COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CAROLL MYERS, Complainant	:	
v.	:	PHRC CASE NO. 200505802 EEOC CHARGE NO. 17FA661908
THE BRETHREN HOME COMMUNITY, Respondent	:	

CAROLL MYERS, Complainant	:	
v.	:	PHRC CASE NO. 200605596 EEOC CHARGE NO. 17F200761865
THE BRETHREN HOME COMMUNITY, Respondent	:	

FINDINGS OF FACTS

CONCLUSIONS OF LAW

OPINION

RECOMMENDATION OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACTS *

1. The Respondent in this case is the Brethren Home Community, a large, faith based, continuing care retirement community operated by the Brethren Church. (N.T. 31)

2. Primarily, the Brethren Home Community has three levels of care: independent living where resident live in cottages; assisted living; and nursing home care. (N.T. 31-32)

3. The Brethren Home Community also has a dementia unit which is a lock down unit. (N.T. 32)

4. Approximately 600 employees care for the Brethren Home Community's 700 to 900 residents. (N.T. 27)

5. At all relevant times, the Executive Director of the Brethren Home Community was Vernon King. (N.T. 48)

6. In April 2002, Caroll Myers, (hereinafter "Myers"), was hired by the Brethren Home Community as a Wellness Coordinator/Exercise Physiologist. (N.T. 26 - 28; C.E. 2).

7. In her position, Myers developed and implemented wellness and fitness programs for both residents and staff. (N.T. 21)

8. Myers list of credentials and qualifications include:

   a. Education

      1. BA from Lock Haven State College .
      2. Associates degree from York College
      3. 1996, Masters in Health Education from Penn State University (specializing in community health and wellness promotion)

* 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 Facts for reference purposes:

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

b. Certifications

1. April 1998, Enhanced Qualification for Exercise and the Older Adult form the American College of Sports Medicine
2. October 1997, Certified Professional Senior Fitness Instructor from the American Senior Fitness Association
3. August 1997, Exercise Specialist Certification from the American College of Sports Medicine (ACSM)
4. December 1993, Registered Pulmonary Function Technologist certificate from the National Board of Respiratory Care
5. December 1991, Registered Respiratory Therapist certificate from the National Board of Respiratory Care

c. Licenses

1. 1995 to 2004, Respiratory Care Practitioner from the Pa. Department of State, Bureau of Professional and Occupational Affairs

d. Other Training credentials

1. Advanced Life Support, Basic Life Support, Basic Life Support Instructor from the American Heart Association
2. First Aid Certification and Instructor, and CPR Certification and Instructor from the American Red Cross
3. Personal Fitness Trainer from the American Council of Exercise
4. Senior Fitness Leader from the Senior Fitness Association

(N.T. 19-26; C.E. 1)

9. The American College of Sports Medicine Certificates are considered the gold standard credentials in fitness certificates and require continuing education. (N.T. 24)

10. The list of credentials Myers had, qualified her to work with older adult populations that are classified as high risk due to multiple co-morbidities including arthritis, congestive heart failure, diabetes and other ailments. (N.T. 25-26)

11. While working for the Brethren Home Community, Myers was the only staff person implementing the wellness program while working for four different supervisors. (N.T. 26, 28, 135)

12. For most of her employment, Myers' supervisor was the Brethren Home Community's Director of Human Resources, Christine Daoularis, (hereinafter "Daoularis"). (N.T. 28-29)

13. Daoularis reported to Executive Director King. (N.T. 49)

14. Daoularis completed a performance evaluation form on Myers effective April 3, 2005. (N.T. 29; C.E. 3)

15. The performance evaluation was separated into two parts:

a. Cove Values

b. Essential Duties

(N.T. 34; C.E. 3)

16. In the categories of Core Values, Daoularis rated Myers as follows:

a. Servanthood – Outstanding

b. Compassion – Commendable

c. Community – Commendable

d. Integrity – Outstanding

e. Life is Sacred – Outstanding

f. Stewardship – Outstanding

(N.t. 34; C.E. 3)

17. In the categories of Essential Duties, Daoularis rated Myers as follows:

a. Identification of needs– Outstanding

b. Confidentiality – Commendable

c. Policy implementation and enforcement – Commendable

d. Education needs identification – Outstanding

e. Speaker work – Outstanding

f. Oversight of day to day operation – Outstanding

(N.T. 34; C.E. 3)

18. After receiving the employment performance evaluation, Myers' salary was increased by 3%. (N.T. 35)

19. At a point in 2005, the Brethren Home Community contracted with Age Dynamics, a consultant group from Oregon, seeking assistance with the Brethren Home Community's process of expanding the Wellness Department's programs. (N.T. 50)

20. Both Myers and Daoulairs worked with Age Dynamic consultant John Rude. (N.T. 51)

21. Myers had been working on developing a new direction and new protocols for the Wellness Department and has submitted lengthy proposals. (N.T. 47)

22. A fall caused Myers to experience a torn labrum in her hip socket. (N.T. 44)

23. Myers told Executive Director King and Daoularis of her injury and the need for surgery and, potentially, eventual hip replacement. (N.T. 43 - 44)

24. On April 19, 2005, Myers began a leave of absence with an 8 week expected duration. (N.T. 42, 45)

25. Although out on a medical leave of absence, Myers was asked to contribute towards the development of new protocols and to evaluate and critique a report Age Dynamics consultant Rude was preparing. (N.T. 56)

26. Myers also shared with Executive Director King and Daoularis that a surgeon in Tennessee had informed Myers that he suspected that she had multiple myeloma, a form of bone cancer. (N.T. 46)

27. Myers and Daoularis discussed the condition of multiple myeloma as the condition had related to another the Brethren Home Community employee. (N.T. 46)

28. While Myers was off for surgery, Daoularis told Myers that the position of Director of Wellness was being created and that the Brethren Home Community also intended to add Wellness Specialists to staff the newly formed Wellness Department. (N.T. 39, 40)

29. Myers told Daoularis that she was interested in the Director of Wellness position but that she would be happy to accept any position in the Wellness Department. (N.T. 40)

30. Approximately a month before Myers' employment with the Brethren Home Community ended, the Wellness Department was moved from the Human Resources Department to Residential Housing. (N.T. 28)

31. Myers described the newly created position of Wellness Director as a mere consolidation of her Wellness Coordinator position and that only position's name had changed. (N.T. 39)

32. A review of the job descriptions for Wellness Coordinator and Wellness Director reveals that the jobs are indeed similar. (C.E. 2)

33. Myers formally applied for the Wellness Director position by emailing Daoularis and Mike Leiter, the then Director of the Residential Housing. (N.T. 28, 37-38)

34. Following her application, Myers was interviewed by telephone by a woman who worked for Age Dynamics, Diane Doster. (N.T. 53)

35. During the telephonic interview, Doster revealed that she knew about Myers' medical leave of absence and asked Myers if she was physically able to do the job. (N.T. 53, 55)

36. Myers had only told Daoularis, King and the Employee Health Nurse of her medical conditions. (N.T. 53)

37. Daoularis informed Myers that she was not happy with the external candidates for the Wellness Director position and that she was going to re-advertise. (N.T. 57)

38. The first ad for the Wellness Director position had only run locally. (N.T. 57)

39. The ad indicated that a BA was required but that a Masters was preferred, that ACSM Certification was preferred, and that the position required CPR and first aid qualification. (N.T. 59)

40. Beyond having worked for approximately five years as the Brethren Home Community's Wellness Coordinator, Myers more than met all of the listed qualifications. (N.T. 59)

41. The individual selected for the Wellness Director position was Kristen Orwick, a woman approximately half Myer's age with no known disabilities and who did not have the extent of either the academic or certification qualifications Myers had. (N.T. 60-61)

42. Orwick had only recently received her fitness certification and had not even begun a masters educational program yet. (N.T. 62)

43. When she was not hired as the Wellness Director, Myers understood that she was terminated because there was no longer a Wellness Coordinator position. (N.T. 67)

44. After the Wellness Director was hired, the Brethren Home Community hired 4 Wellness Specialists. (N.T. 66)

45. Myers applied for the position of Wellness Specialist but was not hired. (N.T. 64, 66, 137)

46. At the time of the hiring of both the Wellness Director and Wellness Specialists, Myers was 50 years of age as her birthday is June 5, 1956. (N.T. 19, 65)

