

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

OMAR BRONSON

Complainant

v

MASSO DETECTIVE AGENCY

Respondent

Case No 200200713

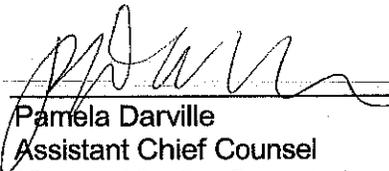
STIPULATIONS OF FACT

The following facts are admitted by all parties to the above-captioned case and no further proof thereof shall be required.

1. The Complainant herein is Omar Bronson, an African-American adult male, (hereinafter "Complainant").
2. The Respondent herein is Masso Detective Agency, (hereinafter "Respondent").
3. The Respondent at all times relevant to the case at hand, employed four or more persons within the Commonwealth of Pennsylvania.
4. On or about August 7, 2002, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "Commission") at Case No. 200200713. A copy of the complaint will be included as a docket entry in this case at time of hearing.
5. On or about October 4, 2002, Respondent filed an Answer in response to the complaint. A copy of the Answer will be included as a docket entry in this case at time of hearing.
6. In correspondence dated March 11, 2003, Commission staff notified the Complainant and the Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint.

7. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so.

8. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved.



Pamela Darville
Assistant Chief Counsel
(Counsel for the Commission
on behalf of the Complainant)

8-18-03

Date

Michael Masso
(Respondent President)

Date



Omar Bronson
(Complainant)

10/02/03

Date

John D'Angelo, Esq.
Atty For MASSO Detective Agency 10/2/03

FINDINGS OF FACT*

1. The Complainant is Omar Bronson, an African American (hereinafter "Complainant"). (S.F. 1)
2. The Respondent is Masso Detective Agency (hereinafter "Respondent"). (S.F. 2)
3. The Respondent, at all times relevant to the instant case, has employed four or more persons within the Commonwealth of Pennsylvania. (S.F. 3)
4. On or about August 7, 2002, the Complainant filed a verified complaint with the Pennsylvania Human Relations Commission (hereinafter "PHRC" or "Commission") at Case Number 200200713. (S.F. 4)
5. On or about October 4, 2002, Respondent filed an answer in response to the complaint. (S.F. 5)
6. In correspondence dated March 11, 2003, Commission staff notified the Complainant and Respondent via a Finding of Probable Cause that probable cause existed to credit the allegations found in the complaint. (S.F. 6)
7. Subsequent to the determination of probable cause, Commission staff attempted to resolve the matter in dispute between the parties by conference, conciliation and persuasion but was unable to do so. (S.F. 7)
8. In subsequent correspondence, Commission staff notified the Complainant and Respondent that a public hearing had been approved. (S.F. 8)
9. Mike Masso (hereinafter "Masso") is a "Jordanian Christian" who came to the United States from Germany thirty years ago. (N.T. 101)

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

S.F. Stipulations of Fact
N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

10. In 2002, Masso had about ten to twenty full-time and part-time employees working as security guards for Masso Detective Agency. (N.T. 101)
11. The overwhelming majority of security guards have always been black. (N.T. 101)
12. The Complainant began working for Masso's security firm as a security guard on or about April 1, 2002. (N.T. 30)
13. On the first day that the Complainant worked for Masso, they were both standing outside talking and a black man walked up and spit in front of Masso. (N.T. 31)
14. Masso said to the Complainant: "You see him? That's an ignorant nigger." (N.T. 31)
15. The Complainant was shocked that Masso would use the term "nigger" so easily in front of him. (N.T. 31)
16. The Complainant received phone calls from Masso to inform him where to report to work. (N.T. 32)
17. The Complainant worked as a security guard for the Respondent at two Foot Locker store locations and a Day's Inn. (N.T. 32)
18. The Complainant was involved in a verbal dispute with the manager at one of the Foot Locker stores and exited the store, but continued to work for the Respondent afterwards. (N.T. 33)
19. The Complainant experienced no other problems at the other Foot Locker store location. (N.T. 32)
20. On August 3, 2002, Masso called the Complainant at his residence and told him to report to work at a particular McDonald's restaurant and proceeded to give the Complainant the location. (N.T. 34)
21. The Complainant reported to the location given to him by Masso, but there was no McDonald's restaurant at the site. (N.T. 34)
22. The Complainant returned home and telephoned Masso informing him that there was no McDonald's restaurant located at the address Masso provided. (N.T. 34)

