COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

FRANCES SELLECCHIA, Complainant	:	PHRC CASE NO. 200503293
and	:	
AMY RICHARDS, Complainant	:	PHRC CASE NO. 200503295
v.	:	
BALLY'S PIZZA PLACE, Respondent	:	

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. The Complainants herein are Frances Sellecchia (hereinafter "Sellecchia"), an adult who resides at 1367 Sanger Street, Philadelphia, PA (N.T. 14) and Amy Richards, (hereinafter "Richards"), an adult who resides at 4259 Ormond Street, Philadelphia, PA (N.T. 22).
2. The Respondent herein is Bally's Pizza Place (hereinafter "Bally's").
3. Sellecchia was hired by Bally's in April 2005. (N.T. 15).
4. June 19, 2005, was Sellecchia's last day of employment with Bally's. (N.T. 15).
5. Sellecchia's rate of pay at Bally's was $7.50 per hour. (N.T. 16).
6. On average, Sellecchia worked for Bally's 60 hours a week. (N.T. 16).
7. Approximately 3 weeks after being constructively terminated from Bally's, Sellecchia began working at New Oxford Pizza. (N.T. 16).
8. Sellecchia only worked four or five days for New Oxford Pizza. (N.T. 18).
9. The owner of New Oxford Pizza knew Bally's owner and when New Oxford Pizza's owner learned why Sellecchia left Bally's, Sellecchia was asked to leave New Oxford Pizza. (N.T. 17).
10. While an employee of New Oxford Pizza, Sellecchia earned $7.50 per hour and worked 8 to 10 hours a day. (N.T. 17).
11. In March 2006, Sellecchia applied for social security disability. (N.T. 18).

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

N.T. Notes of Testimony
C.E. Complainant's Exhibit

12. Sellecchia testified that she was unable to work at all due to her disability. (N.T. 20-21).
13. Sellecchia incurred travel expenses in the form of a parking meter expense in connection with pursuit of her PHRC claim. (N.T. 19).
14. Sellecchia testified that she does not seek reinstatement to Bally's. (N.T. 19).
15. Further, Sellecchia does not seek front pay. (N.T. 28).
16. Richards was hired by Bally's on or about June 1, 2005. (N.T. 23).
17. June 17, 2005 was Richards last day of employment with Bally's. (N.T. 23).
18. Richards' rate of pay at Bally's was $7.00 per hour. (N.T. 23).
19. On average, Richards worked 50 hours per week at Bally's. (N.T. 23).
20. After being constructively terminated from Bally's, Richards worked for approximately three weeks for Yellow Cab. (N.T. 24).
21. Richards worked 40 hours a week at Yellow Cab and earned $7.50 per hour. (N.T. 24-25).
22. On October 2, 2005, Richards began working for Toys "R" Us where she earned $6.50 per hour. (N.T. 24).
23. Richards worked 30 to 40 hours per week at Toys "R" Us. (N.T. 25).
24. On January 14, 2006, Richards went on maternity leave. (N.T. 25).
25. On February 26, 2006, Richards gave birth to her son. (N.T. 27).
26. After February 26, 2006, Richards did not look for work, but elected to begin an educational program on August 15, 2006. (N.T. 25-26).
27. On July 2, 2007, Richards found a job as a medical assistant with Complete Women's Care where she works 37 ½ hours a week at the rate of $10.50 per hour. (N.T. 27-28).

28. Like Sellecchia, Richards does not seek either reinstatement or front pay. (N.T. 27-28).

29. Richards incurred a car fare expense of $10.50 in connection with her pursuit of her PHRC claim. (N.T. 27).

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, the Respondent's failure to file properly verified answers or to respond to Rule to Show Causes resulted in the entry of judgments for the Complainants on the issue of liability.
6. The PHRC has broad discretion in fashioning a remedy.

OPINION

These consolidated cases arose on complaints filed by Frances Sellecchia ("Sellecchia") and Amy Richards ("Richards") against Bally's Pizza Place ("Bally's"). Sellecchia's complaint at PHRC Case No. 2005031293 alleged that from the end of May 2005 until June 19, 2005, she was continually sexually harassed and that on June 19, 2005, she was constructively terminated. Richards' complaint at PHRC Case No. 200503295 alleged that from June 1, 2005 through June 17, 2005, she was subjected to sexual harassment and that on June 17, 2005, she was constructively terminated. Sellecchia's and Richards' complaints state claims under Section 5(a) of the Pennsylvania Human Relations Act ("PHRA").

Sellecchia's verified informal complaint was filed on or about December 2, 2005. By correspondence dated November 2, 2006, the Pennsylvania Human Relations Commission ("PHRC"), Philadelphia regional office, petitioned Motions Commissioner Gilhooley for a Rule to Show Cause. The Petition indicated that Bally's had not answered Sellecchia's complaint. The petition also indicated that on or about August 8, 2006, Bally's owner, Steve Popouldapolis, was personally served with a copy of Sellecchia's complaint and a "Notice to Defend".