47. Myers testified that one of the Wellness Specialists hired was under 30 with no known disabilities and without fitness certifications. (N.T. 65, 137)

47. Myers was earning approximately $32,500.00 a year as the Wellness Coordinator. (N.T. 27)

48. The Wellness Director position paid $44,000.00 per year. (N.T. 41)

49. The Wellness Specialist position paid approximately $32,500.00 per year. (N.T. 42)

50. In addition to a salary, employees of the Brethren Home Community had both health and dental insurance. (N.T. 82, 109)

51. The Brethren Home Community also made a contribution of 4% of gross earnings of an employee to a tax deferred 401(c)(3) pension plan which fully vested after seven years. (N.T. 117, 122, 125)

52. The Brethren Home Community employees who were satisfactory employees could expect at least a 3% yearly salary increase. (N.T. 139)

53. After leaving the employ of the Brethren Home Community, Myers continually attempted to find alternate employment by applying for open positions, reading the newspaper want ads, attending job fairs, looking on-line for openings, reviewing professional journals, and becoming active on a career-link website. (N.T. 68-71)

54. After leaving the employ of the Brethren Home Community, Myers filed a PHRC claim alleging that she had been denied the positions of both Wellness Director and Wellness Specialist because she was regarded as having a disability and because of her age. (C.E. 9)

55. Myers initial complaint also alleged that the Brethren Home Community retaliated against her because she had requested an accommodation for her hip condition. (C.E. 9)

56. Meyer's initial PHRC complaint was served on the Brethren Home Community on June 9, 2006. (N.T. 89; C.E. 9)

57. After her termination from the Brethren Home Community, in September 2006, Myers began working as a Long-Term Care Counselor with the Adams County Office for Aging, Inc. (N.T. 87, 94)

58. Myers' Long-Term Care Counselor job required her to visit nursing homes throughout Adams County, including the Brethren Home Community. (N.T. 94)

59. Myers assessed newly admitted nursing home residents to see whether any resident could return home and, if so, what services would be required. (N.T. 95)

60. Myers was assigned to do assessments at the Brethren Home Community and when she arrived at the Brethren Home Community, Myers was escorted out. (N.T. 96)

61. Gretchen Pierce, the new Human Resources Manager for the Brethren Home Community informed Myers that she had been instructed to escort Myers off the property. (N.T. 96)

62. Myers' contract with Adams County Office for Aging, Inc., was not renewed, partly because Myers was not permitted at the Brethren Home Community. (N.T. 96, 99)

CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission (hereinafter "PHRC") has jurisdiction over the parties and the subject matter of these consolidated cases.

2. The parties have fully complied with the procedural prerequisites to a public hearing in these cases.

3. Caroll Myers is an individual within the meaning of the PHRA.

4. The Brethren Home Community is an employer within the meaning of the PHRA.

5. Normally, in cases involving allegations of disparate treatment, we use the analytical model of *McConnell Douglas v. Green*, 411 U.S. 792 (1973). Under this model, a Complainant bears the initial burden to establish by a preponderance of the evidence a *prima facie* case of discrimination. Establishing a *prima facie* case creates a rebuttable inference of discrimination. Once a *prima facie* case is shown, a Respondent must produce evidence of a legitimate non-discriminatory reason for its action in order to rebut the inference of discrimination created by the *prima facie* showing.

6. A "regarded as" disability claim, an employer can "regard" an employee as having a disability in three ways:

   a. that an employee has a physical or mental impairment that does not substantially limit a major life activity, but that is treated by an employer...as constituting a limitation;

   b. that an employee has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards the impairment; and

c. that an employee has no impairments but is treated by an employer...as having an impairment.

7. To establish a prima facie case of disability discrimination, Myers must prove that:

a. she is a disabled person within the meaning of the PHRA;

b. she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and

c. she suffered an adverse employment decision as a result of discrimination.

8. Myers failed to prove that she is a disabled person.

9. An employer having knowledge of a medical condition, without more, is not sufficient to establish that an employer regarded an employee as having a disability.

10. Under the ADAAA, an individual is not "regarded as" disabled if the condition is minor and lasts for less than six months.

11. To establish a prima facie case of an age-based refusal to hire and termination Myers must prove that:

a. she is a member of a protected class;

b. she applied for positions for which she was qualified;

c. she was not selected for the position of Wellness Director resulting in her termination as Wellness Coordinator; and

d. the employer continued to seek applicants of equal qualifications for the position.

12. Myers established a prima facie case of an age-based failure to hire into the position of Wellness Director and that this resulted in her termination.

13. The Brethren Home Community failed produce an articulated non-discriminatory reason for failing to select Myers to be the Wellness Director.

14. A request for an accommodation of a disability is a protected activity and can be the basis for a retaliation claim.

15. To establish a *prima facie* case of a retaliatory failure to hire Myers as Wellness Director, Myers must show:

a. that she requested an accommodation for what she believed in good faith to be a disability;

b. that the Brethren Home Community was aware of Myers request for an accommodation;

c. that subsequent to requesting an accommodation, Myers suffered an adverse employment action; and

d. that a causal connection exists between the request for an accommodation and the adverse action.

16. Myers established a prima facie case of retaliatory failure to hire Myers as Wellness Director.

17. Once a *prima facie* case has been shown, the burden of production shifts to the Brethren Home Community to articulate a legitimate non-discriminatory reasons for its actions. The Brethren Home Community failed to meet this production burden.

18. To establish a *prima facie* case of a retaliation in the prevention of Myers from performing her duties when working for the Adams County Office for Aging, Inc,, Myers must show:

a. that she engaged in a protected activity;

b. that the Brethren Home Community was aware that Myers had engaged in a protected activity;

c. Myers suffered an adverse employment action; and

d. that a causal connection exists between the protected activity and the adverse action.

19. Myers has established a prima facie case of retaliation in the Brethren Home Community's act of preventing her from performing her duties with the Adams County Office for Aging, Inc.

20. The Brethren Home Community failed to meet the production burden of articulating a legitimate non-discriminatory reason for its action.

21. The PHRC has broad discretion in fashioning a remedy.

22. Myers is entitled to instatement into the position of Wellness Director.

23. Myers is entitled to lost wages, lost pension benefits, and lost medical and dental benefits.

24. To be made whole, until such time as either Myers reached the age of 68 or is instated as Wellness Coordinator, Myers is entitled to front pay.

OPINION

These consolidated cases arise on two complaints filed by Caroll Myers. (hereinafter "Myers") against the Brethren Home Community. On or about March 21, 2006, Myers initially filed a complaint at PHRC Case Number 200505802. In this complaint, Myers named both the Brethren Home Community and Vernon King as Respondents. During the Public Hearing, the case against Vernon King as an individual was abandoned. The complaint at case number 200505802 against the Brethren Home Community generally alleged that Myers was denied a promotion to the position of Wellness Director because of Myers' disability and her age and in retaliation for the fact that Myers had made requests for reasonable accommodations. The complaint also alleged that on or about September 29, 2005, Myers was terminated from her position as Wellness Coordinator for the same unlawful discriminatory reasons. Finally, the complaint alleges that, following her termination, the Brethren Home Community failed to hire Myers for the position of Wellness Specialist, again because of Myers' disability, her age and in retaliation for Myers having requested reasonable accommodations of her disability. On or about March 14, 2007, Myers then filed another complaint at PHRC Case Number 200605596. In Myers' second complaint, Myers alleged that the Brethren Home Community retaliated against Myers by refusing to permit her on the Brethren Home Community premises in connection with a job Myers had with the Adams County Office for Aging, Inc. Myers' first complaint claims that the Brethren Home Community violated Sections 5(a) and (d) of the Pennsylvania Human Relations Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§951 et seq. (hereinafter "PHRA"). Myers' second complaint claims that the Brethren Home Community violated Section 5(d) of the PHRA.

Pennsylvania Human Relations Commission (hereinafter "PHRC") staff conducted an investigation and found probable cause to credit all allegations of both complaints.

Subsequently, the PHRC and the parties attempted to eliminate the alleged unlawful practices through conference, conciliation and persuasion. The efforts were unsuccessful, and these two cases were approved for public hearing. A consolidated Public Hearing was held on September 8, 2014, in Gettysburg, Pennsylvania, before Hearing Examiner Carl H. Summerson. At the Public Hearing, Myers was represented by Attorney Solomon Krevsky. The State's interest in the allegations was overseen by PHRC Assistant Chief Counsel Martin Cunningham. The Respondent did not participate in the Public Hearing.