23. In response Masso said, "You're fucking playing with me, you stupid nigger." (N.T. 34)
24. The Complainant then informed Masso not to talk to him that way. (N.T. 34)
25. Masso proceeded to tell the Complainant, "That's why your whole race is on welfare and drugs, you stupid nigger, you fucking, dumb, black nigger." (N.T. 34)
26. Masso also said to the Complainant, "Say something else and I'll come over to your house and kill you right now." (N.T. 34)
27. The Complainant ended the telephone conversation with Masso by hanging up the telephone. (N.T. 35)
28. Masso called the Complainant back and continued to call him a "nigger" for about ten minutes. (N.T. 35)
29. The Complainant told Masso to stop calling him and to not talk to him that way, specifically telling Masso to not call him "nigger" but Masso would not stop. (N.T. 35)
30. The Complainant felt hurt, disrespected by Masso and frightened of Masso because Masso threatened to kill him. (N.T. 35)
31. The Complainant's wife, Delores Hawkins, overheard the conversation between Complainant and Masso because she was listening on another telephone in the home shared by her with the Complainant. (N.T. 74)
32. Ms. Hawkins claimed that she heard Masso tell the Complainant, "That's why your whole race is on welfare or either on drugs"; "Go fuck your mother with a donkey dick"; and "You're fired, and when I see you again -- the next time I see you -- when you pick up your paycheck, I'm going to shoot you in the face." (N.T. 75)
33. Ms. Hawkins also claimed that she heard Masso state to the Complainant, "Say one more thing and I'll come to your house and I'll shoot you right now." (N.T. 75)
34. After the phone conversation, Ms. Hawkins observed the Complainant and he appeared to be very upset and angry and was shocked and could not believe that Masso called him a "nigger." (N.T. 76)
35. The Complainant did not return to work after Masso called him "nigger" and threatened to kill him because, in the Complainant's opinion, it would

have been very hard to work for somebody who looks at you in that aspect, as a "nigger." (N.T. 35-36)

36. The Complainant stated that he was also fearful for his life and filed a criminal complaint with the District Attorney's Office against Masso on August 6, 2002. (N.T. 36)
37. After the Complainant filed the criminal complaint against Masso, the Complainant received threatening telephone calls from Masso's employee named "Joe" who told the Complainant: "Masso doesn't need these problems," "Don't press charges on Masso," "I see you and your woman, I could shoot you in the back of your head at any time," and "If you take these charges any further, you're going to be dead." (N.T. 38-41, 45)
38. The Complainant knew the caller to be "Joe" because he recognized Joe's voice and was aware that Joe worked as one of the guards at Masso Detective Agency. (N.T. 41, 42)
39. The Complainant also knew that Joe was calling from Masso's office because the Complainant called Joe back and Joe answered the office telephone and heard Masso say in the background, "Don't talk to that nigger." (N.T. 42, 44)
40. Joe proceeded to telephone the Complainant at least fifteen times a day. (N.T. 46)
41. The Complainant felt threatened by these calls from Joe and changed his home telephone number on three occasions. (N.T. 41)
42. The Complainant also reported the telephone calls from Joe to the police. (N.T. 57)
43. The Complainant received a telephone call from Masso's son who told him that his "dad wanted to meet him at a warehouse and to bring his gun." (N.T. 41, 44)
44. The Complainant was frightened by the telephone call from Masso's son and told him not to telephone him. (N.T. 41-42)
45. The Complainant continued to receive telephone calls for a month after Masso received notice about the criminal complaint filed by the Complainant on August 7, 2002. (N.T. 43)
46. The Complainant went to municipal court on the criminal complaint he filed against Masso and an arbitrator issued an order that stated that Masso had to stay away from the Complainant. (N.T. 46)

