

PRACTICE UNDER THE PENNSYLVANIA
HUMAN RELATIONS ACT
ISSUED BY THE PENNSYLVANIA
HUMAN RELATIONS COMMISSION

WITH
Commentary
by

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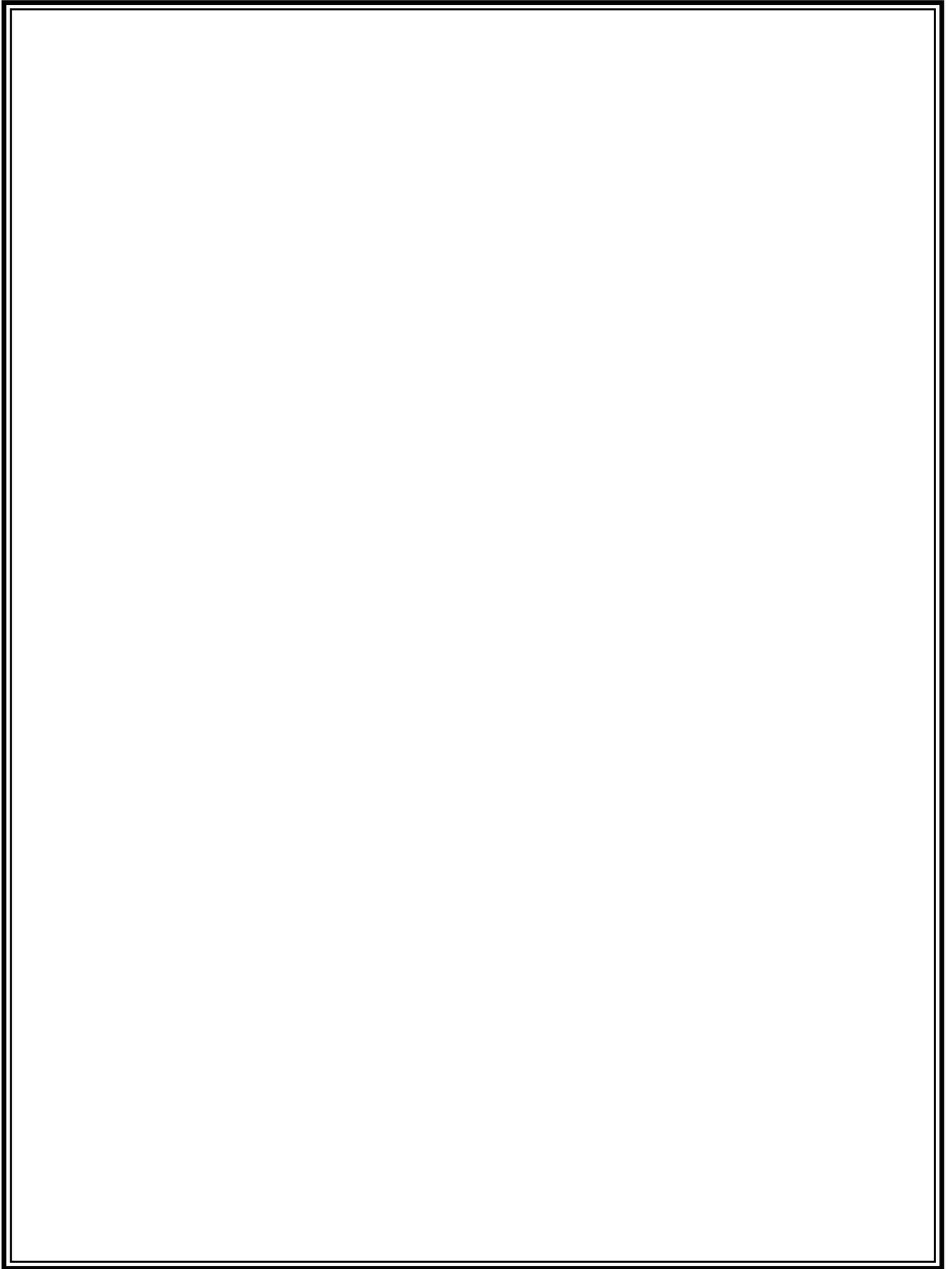
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PRACTICE UNDER THE PENNSYLVANIA HUMAN RELATIONS ACT