A procedural chronology reveals that on April 28, 2014, these matters were placed on the Public Hearing docket. On May 1, 2014, a notice of telephonic Pre-Hearing Conference was sent to two attorneys who represented the Brethren Home Community: Robert H. Benacchio, Esquire and Jeffrey M. Daitz, Esquire of Pecker & Abramson in River Edge, New Jersey. On June 6, 2014, a consolidated Pre-Hearing Conference was held. Participating in the telephonic conference for the Brethren Home Community was Attorney Benacchio. On June 6, 2014, a Pre-Hearing Order was issued listing the dates for the consolidated Public Hearing as September 8, and if necessary, September 9 and 15, 2014. The Pre-Hearing Order specifically indicated that the Public Hearing would be held in Adams County. On July 1, 2014, the then Panel Advisor emailed the parties seeking to change the scheduled third day of a Public Hearing from September 15. On July 1, 2014, Attorney Benacchio responded indicating that either September 17 or 18 were available for the third day of Public Hearing, should that day be necessary. The same day, July 1, 2014, the then Panel Advisor emailed a notice to the parties that the third day was rescheduled for September 18, 2014. On August 15, 2014, the then Panel Advisor emailed the parties asking, among other things, whether Attorney Daitz was a Pennsylvania attorney and whether the parties would waive the forum from Adams County to Dauphin County. On August 18, 2014, the then Panel Advisor again

emailed Attorney Daitz inquiring whether the Brethren Home Community would waive the forum from Gettysburg, in Adams County, to Harrisburg, in Dauphin County. On August 18, 2014, Attorney Daitz sent an email to the then Panel Advisor answering only the question of whether he is a Pennsylvania attorney. Attorney Daitz did not answer the question about the forum waiver until August 19, 2014, at which time, Attorney Daitz noted that he did not agree to waive the forum from Gettysburg to Harrisburg.

On September 2, 2014, a Request for Admissions was sent to Attorney Daitz and on September 4, 2014, a Motion in Limine was also sent to him. On September 5, 2014, the then Panel Advisor emailed Attorney Daitz advising him that he will be afforded an opportunity to respond to the Motion in Limine at the beginning of the Public Hearing on September 8, 2015. On September 8, 2014, prior to the start of the Public Hearing, the Hearing Examiner placed telephone calls to both Attorney Daitz's office in New Jersey and to his cell phone to ascertain the reason he was not present or, if delayed, why. Neither telephone call revealed Attorney Daitz was experiencing a problem. Further, the day after the Public Hearing, an email was sent to Attorney Daitz to afford him an opportunity to potentially indicate that an emergency had prevented him from attending the Public Hearing on September 8, 2015. Attorney Daitz's response was that he was out of town and that Attorney Benacchio had left the firm and the files were in total disrepair. Attorney Daitz also stated that there was no record of any hearings. Clearly, there was direct information that the Public Hearing was scheduled in Gettysburg to begin on the 8th of September.

In the post-hearing brief filed in November 2014, on behalf of Myers, Myers' attorney noted that, although Myers complied in all respects to requirements of the Pre-Hearing Order, the Brethren Home Community did not. Although specifically required to do so, the Brethren Home Community failed to exchange a list of witnesses. Further, it is noted that the Brethren

Home Community did not serve written discovery and failed to answer either a First Request for Production of Documents or a First Request for Admissions. Also, the Brethren Home Community failed to file a Pre-Hearing Statement as instructed by the Pre-Hearing Order. In summary, the post-hearing brief on behalf of Myers correctly observes that the Brethren Home Community made little to no effort to participate in these consolidated cases.

Section 5(a) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice...[f]or any employer because of the ...age...or non-job related disability...of any individual...to ... to refuse to hire ... or to discharge from employment such individual...if the individual ...is the best able and most competent to perform the services required...

Section 5(d) of the PHRA provides in relevant part:

> It shall be an unlawful discriminatory practice...for any person, employer...to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge...under this act.

In these consolidated cases of alleged disparate treatment, Myers' post-hearing brief suggests that the evidence presented should be viewed through the lens of the oft repeated *McDonnell Douglas v. Green*, 411 U.S. 124 (1987) three part allocation of proof formula which requires an initial *prima facie* showing by Myers. If a *prima facie* case can be established, an inference of discrimination arises. Under the three part formula, the second burden would be on the Brethren Home Community to produce an articulated non-discriminatory reason for its actions. Of course, in these consolidated cases, the Brethren Home Community did not attempt to articulate a legitimate non-discriminatory reason for any of the alleged actions. Because of this, all Myers will be required to do is to make a sufficient showing that a *prima facie* case of discrimination exists for each allegation made.

Initially, Myers' complaint speaks of a failure to promote and a termination as separate actions. After the evidence was presented at the Public Hearing, it became clear that the failure to hire Myers as the Wellness Director and her termination from the position of Wellness Coordinator are closely related. Before Myers applied for the position of Wellness Director, the Brethren Home Community restructured the Wellness Department, in part, by creating the entirely new position of Wellness Director. This action effectively eliminated the position of Wellness Coordinator, the position Myers held. When Myers applied for the newly created Wellness Director position and was not selected, she no longer had a job because there was no longer a Wellness Coordinator position. In effect, Myers was not seeking a promotion, but instead, she was seeking to be selected for the newly created position and when she was not, she no longer had a job.

With respect to Myers' disability claim, Sections 4(p) and 4(p.1) of the PHRA provides the only clarification of the reach of Section 5(a) as it relates to a disability claim. Section 4(p) states:

> [t] he term" non-job related handicap or disability" means any handicap or disability which does not substantially interfere with the ability to perform the essential functions of the employment which a handicapped person applies for, is engaged in or has been engaged in....

Section 4(p.1) states:

> The term "handicap or disability, with respect to a person, means: (1) a physical or mental impairment which substantially limits one or more of such person's major life activities; (2) a record of having such impairment; or (3) being regarded as having such an impairment...

The PHRA provisions are supplemented by applicable regulations promulgated by the PHRC which provide:

> *Handicapped or disabled person* – Includes the following:

(i) A person who has or is one of the following:
(A) A physical or mental impairment which substantially limits one or more major life activities.
(B) A record of an impairment.
(C) Regarded as having an impairment.
(16 Pa. Code §44.4)

In the case at PHRC case number 200505802, Myers indicated that her disability claim was being pursued under the "regarded as" theory only. Under 16 Pa. Code §44.4(ii)(D) there are three distinct ways an employer may "regard" someone as having a disability. This section indicates that the phrase "is regarded as having an impairment" means: (1) has a physical or mental impairment that does not substantially limit major life activities, but that is treated by an employer ... as constituting a limitation; (2) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards the impairment; or (3) has [no] impairments but is treated by an employer ... as having an impairment."

These definitions have been upheld as a valid exercise of the PHRC's legislative rule-making authority. *See Pennsylvania State Police v. PHRC,* 72 Pa. Commonwealth Ct. 520, 457 A.2d 584 (1983), and *Pennsylvania State Police v. PHRC,* 85 Pa. Commonwealth Ct. 624, 483 A.2d 1039 (1984), *reversed on other grounds,* 517 A.2d 1253 (1986) (appeal limited to propriety of remedy).

Myers' post-hearing brief correctly observes that to establish a *prima facie* case of disability discrimination under the PHRA, Myers must prove that (1) she is a disabled person within the meaning of the PHRA; (2) she is otherwise qualified to perform the essential functions of the job with or without reasonable accommodation; and (3) that she suffered an adverse employment decision as a result of discrimination. *Williams v. Philadelphia Housing Authority Police Department,* 380

F.3d 751, 10 AD Cases 1607 (3rd Cir. 2004); and *Taylor v. Phoenixville School District*, 184 F.3d 296, 9 AD Cases 1187 (3rd Cir. 1999), *citing Gaul v. Lucent Technologies, Inc.*, 134 F.3d 576, 580, 7 AD Cases 1223 (3rd Cir. 1998).

