson exercised the requisite reasonable diligence in finding comparable employment after his termination.

Concern points to the case of *Booker v. Taylor Milk Company, Inc. et al,* 64 F.3d 860 (3rd Cir. 1995) as support for the argument that Wilson failed to use reasonable diligence to find employment. In *Booker*, unlawful termination was found by the trial court and Booker was awarded back pay that was reduced by an amount the court found that Booker could reasonably have earned following his termination. On appeal Booker challenged the finding that he failed to mitigate his damages. The *Booker* court indicated that a Complainant may satisfy the "reasonable diligence" requirement by demonstrating a continuing commitment to be a member of the work force and by remaining ready, willing, and available to accept employment. Id at 860.

Booker had provided testimony that he read the help-wanted ads and constantly and continuously searched for employment. Additionally, Booker had earned approximately $2,000.00 per year doing "odd jobs." He also testified that he remained active with the area Job Service, a local employment agency. Also, in a three and ½ year period, Booker had not submitted any applications in response to help wanted ads and had only one job interview.

The *Booker* court found that a Complainant's efforts need not be successful, but a Complainant must exercise good faith in attempting to secure a job. The court found that Booker had done little more than register with the Job Service and look through the want ads. On these basic facts, the court found that Booker's conduct following his termination does not appear to demonstrate a continuing commitment to be a member of

the work force. Accordingly, the court observed that the trial court's finding that Booker failed to exercise reasonable diligence was not clearly erroneous. Id at 860.

In this case, in a period of approximately 8 years, Wilson only registered with a single employment agency. Also, Wilson did not apply for work in the nearest city to him. The job he did take for one month was a laborer position and thus not "substantially equivalent" to his supplemental counselor position. During the rehearing, Wilson failed to offer copies of any job applications he filed. Further, Wilson did not sign up with available government job services. (N.T.2 33-35). Using the standard articulated in *Booker*, we find that Wilson failed to exercise reasonable diligence in securing alternate employment.

Concern's post-hearing brief correctly observes that, instead of exercising reasonable diligence at finding employment, Wilson appears to have put his energies into an unsuccessful attempt to develop various business enterprises. During the rehearing, there was scant information presented about the financial details of Wilson's varied business pursuits. About all the record shows is that each and every business venture attempted was not profitable. The record in this case creates the firm impression that it was not long after his termination that Wilson gave up all hope of finding a job equivalent to the supplemental counselor position and, instead, spent his time attempting to form a business that ultimately brought him very little money. Indeed, Wilson's approach to forming his business has every earmark of a formula for failure. Under these circumstances, Wilson's attempt to build a business the way he half-heartedly approached it was equally not a reasonable method of mitigating damages.

For the reasons indicated, we dissent from the majority Opinion in this case.