A. Filing the Complaint

1. Complainants, 43 P.S. § 959(a).

- a. A complaint may be filed by one or more persons on behalf of themselves alone, or on behalf of themselves and all others similarly situated.
 - (1) A "person" includes individuals, partnerships, associations, organizations and corporations, among others. 43 P.S. § 954(a). Therefore, a complaint may be filed by an organization such as the NAACP, or NOW.
 - (2) For a group to have standing to file a complaint under the Pennsylvania Human Relations Act, there must be a "discernible adverse effect" to the group, apart from the effect on the general public. *Board of Public Education v. Human Relations Commission*, 682 A.2d 1345 (Pa.Comm. Ct. 1996).

NOTE: An organization or group must still allege harm to at least one member of the organization or group itself.

- b. The Pennsylvania Human Relations Commission, on its own initiative, may file a complaint. 43 P.S. § 959(a). In *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754 (2002), the United States Supreme Court held that an agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific relief, such as back pay, reinstatement, and damages, in an ADA or Title VII enforcement action. Inasmuch as the PHRC has the statutory right to file discrimination complaints, the PHRC may also bring such complaints and seek victim specific relief.
- c. The Attorney General, on his/her own initiative, may file a complaint. 43 P.S. § 959(a).
- d. Independent contractors may file a complaint alleging unlawful discrimination. See § III.E., above.

2. Respondents, 43 P.S. § 959(a).

A complaint may be filed against any "person, employer, labor organization or employment agency alleged to have committed the unlawful discriminatory practice complained of" Complaints may also be filed against independent contractors, see § III.E., above.

NOTE: There is no fee to file a complaint with the Commission.

- a. Defining the employer - The PHRA covers "any person employing four or more persons within the Commonwealth" 43 P.S. § 954(b), unlike Title VII which applies to any employer who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b).

In *Walters v. Metropolitan Educational Enterprises, Inc.*, 519 U.S. 202, 117 S. Ct. 660 (1997), the Court adopted the "payroll method" for determining Title VII coverage. Whether an employment relationship exists on a given day is demonstrated by the employee's appearance on the payroll. Thus, an employee who is maintained on the employer's payroll is counted toward Title VII coverage even if s/he is not at work each working day.

Under the PHRA, however, the payroll method is not determinative for establishing an employment relationship. See *Harmony Volunteer Fire Co. v. PHRC*, 459 A.2d 439 (Pa. Commw.Ct.1983) (although the duty to pay salary is often coincident with the status of the employer under PHRA, it is not an absolute prerequisite; it is the employer's power to control the nature and parameters of the employee's activities that is the key to the existence of an employment relationship). Thus, volunteers and student interns may be included in calculating the number of employees. See *Garcia v. Copenhagen, Bell & Associates*, 104 F.3d 1256 (11th Cir.1997) (whether entity is an employer under ADEA should be decided by jury rather than by judge).

3. Liability of individuals:

The PHRA has specific provisions that contemplate individual liability for unlawful discriminatory practices. Section 5(d), 43 P.S. § 955(d) (prohibiting retaliation), and Section 5(e), 43 P.S. § 955(e) (aiding and abetting). While holding that an individual employee cannot be held liable under Title VII, the Third Circuit has recognized that individuals are proper defendants under § 955(e) of the PHRA. *Dici v. Com. of Pa.*, 91 F.3d 542 (3d Cir. 1996). See Section III.B.1.b., above.

4. Independent contractors may be sued for unlawful discrimination. See § III.E., above.

5. Naming the proper respondent:

A complaint under the PHRA may be amended to change the respondent's name after expiration of the limitations period where the effect of the amendment is to correct the name of a party already brought within the Commission's jurisdiction by the initial complaint. *Vintage Homes, Inc. v. PHRC*, 581 A.2d 1014 (Pa. Commw.Ct.1990), *allocatur denied*, 527 Pa. 660, 593 A.2d 429; see 16 Pa.Code § 42.35(b).