On the question of whether Myers can show that she is a disabled person, Myers submits that the Brethren Home Community "regarded" her as disabled. However, of the three possible categories of coverage under the regarded as provision found at 16 Pa. Code §44.4(ii)(D), Myers made no attempt to articulate which category she believes applies to her. The post-hearing brief merely states in conclusory fashion that "the record unequivocally establishes that Respondent perceived or regarded Complainant as disabled, and made employment decisions based on such perception." All the post-hearing brief points to is evidence that, in effect, the Complainant was the only staff member of the Brethren Home Community's Wellness Department for nearly five years and then became unwell. The post-hearing brief notes that Myers had required hip surgery with possible future intermittent complications. The post-hearing brief then simply asserts that the Respondent was not about to place Myers into the lead position over a newly reorganized Wellness Department.

Fundamentally, the mere fact that an employer has knowledge of an employee's medical condition, without more, is insufficient to establish either that an employer regarded an employee as disabled or that having knowledge of a condition caused the adverse employment action. *See Steele v. Thiokol Corp.*, 241 F.3d 1248 (10th Cir. 2001); *Reeves v. Johnson Controls World Services, Inc.*, 140 F.3d 144 (2nd Cir. 1998). Regarded as claims turn on an employer's perception of an employee

and is therefore a question of intent, not whether it can be shown that the employee has a condition. *Colwell v. Suffolk County Police Dep't,* 158 F.3d 635 (2nd Cir. 1998).

In the portion of the present case alleging disability discrimination, Myers does not attempt to show that she had a physical impairment that substantially impaired a major life activity. During the Public Hearing Myers testified that she had hip surgery and was expected to be out only 8 weeks. In fact, Myers testified that she worked even while out on the medical leave of absence. (N.T. 57)

Normally, injuries of a short duration have not been found to be disabilities. After the ADA was recently amended, the ADAAA now states that an individual is not "regarded as" disabled if the condition is minor and lasts for less than six months. ADAAA, S.3406 Section 4(a) (2008). While there is not a set period of time that an impairment must last, unless the impairment is "sufficiently severe" it normally must last for at least several months. Here, Myers hip surgery took her away from her job with the Brethren Home Community for under 8 weeks. Further, the post-hearing brief makes no mention of what "major life activity" was substantially impaired. Perhaps this is the reason Myers now seeks to rely on the regarded as provision in her effort to show that she has a disability.

During the Public Hearing, there was mention that Myers did tell Daoularis, Executive Director King and a health nurse that a doctor told her that he suspected that she might have multiple myeloma. Of course, multiple myeloma is a serious form of bone cancer, however, Myers only said that her doctor was suspicious, not that she had multiple myeloma.

Had there been some evidence that the Brethren Home Community acted upon the information that Myers had hip surgery or there was the possibility that she

had multiple myeloma, then a "regarded as" disability might be found. Here, however, there is simply speculation that the Brethren Home Community regarded Myers as having a disability. The present record simply does not connect the failure to hire Myers as the newly created Wellness Director, the termination, or the failure to hire as a Wellness Specialist with an intention to act because of either the hip surgery or the possibility of having multiple myeloma. It is not enough that an employer perceives an employee as "somehow disabled"; the employer must regard the employee as disabled within the meaning of the PHRA, i.e. having an impairment that substantially limits a major life activity. *Jacques v. DiMarzio, Inc.*, 386 F.3d 192 (2nd Cir. 2004).

When looking for evidence of "regarded as" disability discrimination, normally one finds compelling evidence that establishes that an employer specifically took adverse action because of a condition that was regarded as a disability but was not. For example, in the case of *Pa. State Police v. PHRC*, 457 A.2d 584 (Pa. Commonwealth Ct. 1983), an applicant for admission to the Pa. State Police academy had a medical condition that interfered with her ability to breath and it was this condition that was the basis of the applicant's rejection. In that case, the court agreed that the Pa. State Police had regarded the condition as a substantial impairment when in fact, the condition did not substantially impair a major life activity.

Sometimes an employer makes a statement that a condition makes the employee unfit for a job and this evidence forms the basis of a regarded as claim. *See Josephs v. Pacific Bell*, 443 F.3d 1050 (9th Cir. 2005). Other times the Employer may take a contested action when a doctor refuses to clear an employee to work. *See Haynes v. City of Montgomery*, 2009 U.S. App. LEXIS 19209 (11th Cir. 2009). In

another case, a company president wrote in an e-mail that an employee qualifies for ADA designation while, at the same time, ignoring a Complainant's doctor's statement that the employee could return to work. *See Wilson v. Phoenix Specialty Manufacturing Co.*, 513 F. 3d 378 (4th Cir. 2008). Or consider the case of *Quiles-Quiles v. Henderson,* 439 F.3d 1 (1st Cir. 2006), where an employer may have regarded an employee as having a disability where the employee's supervisor made comments indicating that they thought the employee posed a risk to his co-workers because the employee was under psychiatric treatment.

In these cases and many others like them, an employer's actions are shown to have been motivated by a physical condition that falls short of an actual disability but becomes a disability because the employers "regarded" these conditions as substantially limiting a major life activity.

Again, in Myers' allegation of disability discrimination, Myers does not connect her conditions with the Brethren Home Community's actions of refusal to select Myers as the Wellness Director, termination and refusal to hire. For this reason, the first element of the requisite *prima facie* showing of Myers' disability allegation is lacking.

Accordingly, we turn to Myers' age-based allegation that she was refused the position of Wellness Director which, in effect, resulted in her termination and subsequently denied hiring as a Wellness Specialist. Myers' post-hearing brief correctly observes that Myers must initially establish a *prima facie* case.

Fundamentally, Myers' allegation involves the concept of disparate treatment. The concept of disparate treatment refers to situations in which an employer intentionally discriminated against an individual by treating her different than others who, save for a protected characteristic, are similar in terms of qualifications and

eligibility to the individual claiming discrimination. The *prima facie* formula is a very flexible tool that is generally used to eliminate the most common nondiscriminatory reasons for an employer's actions. *Allegheny Housing Rehabilitation Corp. v. PHRC,* 516 Pa. 124, 532 A.2d 315 (1987). Indeed, the *McDonnell Douglas v. Green* formula is simply a "sensible, orderly way to evaluate the evidence in light of common experience." *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979). Once the elements of a *prima facie* case have been established, it can be presumed that the alleged acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 577 (1978).

To establish a *prima facie* case of age-based refusal to select for a position that results in termination, Myers must show four things: (1) that she is a member of a protected class; (2) that she applied for positions for which she was qualified; (3) that she was not selected for the position of Wellness Director resulting in her termination from the position she held and was not selected for the position of Wellness Specialist; and (4) that the employer continued to seek applicants of equal qualifications for the positions of Wellness Director and Wellness Specialist. *See PHRC v. Johnstown Redevelopment Authority*, 527 Pa. 71, 588 A.2d 497 (1991), *citing General Electric Corp. v. PHRC*, 469 Pa. 292, 304-305, 365 A.2d 649, 655-656 (1976).

The burden to establish a *prima facie* case is *de minimus. See Cronin v. Aetna Life Insurance Co.* 46 F.3d 196, 203-204, 66 FEP Cases 1727 (2nd Cir. 1995). The requirement is neither onerous nor intended to be rigid, mechanized or ritualistic. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 and *Furnco*

Construction at 577. However, the requisite showing must be by a preponderance of the evidence.

In this case, Myers is able to show all four elements of the requisite *prima facie* showing. First, Myers testified that at the time of the denial of the positions of Wellness Director and Wellness Specialist, she was 50 years old. Accordingly, because of her age she is a member of a protected class. Myers established that she applied for the positions of Wellness Director and Wellness Specialist. Not only did Myers express her interest in the position of Wellness Director to the Brethren Home Community's Human Resource Director, Myers was interviewed for the position. Further, Myers established that she also applied for the position of Wellness Specialist. Myers also has established that she met all of the qualifications for the positions. An ad for the position of Wellness Director indicated that a BA was required and a Master's preferred. Myers had a Master's degree. Further, Myers testified that she had all of the ad's listings of both required and preferred qualifications. Indeed, in effect, Myers had been working for the previous several years performing the same tasks listed in the job description for the Wellness Director position. Further, Myers was not only performing those same duties, she was doing so quite admirably. In her most recent performance evaluation, Myers performance on numerous rating factors was rated as either commendable or outstanding. In fact of 6 "core value" categories rated, Myers received 4 outstanding and 2 commendable marks. Similarly, her ratings for 6 listed "essential functions" were again, 4 outstanding and 2 commendable marks. As for Myers' certifications, licenses held and experience, Myers was eminently qualified. Beyond all her qualifications, Myers was directly involved in the process of reorganizing the Wellness Department. Myers

worked directly with the Brethren Home Community's consultant and was even asked to review and critique a report the consultant was drafting about recommended changes to the Wellness Department.