47. The telephone calls from Joe continued after the arbitrator issued his order and only stopped after the Complainant changed telephone companies. (N.T. 67-68)
48. The Complainant told his father, Bruce Waters, about the conversation he had with Masso on August 3, 2002 and that Masso threatened to shoot him in the face when he came to pick up his paycheck. (N.T. 78)
49. Mr. Waters telephoned Masso and identified himself as the Complainant's father and stated to Masso that the Complainant told him that he threatened to shoot the Complainant. (N.T. 78)
50. Masso told Mr. Waters to meet him at ten o'clock that night at the warehouse and he would show Mr. Waters "why the American dogs are afraid of Arabs." (N.T. 78)
51. Mr. Waters also allegedly heard Masso state, "Fuck that nigger, don't talk to that nigger no more," in the background during Mr. Water's telephone conversation with Joe. (N.T. 80)
52. Masso employed James Patterson as a security guard on and off for about a two year period. (N.T. 15-16)
53. Mr. Patterson claimed that he stopped working for Masso because Masso frequently called him "nigger," "junkie" and would say, "You're a mother fucking donkey." (N.T. 16, 18-19)
54. Mr. Patterson testified that Masso called the other black men who worked for him "niggers." (N.T. 17)
55. The Complainant decided not to work for Masso on August 3, 2002, the date he had the telephone conversation with Masso in which Masso repeatedly called him a nigger and threatened his life. (N.T. 48)
56. The Complainant contacted prospective employers by telephone, personally visited them to seek employment, and went on job interviews, but has been unsuccessful in finding current employment. (N.T. 49)
57. The Complainant is presently unemployed and has continued to look for work. (N.T. 49, 52)
58. The Respondent paid the Complainant \$7.00 an hour. (N.T. 31)
59. The Complainant worked for Respondent six days a week, nine hours per day. (N.T. 30-32, 108)

60. The Complainant filed his complaint with the Philadelphia Regional Office of the Commission on August 7, 2002, and incurred \$30.00 in expenses in gas and parking. (N.T. 52)
61. The Complainant attended a fact-finding conference in connection with his Commission complaint and incurred \$30.00 in expenses in gas and parking. (N.T. 53)
62. The Complainant attended a conciliation conference in connection with his Commission complaint and incurred \$30.00 in expenses in gas and parking. (N.T. 53-54)
63. The Complainant met with Commission counsel with respect to preparation for the public hearing and incurred \$30.00 in expenses in gas and parking. (N.T. 54)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the Complainant, the Respondent and the subject matter of the complaint under the Pennsylvania Human Relations Act. (hereinafter "PHRA" or "Act").
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing in this matter.
3. The Complainant is an individual within the meaning of Section 5(a) of the Act.
4. The Respondent is an employer within the meaning of Section 4(a) and 5(a) of the Act.
5. The complaint filed in this case satisfies the Section 9 filing requirements found in the Act.
6. Section 5(a) of the Act, *inter alia*, prohibits employers from unlawfully discriminating against employees regarding the terms, conditions or privileges of employment because of their race.
7. A *prima facie* case of racial harassment may be shown by proving that:
 - a. Complainant suffered intentional discrimination because of his protected class status.
 - b. Harassment was severe or pervasive and regular.
 - c. Harassment detrimentally affected the Complainant.
 - d. Harassment would detrimentally affect a reasonable person of the same protected class subject to the same condition.
 - e. The harasser was a supervisory employee or agent.
8. The Complainant has established the existence of a *prima facie* case of racial harassment.
9. A case of constructive discharge constitutes a tangible employment action.
10. A case of constructive discharge may be shown by establishing that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant or difficult that a reasonable person in the employee's shoes would resign.

11. The Complainant has established the existence of constructive discharge.
12. The Complainant has established by a preponderance of the evidence that the Respondent unlawfully discriminated against him because of his race, African American, in violation of Section 5(a) of the Act.
13. Whenever the Commission concludes that a Respondent has engaged in an unlawful practice, the Commission may issue a cease and desist order, order back pay or front pay, and it may order such affirmative action as in its judgment will effectuate the purposes of the Act, including reimbursement for certifiable travel expenses in matters involving the complaint and other verifiable, reasonable out-of-pocket expenses caused by the unlawful discrimination practice.

OPINION

On or about August 7, 2002, Omar Bronson (hereinafter "Complainant") filed a verified complaint with the Pennsylvania Human Rights Commission (hereinafter "Commission") against the Masso Detective Agency (hereinafter "Respondent") at Case No. 200200713. The Complainant alleged that the Respondent unlawfully discriminated against him because of his race, African American, by subjecting him to racial harassment and constructively discharging him.