6. The Complaint, 43 P.S. § 959(a).

a. Verified and in writing, stating the name and address of the alleged discriminator and setting forth the particulars of the discriminatory act(s) complained of.

NOTE: A complainant must make certain that the allegations in the complaint are accurate and credible since Pennsylvania law provides for penalties for persons who knowingly file false complaints.

NOTE: Parents or guardians are permitted to file a complaint on behalf of a minor child.

- b. Particularity of complaint. The complaint must set forth more than general allegations of discriminatory practices. *Murphy v. Com., Pennsylvania Human Relations Commission*, 506 Pa. 549, 486 A.2d 388 (1985) (complaint which only set forth general allegations did not meet particularity requirement and was "a nullity"); *PHRC v. St. Joe Minerals Corp.*, 476 Pa. 302, 382 A.2d 731 (1978) (complaint alleging employer discriminated in hiring on the basis of race and sex which included statistics in support of the allegations was sufficiently particular); *PHRC v. U.S. Steel Corp.*, 458 Pa. 559, 325 A.2d 910 (1974) (general allegations insufficient to meet particularity requirement).

CAVEAT: The Commission staff has the ability to aid in drafting a complaint for the complainant.

- c. Service of complaint on respondent - by the Commission, within 30 days from the date of docketing the complaint. 43 P.S. § 959(b)(2).

- d. See 16 Pa. Code §§ 4231(a), (b) and 42.32(a).

7. Amendment of the Complaint

- a. 43 P.S. § 959(e), provides that "[t]he Commission or the complainant shall have the power reasonably and fairly to amend any complaint"

- b. The complaint may be amended after the 180 days statute of limitations has run for the purpose of correcting the corporate name of the respondent, where "the right party was brought within the Commission's jurisdiction by the initial complaint, but under the wrong corporate designation." *Vintage Homes v. PHRC*, 581 A.2d 1014, 1017 (Pa. Commw. Ct. 1990), *allocatur denied*, 527 Pa. 660, 593 A.2d 429 (1991).

A complaint may be amended during a public hearing to add an allegation of a violation of a specific section of the PHRA where the "proposed amendment served only to clarify the claim ... already set forth in the allegations [of the complaint] and all that was needed to sustain the additional allegation was 'to establish the facts [already] alleged.'" *Brown Transport Corp. v. PHRC*, 578 A.2d 555, 559 (Pa. Commw. Ct. 1990).

- c. See 16 Pa. Code §42.35.

B. Statute of Limitations, 43 P.S. § 959(h)

1. 180 days. 43 P.S. § 959(h).

NOTE: Complainants may still convince the Commission with legal justification for not filing a complaint within the statute of limitations period.

2. Equitable Tolling - The time limits are subject to waiver, estoppel and equitable tolling. 43 P.S. § 962(e). Grounds for equitable tolling include agency error or material misrepresentation on the part of the employer. See *Commonwealth Bank and Trust Co., N.A. v. Winterberger and PHRC*, 582 A.2d 730 (Pa. Commw. Ct. 1990), *allocatur granted*, 527 Pa. 619, 590 A.2d 759 (1991);

Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924 (5th Cir. 1975).

3. Continuing Violations - "If the alleged unlawful discriminatory practice is of a continuing nature, the date of the occurrence of the practice will be deemed to be any date subsequent to the occurrence of the practice up to and including the date upon which the unlawful discriminatory practice shall have ceased." 16 Pa.Code § 42.14(a). See *West v. Phila. Electric Co.*, 45 F.3d 744 (3d Cir. 1995) (complainant may recover for discrimination that occurred outside the limitations period if at least one act occurred within the filing period and the violation was more than an isolated or sporadic act).

NOTE: A docket number will be issued by the Commission and served upon the respondent within 30 days.