The position of Wellness Specialist had even fewer requisite qualifications than the Wellness Director position. Clearly, Myers was eminently qualified for the position of Wellness Specialist.

Since *McDonnell Douglas* was decided, the fourth element of the requisite *prima facie* showing has gone through various iterations and has occasioned considerable differences in judicial statements. Here, the case of *PHRC v. Johnstown Redevelopment Authority Supra*, will be used to principally structure the fourth element. In that case, the court indicated that the fourth element is established if the employer continued to seek applicants of equal qualifications. Applying that element to the present circumstance, Myers has shown that the Brethren Home Community not only continued to seek applicants after Myers, an extremely qualified applicant, was interviewed for the Wellness Director position, but actually re-ran the ad because the Brethren Home Community was not happy with the external applicants after the ad had only run locally. In the *Johnstown Redevelopment* case, there had not been testimony offered that the individual not selected was either as qualified or better qualified than applicant selected. Here, Myers did offer such evidence. Myers revealed that the individual selected as the Wellness Director was not only approximately half her age, the individual selected also did not have the academic qualifications Myers had. Myers had her Masters degree and the individual selected for the Wellness Director position had not yet started a Masters program. Myers also had numerous professional certifications including a certification in fitness

training. The individual selected as Wellness Director did not have the professional certifications Myers had. The individual selected had not even yet obtained a professional fitness. Myers testified that she learned that the one selected for the Wellness Director position did not obtain a professional fitness certificate until a year and a half after she was hired.

With respect to the position of Wellness Specialist, once again, Myers established that she was far more qualified than at least one of the individuals selected. Without question, Myers credentials were superior to one of the individuals selected who Myers says was under 30.

In this case, Myers clearly established that she was not only as well qualified as the persons selected for both the Wellness Director position and the Wellness Specialist position, but was, in fact, much better qualified. Accordingly, Myers successfully established each element of the requisite prima facie showing that she was not hired for either the newly created Wellness Director position or the Wellness Specialist position and as a result of not being selected for the Wellness Director position, the job she had held was effectively abolished. In doing so, Myers created an inference of discriminatory intent by the Brethren Home Community.

Normally, the *prima facie* case is not the end of the story. When a Complainant successfully presents a *prima facie* case, the employer has the opportunity to rebut the inference by articulating legitimate non-discriminatory reasons for the adverse employment action. *Burdine*, 450 U.S. at 254. Of course, in this case, no effort was made to offer legitimate non-discriminatory reasons for the adverse actions. Accordingly, the inference of discrimination created by the *prima facie* showing stands unrebutted. Myers was not selected for the position of Wellness

Director because of her age and this failure to select Myers, in effect, resulted in Myers' termination. Additionally, Myers was not selected for the position of Wellness Specialist because of her age.

Regarding Myers' first allegation of retaliation, Myers submits that she was not selected for the position of Wellness Director in retaliation for having requested an accommodation. The accommodation Myers requested was to have approximately 8 weeks off, beginning on April 19, 2005, for hip surgery on April 26, 2005, and returning on June 9, 2005, with a modified schedule as an accommodation. In July 2005, Myers returned to full time with lifting restrictions. The retaliation provision of the PHRA is found in Section 5(d) which states in pertinent part: "[i]t shall be an unlawful discriminatory practice...[f]or any...employer...to discriminate in any manner against any individual because such individual has opposed any practice forbidden by this act, or because such individual has made a charge...under this act."

The clear unmistakable language of this section is designed to protect the employees who utilize the tools the PHRA has provided to protect their rights. The question we are presented with under the circumstances in this case is whether requesting an accommodation fits within Section 5(d) of the PHRA.

On June 6, 2014, prior to the Public Hearing, the parties were instructed to file pre-hearing statements on the issue of "[w]hether the request for an accommodation acts in such a way as to implicate Section 5(d) (the retaliation provision of the PHRA)? Only the Complainant filed the requisite pre-hearing statement.

In the Complainant's pre-hearing statement, the following two cases were cited: *Shellenberger v. Summit Bancorp*, 318 F.3d 183 (3rd Cir. 2003) and *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177 (3rd Cir. 2010). In both cases, the courts

found that requests for accommodation are protected and such requests can form the basis of protected activity to support a retaliation claim. The reasoning of these cases is sound and is adopted here.

Interestingly, Myers' post-hearing brief only references Myers' retaliation claim brought in PHRC case number 200605596. In that complaint, Myers alleged that the Brethren Home Community refused to permit Myers on the Brethren Home Community premises when Myers was working for the Adams County Office for Aging, Inc. However, in Myers' earlier claims at PHRC case number 200505802, Myers claimed retaliation in response to requests for accommodation when the Brethren Home Community denied her the position of Wellness Director which, in effect, resulted in her termination, and refused to hire her as a Wellness Specialist.

Even though Myers' post-hearing brief does not cover the claims in PHRC case number 200505802, those claims will be addressed here. Once these allegations have been reviewed, the retaliation claim at PHRC case number 200605596 will be reviewed.

To establish a *prima facie* case of a retaliatory denial of the position of Wellness Director and the resultant termination, and the denial of the position of Wellness Specialist, Myers must prove that: (1) she requested an accommodation for what she believed in good faith to be a disability; (2) the Brethren Home Community was aware that Myers had requested an accommodation; (3) Myers suffered adverse employment actions; and (4) a causal connection exists between the request for an accommodation and the adverse actions. *Uber v. Slippery Rock University,* 887 A.2d 362 (Pa. Commonwealth Ct. 2005), *See also, Marra v. Phila. Housing Auth.*, 497 F.3d 286, 300 (3rd Cir. 2007). The circumstances of this case present a relatively small

controversy regarding the first required element of the requisite *prima facie* showing. Clearly, Myers asked for time off for surgery, for a modified schedule following the surgery, and for an accommodation of her lifting restrictions following surgery.

The second required element of the *prima facie* showing is easily met by evidence that the Brethren Home Community provided Myers with time off for surgery, afforded her a modified work schedule and accommodated her lifting restrictions. The third element of the requisite *prima facie* showing was established by evidence that shortly after the surgery, Myers was denied the position of Wellness Director effectively resulting in her termination and shortly thereafter, denied the position of Wellness Specialist.

Turning to the final element of the requisite *prima facie* showing, Myers established a causal connection by showing there is sufficient temporal proximity between the request for accommodation and the denial of the position of Wellness Director, the resultant termination and the denial of the position of Wellness Specialist.

Having sufficiently shown a *prima facie* case of retaliation in the denial of the Wellness Director position, the resultant termination, and the denial of the Wellness Specialist position, the burden of production shifts to the Brethren Home Community to advance a legitimate, non-retaliatory reason for the adverse employment actions. Of course, the Brethren Home Community made no attempt to advance reasons for the adverse actions. Accordingly, a finding of liability on the retaliation claims of PHRC case number 200505802, is appropriate,

Next, we turn to the retaliation claim found in Myers' PHRC case number 200605596. In this claim, Myers asserts that after leaving the employ of the Brethren

Home Community, she was working for Adams County Office for Aging, Inc. As a part of her duties in this new job, Myers was assigned to visit new admissions to nursing homes to discuss options for services. When Myers was assigned to perform these duties with new admissions at the Brethren Home Community, she asserts that on October 3, 2006, when Myers appeared at the premises of the Brethren Home Community, she was prevented from performing her duties and removed from the property in retaliation for having filed the PHRC case number 200505802.

To establish a *prima facie* case with respect to this retaliation claim, Myers must prove that: (1) she engaged in protected activity; (2) the Brethren Home Community was aware that Myers had engaged in protected activity; (3) Myers suffered adverse employment actions; and (4) a causal connection exists between the protected activity and the adverse actions. *Uber v. Slippery Rock University,* 887 A.2d 362 (Pa. Commonwealth Ct. 2005), *See also, Marra v. Phila. Housing Auth.*, 497 F.3d 286, 300 (3rd Cir. 2007).