On November 7, 2006, a Rule to Show Cause was issued, directing Bally's to respond to Sellecchia's complaint on or before December 7, 2006. After no response was filed, on December 27, 2006, Motions Commissioner Gilhooley recommended a finding of liability to the full PHRC. On January 22, 2007, the full PHRC determined that Sellecchia had been sexually harassed and constructively terminated on June 19, 2005.

Richards verified informal complaint was filed on or about December 2, 2005. By correspondence dated January 16, 2007, the Pennsylvania Human Relations Commission

("PHRC"), Philadelphia regional office, petitioned Motions Commissioner Gilhooley for a Rule to Show Cause. The Petition indicated that Bally's had not answered Richards' complaint. The petition also indicated that on or about September 6, 2006, Bally's owner, Steve Popouldapolis, was served with a copy of Richards' complaint and a "Notice to Defend".

On January 30, 2007, a Rule to Show Cause was issued, directing Bally's to respond to Richards' complaint on or before March 2, 2007. After no response was filed, on March 6, 2007, Motions Commissioner Gilhooley recommended a finding of liability to the full PHRC. On March 27, 2007, the full PHRC determined that Richards had been sexually harassed and constructively terminated on June 17, 2005.

The consolidated public hearing on the issue of appropriate damages was held August 21, 2007 in Philadelphia, Pennsylvania, before Hearing Examiner Carl H. Summerson. Norman Matlock, PHRC Assistant Chief Counsel, oversaw the state's interest in the complaints. Sellecchia and Richards were represented by Brian P. Pincus, Esquire. Bally's did not appear. Following the Public Hearing, the parties were afforded the right to file post-hearing briefs. Attorney Pincus elected not to file a post-hearing brief.

Since liability had been found after Bally's failed to file properly verified answers, the only question at the public hearing was what damages Sellecchia and Richards could establish. Under Section 9(f)(1) of the PHRA, the PHRC is empowered to order the 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, compensation for loss of work in matters involving the complaint…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…"

Generally, evidence submitted at the Public Hearing only addressed back pay lost and minimal certifiable travel expenses. Neither reinstatement nor front pay were requested.

The U.S. Supreme Court has ruled that back pay is an integral part of civil rights protections. Abermarle Paper Co. v. Moody, 422 U.S. 405 (1975). In this fundamental pronouncement, the court noted the two-fold purpose of civil rights laws: eliminating unlawful employment discrimination and compensating the economic injuries visited upon the victim of discrimination. Albermarle Paper Co. at 417-19. Here in Pennsylvania, the Commonwealth Court has recognized that a back pay award serves not only the purpose or restoring the injured party to her pre-injury status and making her whole, but also serves to discourage discrimination. Consolidated Rail Corporation v. PHRC, 582 A.2d 702 (Cmwlth. Ct. 1990). Citing Williamsburg Community School District v. PHRC, 99 Pa. Commonwealth Ct. 206, 512 A-2d 1339 (1986).

In the Consolidated Rail Corporation case, the Court also acknowledged that the general question of mitigation of damages is a matter which lies within the sound discretion of the Commission, at 708, citing Albert Einstein Medical Center v. PHRC, 87 Pa. Commonwealth Ct. 145, 486 A.2d 575 (1985). Included within this authority given to the Commission is the more specific discretion to resolve questions regarding the duty of a Compliant to mitigate their damages. Albert Einstein Medical Center v. PHRC, 87 Pa. Commonwealth Ct. 145, 486 A.2d 575 (1985).

We first review the evidence regarding Sellecchia's damages. When constructively terminated, Sellecchia was earning $7.50 per hour, and on average worked 60 hours a week.

Shortly after leaving Bally's, Sellecchia began working at another pizza place, however, she was let go after only a few days. Sellecchia testified that the owner of her new job personally knew the owner of Bally's and that she believes Bally's owner contributed to her being asked to leave her new job. After this, Sellecchia did not work again, In fact, in March 2006, Sellecchia applied for and was granted social security disability.

When individuals apply for social security disability, this does not automatically mean that person cannot work at all. Often, if offered an accommodation for a disability that otherwise qualifies a person for social security disability, such a person is employable. However, in Sellecchia's case, she testified that her condition totally prevented her from working. As a general rule, back pay is not awarded for periods where a Complainant is rendered unemployable due to a disability. See Ostapowiez v. Johnson Bronze Co., 541 F.2d.394, 401, 13 FEP Cases 517 (3rd Cir. 1976), cert denied 429 U.S. 1041 (1977). See also Flores v. Komatsu Mining Systems, Inc., 8 AD Cases 1769 (7th Cir. 1999).

Accordingly, Sellecchia should be awarded the back pay she lost between June 19, 2005 and March 2006, less interim wages, as follows:

$7.50 per hour x 60 hours per week	$ 450.00
$450.00 x 34 weeks	$15,300.00

From this figure we must deduct Sellecchia's interim earnings;

New Oxford Pizza	$ 300.00
Total Lost Wages:	$15,000.00

Additionally, Sellecchia testified that she incurred a parking expense to attend the Public Hearing. Sellecchia should be awarded $6.00 in this regard.

