

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LUIS ALBERTO SANHUEZA,
Complainant

v,

FINE STEEL, INC.,
Respondent

:
:
:
:
:
:
:

PHRC CASE NO. 201002480
EEOC CHARGE NO. 17F201160804

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT*

1. On or about January 10, 2011, Complainant, Luis Alberto Sanhueza, (hereinafter "Sanhueza"), filed a PHRC complaint against Fine Steel, Inc., (hereinafter "Fine Steel"), in which Sanhueza alleged that he was harassed in his position as Ironworker Journeyman because of his ancestry, Mexico, and that on September 9, 2010, Sanhueza was constructively discharged because of his ancestry, Mexico. (O.D. 1).
2. Under cover letter date April 13, 2011, the PHRC's Philadelphia regional office filed a Petition for Rule to Show Cause. (O.D. 1).
3. On April 25, 2011, PHRC Motions Commissioner Daniel L. Woodall, Jr., issued a Rule to Show Cause which, in effect, notified Fine Steel that it had until May 25, 2011 to file a properly verified answer to Sanhueza's complaint. (O.D. 2).
4. The Rule to Show Cause was properly served on Fine Steel on April 25, 2011. (O.D. 2 and 5).
5. Fine Steel did not file an answer. (O.D. 3).
6. On May 31, 2011, Motions Commissioner Woodall recommended to the full PHRC that Fine Steel be found liable for Sanhueza's allegations. (O.D. 4).
7. By Order dated June 28, 2011, the PHRC found Fine Steel liable for harassing Sanhueza and Constructively terminating Sanhueza because of his ancestry, Mexico. (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:

O.D. Official Docket
N.T. Notes of Testimony
C.E. Commission Exhibit

8. The June 28, 2011 Order was properly served on Fine Steel on June 28, 2011. (O.D. 4).
9. By letter dated September 28, 2011, Fine Steel was notified of the scheduling and location of a Public Hearing to determine what, if any, damages are appropriate. (O.D. 6).
10. On September 28, 2011, Fine Steel was properly served with the Notice of Scheduling and Location of Public Hearing. (O.D. 6).
11. PHRC Attorney Hancock also communicated with Fine Steel regarding the scheduling of the Public Hearing via email, phone calls and U.S. mail. (N.T. 9)
12. A public hearing on the issue of what, if any, damages are appropriate was held on October 21, 2011 in Doylestown, Pennsylvania.
13. Sanhueza's address is 13410 Edgetree Drive, Pineville, North Carolina. (N.T. 12-13).
14. Sanhueza learned of an opening at Fine Steel from an August 8, 2010 website on the internet. (N.T. 14; C.E. 1).
15. Sanhueza responded to Fine Steel's internet job posting by both sending a reply email and calling Julia Fine, the owner of Fine Steel. (N.T. 14, 16).
16. During Sanhueza's telephone conversation with her, Julia Fine offered Sanhueza \$30.00 per hour depending on his experience. (N.T. 14).
17. Sanhueza informed Julia Fine that he had 18 to 20 years of experience. (N.T. 14).
18. Julia Fine informed Sanhueza that Fine Steel would pay him \$30.00 per hour as an Iron Worker and also pay for his hotel, meals and gasoline to travel from North Carolina to Pennsylvania. (N.T. 15-18)

19. Julia Fine also emailed Sanhueza directions to her home at 569 Deep Run Road, Perkasio, Pennsylvania so that upon his arrival, Sanhueza could be directed both to a hotel and to Fine Steel. (N.T. 15, 17; C.E. 2).
20. The distance from Sanhueza's home in North Carolina to Perkasio, Pennsylvania is 597 miles and the drive took Sanhueza between 10 and 11 hours. (N.T. 18; C.E. 3).
21. Sanhueza left North Carolina on August 28, 2010 to come to Pennsylvania. (N.T. 20).
22. Sanhueza was taken to a hotel in Doylestown and was informed that after one week, Fine Steel would find Sanhueza an apartment to rent. (N.T. 20-21).
23. The second day at the hotel, Sanhueza began to experience problems when Fine Steel did not pay the hotel. (N.T. 21).
24. Approximately 8 Fine Steel employees were staying at the same hotel. (N.T. 21).
25. On September 8, 2010, when Fine Steel did not pay the hotel bill, Sanhueza and the other Fine Steel employees were kicked out of the hotel. (N.T. 21-22).
26. At that point, Julia Fine took Sanhueza and the others to her home where Sanhueza began the night sleeping in his vehicle and then, in the middle of the night, Julia Fine told Sanhueza to sleep on the floor in her home. (N.T. 22).
27. When Sanhueza received his first pay check on or about Friday, September 3, 2010, Sanhueza felt he had been underpaid. (N.T. 23).
28. Sanhueza confronted Julia Fine who informed him that he would only be paid \$25.00 per hour because she was paying him in cash. (N.T. 23).
29. Sanhueza's last day of employment was September 9, 2010. (N.T. 24).
30. Sanhueza returned to North Carolina. (N.T. 24).