Clearly, Myers filed a PHRC complaint for which the Brethren Home Community was aware by the act of service of the complaint. Next, Myers job with Adams County Office for Aging, Inc. was detrimentally affected when Myers was asked to leave the premises of the Brethren Home Community. Finally, there is a causal connection between the filing of the earlier PHRC complaint and the adverse action. Myers testified the Brethren Home Community's new Human Resources Director escorted Myers off the property and told Myers that she had been instructed to do so.

These straight forward facts sufficiently establish a *prima facie* case of retaliation for Myers' claim that she was not permitted to fulfill her job duties and

removed from the Brethren Home Community's property. Once again, at this point, the Brethren Home Community would have the production burden to articulate some legitimate non-retaliatory reason for treating Myers so badly. Of course, the Brethren Home Community did not. Accordingly, since the Brethren Home Community did not rebut the inference of unlawful retaliation, a finding against the Brethren Home Community on this component of Myers' cases is appropriate.

Because we find the Brethren Home Community liable for both age-based and retaliation-based failing to hire Myers for the position of Wellness Director, which failure resulted in Myers' termination from her position of Wellness Coordinator, for the age-based and retaliation-based failure to hire Myers for the position of Wellness Specialist, and for the act of retaliation that interfered with Myers' duties while working for Adams County Office for Aging, Inc., we move to consideration of an appropriate remedy.

The PHRC has broad equitable power to fashion relief. Section 9 of the Pennsylvania Human Relations Act (hereinafter, "PHRC") states in pertinent part:

> (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 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, hiring, reinstatement or upgrading of employees; 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,....

43 P.S. § 959(f)(1).

In *Murphy v. Cmwlth., PA Human Relations Commission*, 506 Pa. 549, 486 A.2d 388 (1985), the Pennsylvania Supreme Court commented on the extent of the

Commission's power by stating: "We have consistently held that the Commissioners, when fashioning an award, have broad discretion and their actions are entitled to deference by a reviewing court." *Murphy*, at 486 A.2d 393. The expertise of the Commission in fashioning a remedy is not to be lightly regarded. The only limitation upon the Commission's authority is that its award may not seek to achieve ends other than the stated purposes of the Act. *Consolidated Rail Corp. v. Pennsylvania Human Relations Commission*, 136 Pa. Commonwealth Ct. 147,152, A.2d 702 708 (1990).

The purpose of the remedy awarded under the PHRA is twofold. First, the remedy must insure that the Commonwealth's interest in eradicating the unlawful discriminatory practice found to exist is vindicated. Vindication of this interest is non-discretionary. It necessitates entry of an order, injunctive in nature, which requires the Respondent to cease and desist from engaging in unlawful discriminatory practices.

The second purpose of any remedy focuses on entitlement to individual relief. Its purpose is not only to restore the injured party to her pre-injury status and make her whole, but also to discourage future discrimination. *Williamsburg Community School District v. Pennsylvania Human Relations Commission*, 99 Pa. Commonwealth Ct. 206, 512 A.2d 1339 (1986).

With respect to entitlement to individual relief, several other matters must be addressed. First is the fact that where a Complainant demonstrates that economic loss has occurred, back pay should be awarded absent special circumstances. *See: Walker v. Ford Motor Co., Inc.*, 684 F.2d 1355 (11th Cir. 1982). In fact, once liability is established, the burden shifts to the employer to demonstrate that monetary relief

is not proper. *U.S. v. International Brotherhood of Teamsters*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed.2d 396 (1977); *Franks v. Bowman Transportation Co.*, 424 U.S. 474, 96 S. Ct. 1251, 47 L. Ed.2d 444 (1976). It is axiomatic that the calculation of the back pay award need not be exact. It is only necessary that the method used be reasonable. *PHRC v. Transit Casualty Insurance Co.,* 340 A.2d 624 (Pa. Commonwealth Ct. 1975). Uncertainties, in general, should be resolved against a discriminating employer. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211 (5th Cir. 1974), and *Green v. USX Corp.,* 46 FEP Cases 720 (3rd. Cir. 1988)..

The question of mitigation of damages is a matter that lies within the sound discretion of the Commission. *Consolidated Rail Corporation, cited infra,* 582 A.2d at 708. Moreover, the burden is on the employer to demonstrate any alleged failure to mitigate. *Cardin v. Westinghouse Electric Corp.,* 850 F.2d 996, 1005 (3rd Cir. 1988).

In the case at hand, it is certainly possible to calculate the appropriate remedy owed to Myers by use of a method that is reasonable. First, as expressly provided in the PHRA, an offer of hiring/instatement is appropriate. 43 P.S. §959(f)(1). Second, payment of back wages, salary and associated benefits, as well as other expenses caused by the unlawful conduct, are appropriate.

As noted above, apart from the offer of hiring/instatement into the position of Wellness Director, the evidence at the Public Hearing demonstrates that the award should include the following: (a) back pay and associated salary increases; (b) pension plan benefits; (c) medical expense reimbursements; (d) out-of-pocket expenses incurred in connection with the complaint; and (e) an appropriate interest award.

At the time of her termination, Myers was earning $32,500.00 per year as a Wellness Coordinator. Had Myers been hired on September 25, 2005 for the position of Wellness Director, Myers would have begun to earn $44,000.00 per year. Further, the evidence shows that satisfactory employees could expect a yearly salary increase of 3%. We accept as reasonable that Myers was a good employee and had she been hired as the Wellness Director, she would have earned the yearly salary increases. Accordingly, since her termination, Myers lost the following salary:

A. September 25, 2005 through December 31. 2005

$44,000.00 ÷ 52 weeks = $846.15 per week

$846.15 x 13.85 weeks = $11,719.17

B. January 1, 2006 through December 31, 2006

$44,000.00 x 3% salary increase = $45,320.00

C. January 1, 2007 through December 31, 2007

$45.320.00 x 3% salary increase = $46,679.60

D. January 1, 2008 through December 31, 2008

$46,679.60 x 3% salary increase = $48,079.99

E. January 1, 2009 through December 31, 2009

$48,079.99 x 3% salary increase = $49,522.39

F. January 1, 2010 through December 31, 2010

$49,522.39 x 3% salary increase = $51,008.06

G. January 1, 2011 through December 31, 2011

$51,008.06 x 3% salary increase - $52,538.30

H. January 1, 2012 through December 31, 2012

$52,538.30 x 3% salary increase = $54,114.45

I. January 1, 2013 through December 31, 2013

$54,114.45 x 3% salary increase = $55,737.88

J. January 1, 2014 through September 7, 2014 (date of Public Hearing)

$55,737.88 x 3% salary increase = $57,410.02

$57,410.02 ÷ 52 weeks = $1,104.04 per week

35.7 weeks x $1,104.04 = $39,414.23

Total lost wages – September 25, 2005 through September 8, 2014 - $454,134.07

Myers' lost wages must now be adjusted by subtracting her interim wages. Fundamentally, Myers asserts that she made reasonable attempts to mitigate her damages. Diligence in mitigating damages within the employment discrimination context does not require every effort, but only a reasonable effort.

Following her termination from the Brethren Home Community, Myers did mitigate her damages as follows:

A. 2006 earnings

Adams County Office for Aging, Inc.,	-	$2,013.60
Genesis Eldercare Rehab Services	-	$648.00
Country Meadows Association	-	$22.00
Total earnings for 2006		$2.683.60

B. 2007 earnings

American Red Cross York County	-	$136.88
YWCA	-	$4,677.81
Genesis Eldercare Rehab Services	-	$4,677.81
Adams County Office for Aging Inc.	-	$7,455.19
Total earnings for 2007		$16,947.69

C. 2008 earnings

YWCA	-	$381.30
Adams County Office for Aging, Inc.	-	$4,919.68
Genesis Eldercare Rehab Services	-	$22,770.00
Total earnings for 2008	-	$28,070.98

D. 2009 earnings

Genesis Eldercare Rehab Services	-	$32,181.00

E. 2010 earnings

Genesis Eldercare Rehab Services	-	$23,595.60

F. 2011 earnings

Genesis Eldercare Rehab Services	-	$17,840.10

G. 2012 earnings

GHC Payroll LLC – Respiratory Health	-	$27,481.17

H. 2013 earnings

GHC Payroll LLC – Respiratory Health	-	$34,376.59
Franklin Township – per diem	-	$220.50
Total earnings for 2013		$34,597.09

I. 2014 earnings – January 1, 2014 through Sept 8, 2014

Per Diem Cardiac and Pulmonary Rehab	-	$24,205.00

Total earnings between Sept. 25, 2005 through Sept. 8, 2014 - $204,918.63

Lost wages: $454,134.07 – mitigation earnings $204,918.63 = $249,215.44

It is noted that the post-hearing brief on behalf of Myers deducted unemployment compensation paid to Myers after her termination. As to whether unemployment benefits should be deducted, we find that they should not. In the

Third Circuit, courts have carved out an exception to what has come to be known as the "collateral source rule." Under the collateral source rule, payments under Social Security, unemployment compensation and similar programs are normally treated as collateral benefits which would not ordinarily be set off against damages awards. *See Craig v. Y&Y Snacks, Inc.*, 721 F.2d 77 (3rd Cir. 1983); and *Maxfield v. Sinclair Int'l*, 766 F.2d 788 38 FEP Cases 442 (3rd Cir. 1985).