On or about March 11, 2003, Commission staff notified the parties that probable cause existed to credit allegations raised in the complaint. Subsequent to that determination, Commission staff attempted to resolve the matters in dispute between the parties by conference, conciliation, and persuasion, but were unable to do so. Commission staff then later notified the parties that a public hearing had been approved.

A public hearing was held on this matter in Philadelphia, Pennsylvania before Permanent Hearing Examiner Phillip A. Ayers. Pamela Darville, Assistant Chief Counsel, represented the state's interest in the complaint. John J. D'Angelo, Esquire, represented the Respondent in the instant case. Both parties submitted post-hearing briefs.

Section 5(a) of the Pennsylvania Human Relations Act provides that it is an unlawful discriminatory practice:

- (a) "For any employer, because the...race...of any individual... to discharge from employment such individual...or to otherwise discriminate against such individual...with respect to

compensation, hire, tenure, terms, conditions or privileges of employment..."

Normally in cases involving allegations of differing treatment, we use the analytical model of McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct 1817, 35 L.Ed. 2d 668 (1973). Under that model, the Complainant bears the initial burden of establishing a *prima facie* case of discrimination. Once a Complainant has met the *prima facie* burden, the Respondent must produce evidence of a legitimate non-discriminatory reason for its actions. The Complainant still retains the ultimate burden of proving that he is the victim of unlawful discrimination. We now must review the record to establish whether the Complainant has established a *prima facie* case of harassment based on race. In order to establish a *prima facie* case, the Complainant must show:

- (1) He suffered intentional discrimination because of his race.
- (2) The harassment was severe or pervasive and regular.
- (3) The harassment detrimentally affected the Complainant.
- (4) The harassment would detrimentally affect a reasonable person of the same protected class.
- (5) The harasser was a supervisory employee or agent.

See Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432 (3rd Cir. 2003) citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990) In the instant case, the Complainant alleges that there is direct evidence of unlawful discrimination because of his race. Specifically, the Complainant herein asserts that his race was the motivating

factor in creating a hostile work environment that resulted in the Complainant's constructive discharge.

Indeed, in Desert Palace, Inc., DBA Caesar's Palace Hotel and Casino v. Costa, 2003 U.S. Lexis 4422 (June 9, 2003), the United States Supreme Court found that a Complainant could establish that an impermissible consideration was a motivating factor in an adverse employment decision through circumstantial or direct evidence.

The Complainant, at the public hearing, presented credible testimony showing that race was a motivating factor in creating the hostile work environment that led to his constructive discharge. In addition to the Complainant, Delores Hawkins and Bruce Waters also testified to the use of the word "nigger" and other racially demeaning statements (N.T. 34-35). James Patterson, another Complainant witness, also testified that the Respondent routinely used the word when referring to not only himself but also other African American employees (N.T. 16-19).

As Commission Counsel notes, a number of cases have held that an employer's use of the term "nigger" may be direct evidence of discrimination. See Brown v. East Mississippi Electric Power Association, 989 F.2d 858 (5th Cir. 1993) (Supervisor's use of racial slurs constitutes direct evidence that racial animus was a motivating factor); Kendall v. Block, 821 F.2d 1142 (calling an employee "nigger" may be direct evidence of discrimination). There is no better description of the heinous use of this term than a quote from Rodgers v. Western-Southern Life Insurance Company, 12 F.3d 668 (7th Cir. 1993):

Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as "nigger" by a supervisor in the presence of his subordinates. The use of the word "nigger" automatically separates the person addressed from every non-black person; this is discrimination *per se*. Rodgers v. Western-Southern Life Insurance Company, 12 F.3d 668 at 674.

The record is clear that the Respondent's owner frequently and intentionally used racial epithets against the Complainant, in addition to physically threatening the Complainant and his family.

Next, the harassment must be severe or pervasive and regular. In determining whether conduct is severe or pervasive and regular, one can look at the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. See Harris v. Forklift Systems, 510 U.S. 17 (1993). The Respondent's owner not only used racially derogatory names frequently, he also threatened to physically harm the Complainant and his wife (N.T. 34-35). In addition to the Complainant, the Respondent called the Complainant's father a "nigger" and threatened him. This behavior was so heinous that the Complainant filed a criminal complaint against Mike Masso with the City of Philadelphia's District Attorney's Office (N.T. 36; C.E. 1). There can be no question that the Complainant has met this element of the *prima facie* case.