CAVEAT: After service of the complaint, the Pennsylvania Human Relations Commission strongly desires immediate resolution or settlement.

4. See 16 Pa. Code § 42.14.

C. Filing the Answer and Rule to Show Cause

1. The Answer, 43 P.S. § 959(b)(3).
 - a. Verified and in writing.
 - b. Filing Period - The answer shall be filed within 30 days of the service of the complaint.

Extension - The PHRA limits any extension to 30 days. 43 P.S. § 959(b)(3). Requests for an extension must be in writing to the investigator who has been in contact with the respondent; a formal motion is not required. The request will be granted if good cause is shown. 16 Pa. Code § 42.31(c).

- c. The respondent is required to serve a copy of the answer on each named complainant and on each attorney who has entered an appearance on behalf of a named complainant. 16 Pa. Code § 42.31(c).

NOTE: An answer to the complaint must be served on the complainant immediately and information in the complaint will not be kept private or confidential.

- d. Contents of the answer - "The answer shall ... fully and completely advise the parties and the Commission as to the nature of all defenses, shall admit or deny with specificity each averment of fact in the complaint, and shall state clearly and concisely the facts and matters of law relied upon." 16 Pa. Code § 42.32(b).
 - e. See 16 Pa. Code §§ 42.32(b), 42.33 and 42.35.

CAVEAT: It is very important to perform a thorough investigation before responding to the complaint. Respondent should review and study personnel files and determine the veracity of witnesses.

2. Failure to Answer - Rule to Show Cause, 16 Pa. Code §§ 42.31(d), 42.32(c) and (d).

- a. "Failure to file an answer within the required time will be deemed to place the respondent in default and may result in .. [a] rule to show cause." 16 Pa. Code § 42.31(d).
- b. "If the Commission staff determines that a complaint sets forth sufficient facts to raise an inference of unlawful discrimination under the act, and the respondent has failed to deny these facts in an answer, or has failed to file a timely answer, the staff may petition the Commission, through the appropriate motions commissioner (one is designated for each of the three regions) or examiner, for a rule to show cause why this failure should not result in a finding of probable cause, and a judgment for the complainant on the issue of liability." 16 Pa. Code § 42.33(c).
- c. "If the Commission staff fails to file a petition [for a rule to show cause] within 10 days of the respondent's failure to file a timely answer, including extensions granted under § 42.31..., the complainant may ... file a petition. The commissioner or examiner will then cause the rule to be issued and served on the respondent for a reply." 16 Pa. Code § 42.33(c).
 - (1) "Upon consideration of the petition [for a rule to show cause], replies to the rule to show cause, and other information as the motions commissioner or examiner may deem necessary or appropriate, the commissioner or examiner will do one of the following: "For good cause, permit an otherwise untimely answer, which has been filed and is well pled, to stand, and return the case to the staff for further appropriate action; "Order an answer to be filed by a date certain, with the failure to file resulting in an appropriate order or recommendation ...;" "Return the case to staff for further appropriate action, if the complaint does not appear to set forth sufficient facts to raise an inference of unlawful discrimination; "Recommend to the Commission a finding of probable cause, and the entry of a judgment on the issue of liability, to be followed by a public hearing on the issue of damages if conciliation efforts fail." 16 Pa. Code § 42.33(d) (1)-(4).
 - (2) Normally, the Commission's order will provide for the PHRC staff to report back to the appropriate motions commissioner or examiner the status of conciliation efforts within 60 days of the Commission's order finding probable cause, entering a judgment of liability and recommending conciliation efforts.
 - (3) If conciliation fails, or if a timely report on the status of conciliation efforts is not received by the appropriate

motions commissioner or examiner, the case will be placed on the Commission's public hearing docket. The public hearing will be limited to the issue of damages. The issue of liability has already been decided by the Commission in favor of the complainant.

- d. Commission decisions on finding liability on a Rule to Show Cause are interlocutory orders, not final orders. *Gateway Country Store v. PHRC and Omar Mosley*, No. 495 C.D. 1999 (Pa. Commw. Ct., March 1, 1999).