Returning to the question of lost wages, two components of this issue remain. First, Myers seeks hire/instatement into the position of either Wellness Director or Wellness Specialist and such an order is proper. Second, Myers seeks front pay until such time as the Brethren Home Community offers Myers a position as either Wellness Director or Wellness Specialist and Myers either accepts such a position or refuses the offer of such a position.

Evidence produced at Public Hearing established that employees of the Brethren Home Community participated, at no cost to them, in a pension plan. At the time of her termination, Myers had made contributions to this plan. At the time of her termination Myers received a check in the amount of $17,724.81. The Brethren Home Community pension plan entailed the Brethren Home Community contributing to an employee's pension plan in an amount equal to 4% of an employee's gross earnings once an employee had worked for more than 90 days. Upon an employee leaving the employ of the Brethren Home Community, the employee was vested as follows:

After 1 year of employment	-	0 % vested
After 2 years	-	0 % vested
After 3 years	-	20 % vested

After 4 years - 40 % vested

After 5 years - 60 % vested

After 6 years - 80 % vested

After 7 years - 100 % vested

After 11 years – and at 5 year increments thereafter, the Brethren Home Community would contribute to an employee's account amounts based on the amounts of an employee's contributions.

Since Myers received a payout on her pension account on January 25, 2006, we begin the calculation of the amount of pension contributions lost in 2006. Further, no evidence was presented to show the percentage of increase on pension funds during the time from Myers' termination to the present. Accordingly, a figure of 3% per year will be used as a reasonable figure with respect to interest earned on accumulated pension funds. These calculations are as follows:

2006 - $45.320.00 x 4 % contribution = $1,812.80

2007 - $46,679.60 x 4% = $1,867.18 plus 3% on the 2006

Contribution - $54.38 = $1,921.56

2008 – $48,079.99 x 4 % = $1,923.20 plus 3% on the 2006,

2007 contribution plus interest - $112.03 = $2.035.23

2009 - $49,522.39 x 4% = $1,908.90 plus 3% on the 2006, 2007

2008 contribution plus interest - $173.09 = $2,081.89

2010 – $51,008.06 x 4% = $2,040.32 plus 3% on the 2006, 2007,

2008 and 2009 contribution plus interest = $2,275.86

2011 - $52,538.30 x 4% = $2,101.53 plus 3% for years 2006

through 2010 contribution plus interest = $303.82 = $2,405.35

2012 – $54,114.45 x 4% = $2,164.58 plus 3% for years 2006 through 2011 contribution plus interest = $375.98 = $2,540.56

2013 - $55,737.88 x 4% = $2,229.52 plus 3% for years 2006 through 2012 contribution plus interest = $452.20 = $2,681.72

2014 - $39,414.23 x 4% = $1,576.57 plus 3% for years 2006 through 2013 contribution plus interest = $514.65 = $2,091.22

Total lost pension contributions and interest from Sept. 2005 to Sept. 8, 2014 $17,164.47

As more than 7 years have elapsed, the entire amount of lost pension contributions is the appropriate amount to award.

The next item of damage to be considered addresses lost medical benefits. While an employee of the Brethren Home Community, Myers received medical benefits. Upon her termination, the cost for Myers to continue medical coverage include the following:

2005

COBRA Health Care Coverage – 3 months @ $449.96 per month $1,349.88

2006

COBRA Health Care Coverage – 9 months @ $449.96 per month $4,049.64

2007

Capital Blue Cross coverage – 12 months @ $159.14 per month $1,909.68

2008

	Capital Blue Cross coverage – 12 months	
	@ $174.89 per month	$2,098.68
2009		
	Capital Blue Cross coverage – 12 months	
	@ $185.79 per month	$2,229.48
2010		
	Capital Blue Cross coverage - 12 months	
	@ $192.44 per month	$2,309.28
2011		
	Highmark Special Care Plan – 12 months	
	@ approx.. $175.00 per month	$2,100.00
2012		
	Highmark Special Care Plan – 12 months	
	@. $144.55 per month	$1,734.60
2013		
	Highmark Special Care Plan – 12 months	
	@. $151.80 per month	$1,821.60
2014		
	Affordable Care Act plan – 9 months	
	@ $152.00 per month	$1,368.00
	Total expenditures for health care that Myers made –	$20,970.84

A separate item of potential damages involved a request Myers received for a tuition reimbursement. The request is related to education Myers pursued following her termination, as Myers began working on a doctorate. The amount requested

was $1,800.00, however, Myers testified that she never had to pay the money back. Accordingly, this amount should not be awarded.

Myers also testified that during her employment with the Brethren Home Community, she had dental coverage that was lost at the time of her termination. Dental expenses incurred by Myers that would have been paid under the Brethren Home Community's dental plan include:

2009 - $73.00; 2010 - $177.00; 2011 - $1,609.00: and 2012 - $85.00. These expenditures for dental care total: $1,944.00. An award for these expenses is appropriate.

Myers also provided evidence of medical expenses, other than the continuation of medical coverage expenses listed above, that she incurred that would have been covered had she not been terminated. These expenses include:

2009 – prescriptions $287.44; 2010 – prescriptions $236.00; 2011 – prescriptions $565.00, chiropractor $56.00 and blood work $170.00; 2012 – prescriptions $383.46 and unpaid medical appointments $1,521.00; and 2013 – prescriptions $988.00, co-pays $158.00 and MRI $3,670.00. These expenditures total $8,034.90. An award for these expenses is also appropriate.

Returning to the question of front pay, in order to make Myers whole, consideration of front pay is appropriate. Front pay is a monetary award that both compensates a victim of discrimination for lost employment extending beyond the date of a Public Hearing and aids in ending discrimination. Here, for multiple reasons, the Brethren Home Community may be unable to hire/instate Myers into the position of Wellness Director immediately. In such an event, the Brethren Home Community should be required to pay Myers the difference between what she would

have earned as the Wellness Director and her gross earnings from jobs she works in furtherance of her obligation to mitigate her damages. Further, should the Brethren Home Community choose to hire/instate Myers into a Wellness Specialist position, front pay should be awarded that covers the difference in pay between the Wellness Director's position and the lower paying Wellness Specialist position until such time as Myers is hired/instated into the Wellness Director position. In the event that Myers would be offered a Wellness Specialist position, and accept, front pay would be appropriate until such time as the Wellness Director position is offered to Myers. Should Myers be offered either a Wellness Specialist position or the Wellness Director position and reject such an offer, at that time, all front pay obligations would cease.

In making the discretionary decision to award front pay under the circumstances of this case, several factors are important considerations. First, the record shows that Myers' efforts to mitigate her damages have been extensive. She has continually diligently sought employment in her field and, despite her efforts, has only been partially successful in securing comparable employment. Second, we review Myers' qualifications as compared to those hired into both the Wellness Director position and the Wellness Specialist positions and find that Myers qualifications are vastly superior. Next, we give due consideration to Myers' age. Despite her extensive qualifications, Myers' age may well increase the difficulty in finding and securing comparable employment. *See Gotthardt v. National R.R. Passenger Corp.*, 191 F.3d 1148, 80 FEP Cases 1528 (9th Cir. 1999). And finally, we consider the act of retaliation the Brethren Home Community visited on Myers when she was working for Adams County Office for Aging, Inc.