The next element of the *prima facie* case is whether the Complainant was detrimentally affected by the Respondent's harassment. The Complainant creditably testified that he was "hurt and frightened and felt disrespected by

Masso" (N.T. 35). The Complainant's wife testified as to the Complainant's shock and incredulity at being called a "nigger" (N.T. 76). Certainly the evidence adduced at the public hearing shows that the Complainant was detrimentally affected by the harassment.

The next question is whether a reasonable person of the same protected class would be detrimentally affected by the harassment described herein. Certainly any reasonable African American would be offended, insulted and, of course, detrimentally affected by such racial epithets and threats of physical harm. This is not a case of an ultra-sensitive employee.

Next, in the matter before the Commission, the harasser was the Complainant's supervisor. The record shows that Masso would call and give the Complainant work assignments (N.T. 32). He was the Complainant's supervisor who had the authority to hire, fire and control his work assignments. The Complainant has met the required prima facie showing.

The next question is whether the Complainant was constructively discharged. The United States Court of Appeals for the Third Circuit has provided guidance on this specific issue in two major cases: Goss v. Exxon Office Systems Co., 747 F.2d 885, 887 (3rd Cir. 1984) and Suders v. Easton, Baker, Prendergast, Elliot and the Pennsylvania State Police, 325 F.3d 432, 445 (3rd Cir. 2003). The court in Goss stated:

We hold that no finding of a specific intent on the part of the employer to bring about a discharge is required for the application of the constructive discharge doctrine. The court need merely find that the employer knowingly permitted conditions of discrimination in employment so intolerable that a reasonable person subject to them would resign. Goss at 888

The court in Suders held:

[A] Plaintiff-employee alleging a constructive discharge in violation of Title VII must establish the convergence of two factors: (1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; in that regard, although we cannot say as a matter of law that a single incident of discrimination is sufficient to show constructive discharge, the employee has the burden of establishing that the discrimination surpassed a threshold level of intolerability; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances; as to this factor, although it is relevant whether the employee explored alternative avenues to resolve the alleged discrimination before resigning, a failure to do so will not defeat a claim of constructive discharge where the working conditions were so intolerable that a reasonable person would have concluded that there was no other choice but to resign. Suders, cited *supra*.

Upon review of the record, the Complainant has met the tests set forth by Goss and Suders. Reviewing the racially derogatory terms used by Masso against the Complainant, the use of the term “nigger” and physical threats, the Complainant understandably felt compelled to resign. See Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3rd Cir. 2001). See also Grande v. State Farm Mutual Auto Insurance Co., 83 F. Supp. 2d 599 (E.D. Pa. 2000). Also, the Complainant's reaction to the insufferable circumstances was reasonable. Consequently, the Complainant has established that he was constructively discharged.

Initially we must review whether a constructive discharge constitutes a tangible employment action. Courts have found that when an employee meets his or her burden under this test, a constructive discharge operates as the functional equivalent of an actual termination. See Sheridan v. E.I. Dupont de

Nemours & Co., 100 F.3d. 1061, 1075 (3rd Cir. 1996), cert. denied, 521 U.S. 1129, 138 L. Ed. 2d 1031, 117 S. Ct. 2532 (1997). Also, if the plaintiff proves he or she was constructively discharged, the Third Circuit has held that it is also a tangible adverse employment action. See Durham Life Insurance Co. v. Evans, 166 F.3d, 139 (3rd Cir. 1995). It is therefore clear that a constructive discharge is a tangible employment action.

In light of the recent cases involving race being a motivating factor, the Respondent has a defense if it can show that it would take the same action in the absence of the motivating factor. In the matter before the Commission, the Respondent's defense is that the conversation of August 3, 2002 did not occur. The Respondent testified that he not only never called the Complainant or anyone else a "nigger," he did not know what the word meant and he had never heard the word before (N.T. 99, 102, 104-105). He further testified that James Patterson, Complainant's witness, never worked for him (N.T. 88, 99). Lastly, the Respondent testified that the Complainant was a poor employee and had had incidents at job sites (N.T. 89, 90).