D. Investigation

After the complaint is filed, it is assigned to an investigator. See 16 Pa. Code §§ 42.41-42.58.

1. Initial Request for Documents

When the complaint is served, the investigator will send the respondent an initial request for documents. Normally, the respondent will be asked to provide these documents within 30 days after the request is made, along with the answer to the complaint. If the respondent needs more time to submit the requested documents, it should contact the investigator and ask for an extension of time.

NOTE: The Commission has the authority to subpoena witnesses and documents relevant to the case.

- a. The request for documents is separate from the answer to the complaint.
- b. Unlike the answer, the time frames are not statutorily imposed.
- c. Unlike the answer, the respondent is not required to serve the complainant with the response to the document request. If the respondent thinks that certain documents or responses should be treated as confidential, the respondent should discuss this with the investigator.
- d. See 16 Pa. Code § 42.43(b), specifically, and 16 Pa. Code §§ 42.41-42.58, in general.

NOTE: Although a position statement is not required by the Commission, it benefits the investigator to rely upon a cogent, focused and persuasive argument for a parties' position. Position Statements should not be served on opposing party.

2. Fact-Finding Conference ("FFC")

- a. Usually, a FFC will be scheduled for within approximately two to four months after the service of the complaint, or as soon as is feasible.

The FFC brings the parties together, before the investigator, for the purpose of presenting their respective positions and any supporting evidence. The FFC is not a hearing. There is no right to

cross-examine witnesses; testimony is not stenographically recorded or given under oath.

Never call a fact-finding conference a "hearing." That creates confusion because it may then be confused with a preliminary hearing or a public hearing.

NOTE: A staff member or investigator from the commission conducts the Fact Finding Conference. The staff member or investigator must be impartial and cannot advocate a position for either party.

- b. While there is no legal requirement that a respondent attend the FFC, it is in the respondent's best interest to attend the FFC, since the FFC provides a respondent with an excellent opportunity to present its defense to the investigator and hasten the resolution of the complaint.
- c. Failure of the complainant to attend the FFC will not result in an automatic closing of the case. There may be many legitimate reasons why the complainant cannot attend. However, the Commission may close a case if the complainant fails to cooperate with the Commission's investigation. 16 Pa. Code § 42.61(a).
- d. In addition to discovering facts and evidence, the FFC provides a forum for settlement discussions. A significant percentage of the complaints filed with the Commission are settled at, or as a direct result of, the FFC.

NOTE: Although the Commission encourages the parties to attend a Fact Finding Conference at the same time, the Commission will allow for separate conferences.

CAVEAT: The Commission strongly disfavors parties to request a continuance of the Fact Finding Conference due to time limitations in conducting the investigation.

NOTE: The Commission is not required by law to conduct a Fact Finding Conference although often times it does.

CAVEAT: Parties are not obligated to attend the Fact Finding Conference.

NOTE: Parties may request that the Commission perform a regular investigation without the need for a Fact Finding Conference.

NOTE: Although each party has a right to be represented by an attorney at the Fact Finding Conference, the attorney must initially enter a notice of appearance with the Commission.

NOTE: It is not necessary for either party to be represented by an attorney at the Fact Finding Conference. However, a complainant is permitted to have one lay person in attendance at the conference to provide advice and moral support.

CAVEAT: Attorneys representing the parties are not permitted to testify at a Fact Finding Conference. However, if an attorney has direct knowledge referable to the complaint, testimony may be permissible.

CAVEAT: Attorneys are not permitted to ask direct questions to any party at the Fact Finding Conference. Cross examination will not be allowed.

NOTE: Witnesses are permitted to attend and testify at the Fact Finding

Conference.

NOTE: The complainant and respondent may respond to and rebut evidence or statements of the other, in addition to, presenting their own evidence, statements, and documentation to support their case.

CAVEAT: More often than not, the investigation continues after the Fact Finding Conference. Further investigation may include securing additional documents or interviewing more witnesses.