These factors make an award of front pay appropriate. As front pay, Myers should be paid the difference between (1) what she has earned since the Public Hearing to date and what she will earn in the future, and (2) what she would have earned as the Wellness Director. If Myers is not hired/instated into either the Wellness Director position or a Wellness Specialist position, the front pay award should continue until Myers reaches the age of 68. *See Shore v. Federal Express Corp.*, 49 FEP Cases 1616 (W.D. Tenn. 1986).

Initially, within 30 days of the date of this Order, Myers should be required to report to the Brethren Home Community the amount of her gross earnings from the date of the Public Hearing and the date of this Order. Then, within 30 days of the Brethren Home Community's receipt of Myers' initial report, the Brethren Home Community should be required to pay to Myers the amount of gross earnings Myers would have made as a Wellness Director less the amount or gross earnings Myers received in the relevant period. Subsequently, beginning six month after this Order, and then on a semi-annual basis, Myers should be required to report to the Brethren Home Community the amount of her gross earnings for the previous six months. Then, within 30 days of the receipt of such semi-annual report, the Brethren Home Community should be ordered to pay Myers the amount of gross earnings she could have received if she had been employed as a Wellness Director minus the amount of gross earnings she actually made during the relevant six month period. At all times, Myers should be required to continue to seek to mitigate her damages by actively looking for comparable employment. Further, if Myers is not hired/instated into a position with the Brethren Home Community, on a yearly basis, until Myers reaches the age of 68, the Brethren Home Community should also be required to

pay to Myers an amount equal to appropriate pension plan contributions.

Of course, the PHRC is authorized to award interest on the back pay and lost benefits awards. *Goetz v. Norristown Area School District*, 16 Pa. Commonwealth Ct. 389, 328 A.2d 579 (1975). Accordingly, an award of interest at the rate of 6% per year is appropriate.

Myers does not seek recovery for certifiable travel expenses.

Myers' post-hearing brief raises a final issue regarding damages. In the post-hearing brief, Myers asks the PHRC to go against precedent and award damages for emotional distress. The brief correctly observes that the Pa. Supreme Court case of *PHRC v. Zamantakis*, 478 Pa. 454 (1987), generally held that the PHBRC does not have the authority to award damaged for mental anguish and humiliation.

To award such damages, there would have to be clear legislative intent to authorize the PHRC to do so. Under the PHRA, the legislature carves out one single area where damages for humiliation and embarrassment are appropriate and this area in not in employment cases. The limited area is in housing cases only. For this reason, the request for an award of emotional distress damages should be denied.

An appropriate recommendation and order follows.

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

CAROLL MYERS,	:	
Complainant	:	
	:	
v.	:	**PHRC CASE NO. 200505802**
	:	**EEOC CHARGE NO. 17FA661908**
THE BRETHREN HOME COMMUNITY,	:	
Respondent	:	
CAROLL MYERS,	:	
Complainant	:	
	:	
v.	:	**PHRC CASE NO. 200605596**
	:	**EEOC CHARGE NO. 17F200761865**
THE BRETHREN HOME COMMUNITY,	:	
Respondent	:	

RECOMMENDATION OF THE PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Permanent Hearing Examiner finds that Myers has proven that she was discriminatorily denied the position of Wellness Director, which, in effect, resulted in her terminated, in violation of Sections 5(a) and (d) of the Pennsylvania Human Relations Act. The Permanent Hearing Examiner also finds that Myers has proven that she was discriminatorily denied the position of Wellness Specialist, also in violation of Sections 5(a) and (d) of the PHRA. Further, the Permanent Hearing Examiner finds that Myers has proven that the Brethren Home Community retaliated against her because she had filed a PHRC claim in violation of Section 5(d) of the PHRA by denying her access to the Brethren Home Community property when

Myers was an employee of Adams County Office of Aging, Inc. 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.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

March 5, 2015
Date

By: 
Carl H. Summerson
Permanent Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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THE BRETHREN HOME COMMUNITY,	:	
Respondent	:	

FINAL ORDER

AND NOW, this 27th day of April, 2015, 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, Opinion, and Recommendation of Permanent Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, Opinion , and Recommendation of the Permanent Hearing Examiner as its own findings in this matter and incorporates the Findings of Fact, Conclusions of Law, Opinion,

and Recommendation of Permanent Hearing Examiner into the permanent record of this proceeding, to be served on the parties to the complaint, and hereby

ORDERS

1. That the Brethren Home Community shall cease and desist from age-based discrimination in the selection of individuals hired by the Brethren Home Community.
2. That the Brethren Home Community shall cease and desist from retaliating against any employee that seeks an accommodation for any condition reasonably believed to be a disability.
3 That the Brethren Home Community shall cease and desist from retaliation against anyone who has filed a complaint with the PHRC.
4. That the Brethren Home Community shall pay to Myers, within 30 days of the effective date of this Order, the lump sum of $249,215.44, which amount represents back pay lost for the period between September 25, 2005 and September 8, 2014.
5. That the Brethren Home Community shall pay to Myers, within 30 days of the effective date of this Order, the lump sum of $17,164.47, which amount represents lost pension contributions and interest from September 2005 to September 8, 2014.
6. That the Brethren Home Community shall pay to Myers, within 30 days of the effective date of this Order, the lump sum of $20,970.84, which amount represents expenditures for continued health care coverage between September 25, 2005 and September 8, 2014.

7. That the Brethren Home Community shall pay to Myers, within 30 days of the effective date of this Order, the lump sum of $1,944.00, which amount represents dental expenditures incurred by Myers during the period between September 25, 2005 and September 8, 2014.

8. That the Brethren Home Community shall pay to Myers, within 30 days of the effective date of this Order, the lump sum of $8,034.90, which amount represents medical expenses incurred by Myers during the period between September 25, 2005 and September 8, 2014.

9. That the Brethren Home Community shall pay additional interest at the rate of six percent per annum on awards listed in items 4, 5,6 and 7 above, calculated from September 25, 2005, until payment is made.

10. That the Brethren Home Community shall offer to hire/instate Myers into the position of either Wellness Director or Wellness Specialist.

11. Unless the Brethren Home Community hires/instates Myers into the position of Wellness Director, until Myers reached the age of 68, the Brethren Home Community shall pay to Myers front pay as follows:

    a. Within 30 days of the date of this Order, Myers shall report to the Brethren Home Community the amount of her gross earnings from September 8, 2014, until the date of this Order. Upon the Brethren Home Community's receipt of this report, within 30 days, the Brethren Home Community shall pay to Myers an amount equal to the difference between her gross earnings during this period and what she would have earned as a Wellness Director.

b. Beginning six months after the date of this Order, Myers shall file semi-annual reports to the Brethren Home Community which indicate the gross amount of earnings Myers had during that previous 6 month period. Upon receipt of these reports, the Brethren Home Community shall pay to Myers the amount of the gross earnings she would have earned as a Wellness Director minus Myers gross earnings during the relevant period.

c. If the Brethren Home Community hires/instates Myers into the position of Wellness Specialist, the Brethren Home Community shall continually pay to Myers the difference between the pay of a Wellness Specialist and the pay of a Wellness Director. Such pay differences shall be paid until such time as either the Brethren Home Community hires/instates Myers into the position of Wellness Director or Myers voluntarily leaves the employ of the Brethren Home Community.

d. If the Brethren Home Community offers Myers either the position of Wellness Director or Wellness Specialist and Myers refuses such an offer, at that time, all front pay obligations shall cease.

e. Unless Myers is hired/instated into a Wellness Specialist or Wellness Director position, on a yearly basis, until Myers reaches the age of 68, the Brethren Home Community shall pay to Myers an amount equal to appropriate pension contributions that are calculated at 4% of the gross salary of the Wellness Director position.

12. If the Brethren Home Community fails to hire/instate Myers into either the position of Wellness Director or Wellness Specialist, that Myers shall continue to make diligent efforts to find comparable work.

13. That the Brethren Home Community. shall report the means by which it will comply with this Order, in writing to Martin Cunningham, Esquire, PHRC Assistant Chief Counsel of the PHRC's Chief Counsel's office, within 30 days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

By: _____
Gerald S. Robinson, Chairperson

ATTEST:

By: _____
Dr. Raquel O. Yiengst, Vice Chairperson