The Commission, as trier of fact, is the sole judge of the credibility of witnesses, and it is for the Commission to decide what evidence should be accepted as fact and what weight should be given to evidence. See Pennsylvania State Police v. Cmwlth, Human Relations Commission, 136 Pa. Cmwlth. 381, 583 A.2d 50 (1990).

Simply stated, the Respondent owner, Mike Masso, is not credible. The evidence in the record is clear and convincing that the Respondent called the

Complainant and other employees "nigger" on a routine basis. The Complainant, Delores Hawkins, James Patterson and Bruce Waters all creditably testified in regard to that point.

Masso testified that Mr. Patterson never worked for him. Mr. Patterson, however, creditably testified as to his employment with the Respondent and specific incidents during his employment with Respondent (N.T. 21-22). In addition, the Respondent's own attorney questioned Mr. Patterson about continuing to work for the Respondent subsequent to some of the incidents. Consequently, the testimony that James Patterson never worked for the Respondent is not credible.

Next, Masso's testimony that the conversation on August 3, 2002 never occurred is not believable. During this conversation, Masso repeatedly called the Complainant "nigger" and threatened his life (N.T. 78, 80). As the record reflects, the Complainant was in such fear, he filed a criminal complaint against Masso and obtained a restraining order (C.E. 1, 2).

The testimony that the Complainant was a bad employee is also not credible. At no time did Masso indicate, during Complainant's employment or his testimony, that he was even considering terminating him.

Lastly, there is Masso's testimony at the public hearing that he has never used the word "nigger," he has never heard of the word and he did not know the meaning of the word. While it is distressing that this testimony is used at all, it is simply not believable that Respondent never heard the word, never used it, or knew what it meant. One can only wonder at Masso's motivation in testifying as

he did at the public hearing. Therefore, the evidence before the Commission clearly shows that Respondent racially harassed the Complainant and created a hostile work environment, which resulted in the constructive discharge of the Complainant.

Having found that the Complainant has shown unlawful discrimination, we now move to the issue determining the appropriate remedy. The Commission has broad discretion in fashioning a remedy. Section 9 of the Act provides:

(f)(1) 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 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, herein, reinstatement or upgrading of employees with or without back pay...and any reasonable, verifiable out-of-pocket expenses caused by such unlawful discriminatory practice. 43 P.S. §959 (f)

The remedy serves two purposes. The first is to insure that the state's interest in eradicating unlawful discriminatory practices is vindicated. This interest is served by the entry of a cease and desist order against the Respondent. The second purpose of any remedy is to restore the injured party to his/her status before the discriminatory action and make him/her whole.

Consolidated Rail Corp. v. Pennsylvania Human Relations Commission, 582 A.2d 702, 708 (1990)

In the matter before the Commission, the specific nature of the remedy is clear. First, the Respondent should be ordered to cease and desist from discriminating against individuals because of their race, African American. Secondly, the Complainant is entitled to an award of back pay. It is axiomatic

that the calculation of the back pay award need not be exact. Rather, it is only necessary that the method used be reasonable. Uncertainties, in general, should be resolved against a discriminating employer. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974). Also the Complainant is entitled to an award of interest on the back pay. See Brown v. Transport Corp. v. Cmwith., Human Relations Commission, 578 A.2d 555 (1990). Upon review of the record in this matter, the Complainant would have worked 476 days for the period of August 3, 2002 to February 16, 2004. The back pay calculations are as follows:

$$476 \text{ days} \times 9 \text{ hours per day} = 4,284 \text{ hours}$$
$$4,284 \text{ hours} \times \$7.00 \text{ per hour} = \$29,988.00$$

Therefore the Complainant's back pay award should be \$29,988.00

On the issue of mitigation of damages, it is the Respondent's burden to establish that the Complainant failed to mitigate his damages in order to limit a back pay award. See Cardin v. Westinghouse Electric Corp., 850 F.2d 996, 1005 (3rd Cir. 1988). The standard used in determining mitigation is whether the Complainant exercised reasonable diligence in seeking employment. As Commission Counsel notes, all that is required is an honest, good faith effort. See Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1016 (8th Cir. 1988). Upon review of the record, the Respondent has not demonstrated that the Complainant failed to mitigate his damages. The Complainant, at the public hearing, was able to produce a list of places where he sought employment after his constructive discharge. The Complainant exercised reasonable diligence and, therefore, he should be awarded back pay as previously calculated.