3. Post-FFC Investigation

- a. Most cases that are not settled at the FFC require further investigation. Based on the information received at the FFC, the investigator usually asks the respondent to provide additional documents and/or make witnesses available for interviews. The investigator also will ask the complainant to provide whatever relevant documents are within the complainant's control, a list of documents the complainant knows of that are in anyone else's control, along with the name and address of the custodian, and a list of the names and addresses of witnesses complainant believes to have relevant information.
- b. Subpoenas - Documents and witnesses not provided pursuant to the investigator's request may be subpoenaed by the Commission. 43 P.S. § 957(g)(1); 16 Pa. Code § 42.48; *PHRC v. Hansson*, 331 A.2d 255 (Pa. Commw. Ct. 1975). Subpoenas are normally enforced in Commonwealth Court, but may also be enforced in the appropriate court of common pleas.
- c. Pre-determination Settlements - "After service of the complaint, the Commission shall encourage voluntary and informed pre-determination settlements between parties." 43 P.S. § 959(b)(4). This may occur at any time during the process described above.

E. Motions

1. Motions are filed with the Commission in writing, setting forth the ruling or relief sought, stating the grounds therefore and the statutory or other authority relied upon, include a proposed Order and shall comply with the captioning requirements set forth in 16 Pa. Code § 42.12. 16 Pa. Code § 42.34(a). Written motions and replies shall be served by the submitting party upon all parties to the proceeding. 16 Pa. Code § 42.34(d).
2. Replies to motions shall be in writing. The staff counsel shall reply to motions, which seek to limit the Commission's ability to proceed with a complaint, by making whatever good faith arguments may exist in favor of the Commission's ability to continue to proceed. 16 Pa. Code § 42.43(c). The complainant may also reply, directly or through private counsel.
3. "Upon the filing and consideration of a motion, any replies thereto, and other information the Commission may deem necessary or appropriate to obtain, the Commission will issue and serve the parties with a

written ruling thereon, including the reasons for the ruling." 16 Pa. Code § 42.43(f).

4. The Commission's ruling on motions to dismiss, summary judgment, etc., are interlocutory orders that are interlocutory orders that are not subject to review by Commonwealth Court. The exception would be if the condition precedent of receiving permission from the agency pursuant to Pa.R.A.P. 1311 is met. *Pittsburgh Board of Public Education v. PHRC*, 820 A.2d 838 (Pa. Commw. Ct. 2003). *Accord Caerarvon Township (Berks County) Zoning Hearing Board v. Commonwealth of Pennsylvania Human Relations Commission*, ___ Pa. ___, No. 151 MAP 2002, 2004 Pa. LEXIS 65 (Feb. 17, 2004).

F. Dismissal of Complaints

1. Dismissal Procedure

- a. If, after the completion of the investigation, the Commission staff determines that no probable cause exists to credit the allegations of the complaint, the case is submitted to the Executive Director for closing.
- b. If the Executive Director dismisses the complaint, both parties are promptly notified, in writing, of the Commission's action. 16 Pa. Code § 42.61(c).
- c. The complainant is also notified of his/her right to:
 - (1) Request a preliminary hearing of the complaint. 43 P.S. § 959(c); 16 Pa. Code §§ 42.61(c), 42.62; and/or
 - (2) Bring a *de novo* action in the court of common pleas in the county in which the alleged act of discrimination occurred. 43 P.S. § 962(c); 16 Pa. Code § 42.61(c).

An action brought under § 962(c) "shall be filed within two years after the date of notice from the Commission closing the complaint."