31. Fine Steel did not pay Sanhueza for the hours he worked between September 6 and 9, 2010. (N.T. 24-25).
32. Subsequently, when Sanhueza called Julia Fine about the pay discrepancies, Julia Fine cursed him out and told him that she has his social security number and all his personal information and that she would report him to the authorities for being an illegal Mexican. (N. T. 25-26).
33. Sanhueza is a U.S. citizen. (N.T. 26).
34. Upon leaving Fine Steel, Sanhueza diligently attempted to find alternative employment. (N.T. 26-27; C.E. 4).
35. In approximately April 2011, Sanhueza did find employment in Georgia as an Ironworker Journeyman with Davis Rebar. (N.T. 28-29).
36. Sanhueza's hourly rate at Davis Rebar was \$23.50 per hour. (N.T. 28).
37. Sanhueza worked for Davis Rebar until he was laid off on September 15, 2011. (N.T. 30).
38. Sanhueza earned a total of \$15,514.23 working for Davis Rebar. (N.T. 36; C.E. 5).
39. Following his lay off from Davis Rebar, Sanhueza diligently continued his search for employment. (N.T. 30; C.E. 4).
40. To date, Sanhueza has not been successful in finding employment. (N.T. 31).
41. Sanhueza incurred travel-expenses in the amount of \$1,256.46 associated with his pursuit of his PHRC claim. (N.T. 20, 28).

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, Fine Steel's failure to file a properly verified answer resulted in the entry of a judgment for Sanhueza 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 Luis Alberto Sanhueza, against Fine Steel, Inc. Sanhueza's complaint alleged that Fine Steel harassed Sanhueza in his position as Ironworker Journeyman and that on September 9, 2010, constructively discharged Sanhueza because of his ancestry, Mexico. Sanhueza's complaint states a claim under Sections 5(a) of the Pennsylvania Human Relations Act ("PHRA").

Sanhueza's verified complaint was filed on or about January 10, 2011. By correspondence dated April 13, 2011, the Pennsylvania Human Relations Commission ("PHRC") Philadelphia regional office petitioned Motions Commissioner Woodall for a Rule to Show Cause, indicating that Fine Steel had not answered Sanhueza's complaint. The petition declares that Fine Steel had been served with Sanhueza's complaint on February 11, 2011. The Petition also declares that on March 4, 2011, a PHRC investigator made telephone calls to the Respondent and left messages regarding the necessity of Fine Steel filing an answer. The petition further indicates that by letters dated March 15, 2011, and March 31, 2011, additional efforts had been made to obtain an answer from Fine Steel.

On April 25, 2011, a Rule to Show Cause was issued directing Fine Steel to respond on or before May 25, 2011. On May 31, 2011, after Fine Steel failed to file a properly verified answer, Motions Commissioner Woodall recommended a finding of liability to the full PHRC. On June 28, 2011, the full PHRC determined that Fine Steel harassed Sanhueza because of his ancestry, Mexico and that on September 9, 2010, Fine Steel constructively discharged Sanhueza because of his ancestry,

Mexico. A copy of the Recommendation and Order was subsequently served on the Respondent on June 28, 2011.

After the finding of liability in this case, conciliation efforts were unsuccessfully attempted. 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 October 21, 2011, in Doylestown, Pennsylvania, before Permanent Hearing Examiner Carl H. Summerson. The state's interest in the complaint was overseen by Ryan Alan Hancock, Esquire, PHRC Philadelphia regional office. Fine Steel failed to attend the public hearing.

Since liability had been found after Fine Steel failed to file a properly verified answer, the only question at the public hearing was what damages Sanhueza 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 the 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 Sanhueza 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).