The PHRC regional office post-hearing brief asserts that the Complainant should be awarded front pay. Front pay is "money awarded for lost compensation during the period between judgment or reinstatement or in lieu of reinstatement". Pollard v. E. I. du Pont de Nemours and Co., 121 S. Ct. 1946, 1948(2001). Front pay can be awarded in two situations: first, when reinstatement cannot occur immediately because of the lack of availability of employment; and second, when the remedy of reinstatement is simply not appropriate, because of the hostility between the parties. Carter v Sedgwick County, 36 F.3d 952, 65 FEP 1217(200). In the matter before the Commission, reinstatement is not a viable option. Masso physically threatened the Complainant and his family. Their fear was so compelling that the Complainant filed a criminal complaint and obtained a restraining order. Accordingly, the Respondent should be required to pay the Complainant front pay for a period of three years or until such time as the Complainant obtains substitute employment. Front pay shall end at the earlier of the following events, at the end of the three-year period or when the Complainant finds alternative employment, whichever is earlier.

The Respondent should also be required to pay to the Complainant the sum of \$120.00, which represents the costs that the Complainant incurred in connection with the filing of his complaint.

Lastly, the Respondent should be required to conduct training to insure that the other employees are treated in a non-discriminatory manner consistent with the provisions set forth in the Pennsylvania Human Relations Act.

An appropriate order follows:

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. The Respondent shall cease and desist from discriminating against individuals because of their race, African American.
2. That within 30 days of the date of this Order, the Respondent shall pay Complainant the amount of \$29,988.00, which represents back pay from August 3, 2002 to February 16, 2004. Interest at the rate of 8% per annum from August 2002 through November 2004 in the amount of \$3,669.12 shall be added to the back pay award.
3. Beginning with the date of this order, the Respondent shall pay the Complainant a monthly amount of \$1,638.00, which represents front pay for a period not to exceed three years.
4. That within 30 days of the date of this order, the Respondent shall pay the Complainant \$120.00, which represents the costs the Complainant incurred in connection with filing his complaint.
5. That within 30 days of the date of this order, the Respondent shall fashion and implement internal policies and procedures for effectively accepting and resolving employee complaints of discriminatory treatment. Such policies and procedures shall be subject to review by the PHRC Philadelphia Regional Office and must meet their approval. Further, the policies and procedures must include,

at a minimum, the prohibition of all forms of discrimination, including racial harassment and retaliation, and an effective grievance procedure calculated to resolve claims of disparate treatment and to encourage employees who feel they have been victimized to come forward with their complaints.

6. That within 30 days of the date of this order, the Respondent shall conduct appropriate sensitivity training on work-place harassment and acceptable work-place behavior and shall conduct training on the employment provisions of the Pennsylvania Human Relations Act, Pennsylvania Human Relations Commission regulations, Title VII of the U.S. Civil Rights Act, the U.S. Americans with Disabilities Act and the U.S. Age Discrimination in Employment Act.

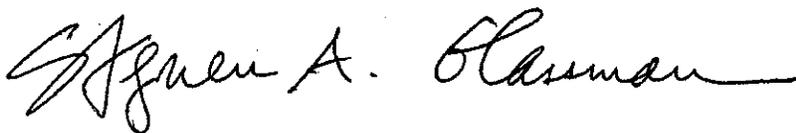
Pennsylvania Human Relations Commission staff shall participate in the training and shall review all training materials before the training is conducted. The training will be given to all employees at the Respondent's workplace.

7. The Respondent is hereby advised of Section II of the PHRA, which states in pertinent part: "Any person who shall willfully...violate an order of the Commission, shall be guilty of a misdemeanor and, upon conviction thereof, shall be sentenced to pay a fine of not less than five hundred dollars (\$500.00), or to undergo imprisonment not exceeding thirty (30) days, or both..."

8. That within 30 days of the effective date of this order, the Respondent shall report to the PHRC on the manner of its compliance with the terms of this order by letter addressed to Pamela Darville, Assistant Chief Counsel, PHRC

Philadelphia Regional Office, 711 State Office Building, 1400 Spring Garden
Street, Philadelphia, PA 19130.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 

Stephen A Glassman, Chairperson

ATTEST: 

Daniel D. Yun, Assistant Secretary