Turning to Richards' situation, at the time of her constructive termination, she was earning $7.00 per hour and working 50 hours a week. Upon leaving Bally's, Richards began working for Yellow Cab in September 2005. She worked there for approximately three weeks during which she worked 40 hours a week earning $7.50 per hour. Next, in early October 2005, Richards began working for Toys "R" Us and remained there until January 14, 2006. Richards testified that she worked between 30 to 40 hours a week at Toys "R" Us, earning $6.50 per hour.

On January 14, 2006, Richards left work to go on maternity leave. Generally, a Complainant is not entitled to recovery for any period of unavailability due to child bearing. See Walston v. School Bd., 566 F2d 1201, 1206, 16 FEP Cases 728 (4th Cir. 1977); Grindtaff v. Burger King, Inc., 494 F Supp. 622, 625, 23 FEP Cases 1486 (ED Tenn. 1980); and Doe v. Osteopathic Hospital. 333 F. Supp 1357, 1363, 3 FEP Cases 1120 (D. Kan. 1971).

On February 26, 2006, Richards gave birth to her son. However, Richards then testified that she did not look for work again until after she completed an educational program that she began on August 15, 2006. After completing the education program she elected to attend, she then secured employment as a medical assistant where she worked 37 ½ hours a week and earned $10.50 per hour. On this job, Richards began to earn more than she did while an employee at Bally's.

By admitting she did not seek work after she had her child, Richards effectively relieved Bally's from its obligation to establish there was substantially equivalent work available. Further, once Richards decided to attend school, it appears she did so without seeking employment while attending the educational program. Had she sought employment while

attending school, perhaps and award of back pay would be appropriate during that period. However, she did not.

Accordingly, Richards should be awarded the back pay she lost between June 17, 2005 and January 14, 2006, less interim wages as follows:

$7.00 per hour x 50 hours per week	$ 350.00	
$350.00 x 30 Weeks		$10,000.00
Minus Richards interim wages:		
Yellow Cab $7.50 per hour x 40 hours per week		
$300.00 x 3 weeks	$ 900.00	
Toys "R" Us.		
$6.50 per hour x 35 hours per week	$ 227.50	
$227.50 x 14 weeks	$ 3,185.00	
Total Interim Wages		$ 3,412.50
Total lost wages		$ 7,087.50

Richards also testified that she incurred a car fare expense of $10.50. She should also be awarded this amount.

Finally, the PHRC is authorized to award interest on back pay awards. Goetz v. Norristown Area School District., 16 Pa. Commonwealth Ct. 389, 328 A. 2d 579 (1975).

An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

FRANCES SELLECCHIA,	:	**PHRC CASE NO. 200503293**
Complainant	:	
	:	
and	:	
	:	
AMY RICHARDS,	:	**PHRC CASE NO. 200503295**
Complainant	:	
	:	
v.	:	
	:	
BALLY'S PIZZA PLACE,	:	
Respondent	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Frances Sellecchia and Amy Richards suffered damages. It is, therefore, the Permanent Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law and Opinion be approved and adopted by the full Pennsylvania Human Relations Commission. If so approved and adopted, the Permanent Hearing Examiner recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

September 12, 2007
Date

Carl H. Summerson,
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

FRANCES SELLECCHIA,	:	**PHRC CASE NO. 200503293**
Complainant	:	
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Complainant	:	
	:	
v.	:	
	:	
BALLY'S PIZZA PLACE,	:	
Respondent	:	

FINAL ORDER

AND NOW, this 26th day of September, 2007, after a review of the entire record in these consolidated cases, 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 these complaints and hereby

ORDERS

1. That Bally's shall cease and desist from failing to timely file an answer to any future PHRC complaint that may be filed against it.
2. That Bally's shall pay to Sellecchia within 30 days of the effective date of this Order the lump sum of $15,000.00, which amount represents back pay lost for the period between June 19, 2005 and March 2006.

3. That Bally's shall pay to Richards within 30 days of the effective date of this order the lump sum of $7,087.50, which amount represents back pay lost for the period between June 17, 2005 and January 14, 2006.
4. That Bally's shall pay additional interest of six percent per annum on the back pay awards.
5. That Bally's shall pay Sellecchia, within 30 days of the date of this Order, the lump sum of $6.00, which amount represents Sellecchia's certifiable travel expenses in connection with Sellecchia's pursuit of her PHRC claim.
6. That Bally's shall pay Richards, within 30 days of the date of this Order, the lump sum of $10.50, which amount represents Richards' certifiable travel expenses in connection with Richards' pursuit of her PHRC claim.
7. That within 30 days of the effective date of the Order, Bally's shall report to the Commission on the manner of its compliance with the terms of this Order by letter addressed to Norman Matlock, Esquire, in the Commission's Philadelphia Regional Office, 7th Floor, Philadelphia State Office Building, 1400 Spring Garden Street, Philadelphia, PA 19130-4088.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Stephen A. Glassman, Chairperson

Attest:

_____
Dr. Daniel D. Yun
Secretary