In this case, at the time of his constructive discharge from Fine Steel on September 9, 2010, Sanhueza's agreed upon wages were \$30.00 per hour.

Following his constructive discharge, Sanhueza testified that he made reasonable attempts to mitigate his damages. Indeed, the evidence shows that shortly after being constructively discharged by Fine Steel, Sanhueza began an almost immediate diligent search to find alternative work. Sanhueza testified that in April 2011 he found employment in Georgia as an Ironworker Journeyman for Davis Rebar. Sanhueza submitted evidence that during the time of his employment with Davis Rebar he earned a total of \$15,514.23. Sanhueza offered that on September 15, 2011, all of Davis Rebar's employees were laid off.

Accordingly, the following calculations of back pay lost are made:

Unpaid wages for September 6-9, 2010....

1 week – 40 hours @\$30.00 per hour - \$1,200.00

Lost earnings between September 9, 2010

and October 21, 2011 – 59 weeks

\$1,200.00 per week x 59 weeks - \$70,800.00

Interim earnings:

Davis Rebar

April 2011 to September 15, 2011 - \$15,514.23

Lost wages minus interim wages - \$55,285.77

Next, we turn to Sanhueza's claim for certifiable travel expenses. Sanhueza testified that he made 4 trips to Pennsylvania regarding matters involving his PHRC claim. Sanhueza presented evidence that the mileage between his home in North Carolina and Pennsylvania is 597 miles. At \$.50 per mile, Sanhueza is entitled to reimbursement of \$1,194.00 for mileage. (2388 miles @ \$.50 per mile = \$1,194.00) Additionally, Sanhueza submitted evidence supporting that he incurred additional travel expenses of \$62.46. (C.E. 7). Accordingly, he is entitled to an award of \$1,256.46 for his certifiable travel expenses.

Finally, Sanhueza testified that, because of the way he had been treated by Fine Steel, he does not seek reinstatement. (N.T. 32). Instead, Sanhueza seeks an award of front pay for a period of one year. Such an award is appropriate.

During the one year period beginning November 21, 2011 to November 21, 2012, although the chances of finding alternative employment are significantly reduced during the present economic climate, Sanhueza's mitigation efforts may successfully locate alternate employment. Because of this possible contingency, on the 21st of each month beginning on December 21, 2011, Sanhueza shall report to Fine Steel the amount of any gross earnings he made in the prior month's period. Within 10 days of Fine Steel's

receipt of Sanhueza's monthly reports, Fine Steel shall pay to Sanhueza the amount of \$5,200.00 less the amount of gross earnings Sanhueza made in the prior month. Under this plan, Fine Steel shall make 12 front pay payments to Sanhueza, the first payment to begin within 10 days of Sanhueza's 1st report to be made to Fine Steel on December 21, 2011.

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LUIS ALBERTO SANHUEZA,
Complainant

v,

FINE STEEL, INC.,
Respondent

:
:
:
: PHRC CASE NO. 201002480
: EEOC CHARGE NO. 17F201160804
:
:

RECOMMENDATION OF PERMANENT HEARING EXAMINER

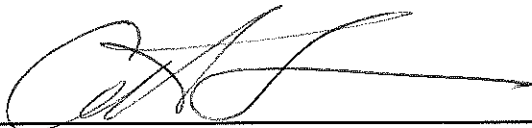
Upon consideration of the entire record in the above-captioned matter, I find that Sanhueza suffered damages. It is, therefore, my recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, I further recommend issuance of the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

PENNSYLVANIA HUMAN RELATIONS COMMISSION

November 7, 2011

Date

By:



Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION

LUIS ALBERTO SANHUEZA,
Complainant

v,

FINE STEEL, INC.,
Respondent

:
:
:
: **PHRC CASE NO. 201002480**
: **EEOC CHARGE NO. 17F201160804**
:
:

FINAL ORDER

AND NOW, this 29th day of November, 2011 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 Fine Steel shall cease and desist from: (a) harassing employees because of their ancestry; and (b) discharging employees because of their ancestry.
2. That Fine Steel shall pay Sanhueza the lump sum of \$55,285.77 which amount represents lost wages following Sanhueza's constructive discharge.

3. That Fine Steel shall pay additional interest of 6% per annum on the back pay award calculated from September 9, 2010 until payment is made.
4. That Fine Steel shall reimburse Sanhueza \$1,256.46, which represents certifiable travel expenses incurred by Sanhueza in matters involving his complaint.
5. That, for the one year period of November 21, 2011 to November 21, 2012, Fine Steel shall pay to Sanhueza front pay in the amount of \$62,400.00 minus any gross earnings Sanhueza is able to make during such one year period.
6. That, within thirty days of the effective date of this Order, Fine Steel shall report to the PHRC on the manner of his compliance with the terms of this Order by letter addressed to Ryan Alan Hancock, Assistant Chief Counsel, Pennsylvania Human Relations Commission, 110 North 8th Street, Suite 501, Philadelphia, PA 19107.

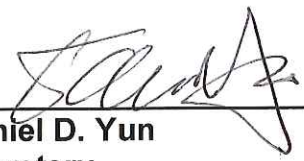
PENNSYLVANIA HUMAN RELATIONS COMMISSION

By:



Gerald S. Robinson
Chairman

Attest:



Daniel D. Yun
Secretary

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LUIS ALBERTO SANHUEZA,
Complainant

v.

FINE STEEL INC.,
Respondent

:
:
:
:
:
:
:

PHRC CASE NO. 201002480
EEOC CHARGE NO. 17F201169804

ENFORCEMENT DETERMINATION HEARING
FINDINGS OF FACT

1. In a PHRC Final Order dated November 29, 2011, the Respondent was order to pay Sanhueza the lump sum of \$55,285.77 within 30 days of November 29, 2011, plus 6% interest per annum.
2. The PHRC Final Order dated November 29, 2011, also ordered the Respondent to pay Sanhueza \$1256.46 in certifiable travel expenses.
3. The PHRC Final Order dated November 29, 2011, further ordered the Respondent to pay Sanhueza \$62,400 in front pay, minus any gross earnings Sanhueza would be able to make.
4. The November 29, 2011 Final Order further ordered the Respondent to report in writing to the PHRC on the manner of its compliance with the terms of the Final Order within 30 days of November 29, 2011..
5. Or or about November 29, 2011, a copy of the November 29, 2011 Final Order was mailed to the Respondent.

6. The Respondent has not appealed the PHRC's November 29, 2011 Final Order.
7. As of the date of the Enforcement Determination Hearing, the Respondent has failed to make either the ordered lump sum payments or front pay payments to Sanhueza, and has failed to submit written verification regarding the Respondent's compliance with the PHRC's November 29, 2011 Final Order.
7. The Respondent has presented no just cause for its failure to comply with the PHRC's November 29, 2011 Final Order.

March 6, 2011
Date


Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

**LUIS ALBERTO SANHUEZA,
Complainant**

v.

**FINE STEEL INC.,
Respondent**

:
:
:
:
:
:
:
:

**PHRC CASE NO. 201002480
EEOC CHARGE NO. 17F201169804**

RECOMMENDATION OF PERMANENT HEARING EXAMINER

AND NOW, this 6th day of March, 2012, upon consideration of the entire record of the Enforcement Determination Hearing, held on February 10, 2012, the Permanent Hearing Examiner concludes that the Respondent has failed to comply with the PHRC's Final Order dated November 29, 2011, and therefore, recommends that the foregoing Enforcement Determination Hearing Findings of Fact and Final Order attached be adopted by the full Pennsylvania Human Relations Commission pursuant to PHRC policy adopted on June 2, 1986.



**Carl H. Summerson
Permanent Hearing Examiner**

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

LUIS ALBERTO SANHUEZA,
Complainant

v.

FINE STEEL INC.,
Respondent

PHRC CASE NO. 201002480
EEOC CHARGE NO. 17F201169804

FINAL ORDER

AND NOW, this 27th day of March, 2012, the Pennsylvania Human Relations Commission hereby adopts the foregoing Enforcement Determination Hearing Findings of Fact in accordance with the Recommendation of the Permanent Hearing Examiner, and therefore

ORDERS

1. That the Respondent shall, within 30 days of the effective date of this Final Order, comply with the PHRC's November 29, 2011, Final Order, in the above-captioned case.
2. That the Respondent's failure to comply with such Final Order within 30 days shall automatically operate to authorize enforcement proceedings to be instituted in Commonwealth Court.

By


Gerald S. Robinson, Chairman

Attest


Dr. Daniel D. Yun, Secretary