2. Request for Preliminary Hearing

- a. A request for a preliminary hearing must be filed within 10 days after the receipt of the notice of dismissal, 43 P.S. § 959(c); be in writing; and state specifically the grounds relied upon. 16 Pa. Code § 42.62.
- b. The request for a preliminary hearing is served on the respondent, who may file a response within 10 days of receipt of the copy of the request. 16 Pa. Code § 42.62(d).
- c. The request, along with the respondent's response, is referred to staff counsel, who evaluates the request and submits a recommendation to the Executive Director, who may

grant the request and convene a preliminary hearing or take other action, as the Executive Director deems appropriate. 16 Pa. Code § 42.63(b).

d. Request Denied

- (1) The Commission is not required to hold preliminary hearings. *Baker v. PHRC*, 507 Pa. 325, 489 A.2d 1354 (1985); *Graves v. PHRC*, 634 A.2d 701 (Pa. Commw. Ct. 1993), *allocatur denied*, ___Pa. ___, ___A.2d ___ (Feb. 23, 1995).
- (2) If the request for a preliminary hearing is denied, the complainant may initiate a *de novo* proceeding in the appropriate court of common pleas under 43 P.S. § 962(c), of the PHRA. *Graves, supra*.
- (3) Denying a request for a preliminary hearing is not an adjudication appealable to Commonwealth Court. "An 'adjudication' is defined as a final order, decision or determination by an agency affecting a personal or property right. 2 Pa.C.S. § 101. ***[W]here the complainant retains the right to proceed in court, the Commission's denial of an administrative remedy [does not] preclude the complainant from seeking relief in court." *Graves*, 634 A.2d at 703 (emphasis in original).

e. Request Granted

- (1) If the request is granted, the case will be referred back to staff counsel who may obtain additional information, either through investigation or a preliminary hearing.
- (2) A preliminary hearing is held before a preliminary hearing officer for the purpose of determining whether probable cause exists to credit the allegations of the complaint. 43 P.S. § 959(c); 16 Pa. Code § 42.65(b).
- (3) The complainant has the burden of proving that probable cause exists.
- (4) After reconsideration, the preliminary hearing officer dismisses the complaint or enters a finding of probable cause. 43 P.S. § 959(c). 16 Pa. Code § 43.66.

G. Finding of Probable Cause and Pre-Hearing Conciliation

1. The Finding - If, after the completion of the investigation, the Commission staff determines that probable cause exists to credit the allegations of the complaint, a finding of probable cause will be served on the respondent. The finding of probable cause sets forth the facts revealed by the investigation in support

of probable cause.

NOTE: Parties will be notified by regular mail of all findings.

2. PHRC Function and Status - Prior to a finding of probable cause, the entire Commission is a neutral, fact finding body. Subsequent to the finding of probable cause, the Commission bifurcates. The Commissioners, hearing examiner and panel advisor, the adjudicatory branch, remain neutral. The remainder of the staff represents the complaint, as well as the Commission.
3. Pre-Hearing and Conciliation - When the finding of probable cause is served on the respondent, the Commission invites the respondent to conciliate the case. Conciliation efforts usually involve the Commission staff and the respondent's representative, with the Commission staff representing the position of the complaint.
 - a. Members of the Commission and its staff may not disclose what has transpired during the course of attempts to conciliate. Information concerning offers made during the conciliation process may not be raised at the public hearing. 43 P.S. § 959(c).
 - b. The Commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation, when the complaint has been adjusted, without disclosing the identity of the parties involved. 43 P.S. § 959(c).
 - c. The terms of a conciliation agreement may include remedies that are beyond what the Commission could order after a public hearing.
 - d. PHRC has the authority to interpret and enforce provisions of settlement agreements. *News-Chronicle v. PHRC*, 672 A.2d 400 (Pa. Cmmw. Ct. 1996); *Mechensky v. PHRC*, *McGraw-Edison v. PHRC*, 578 A.2d 589, 594 (Pa. Commw. Ct. 1990).
 - e. For an employer to breach a settlement agreement under the doctrine of commercial impracticability, th employer "must show not only that performance under the contract would result in a loss, but also that the loss would be especially severe and unreasonable." *News - Chronicle*, 672 A.2d at 402, *petition for allowance of appeal denied citing Dorn v. Stanhope Steel, Inc.*, 368 Pa. Super. 557, 586, 534 A.2d 798, 813 (1987), *allocatur denied*, 518 Pa. 656, 544 A.2d 1342 (1988).
4. If conciliation has not been achieved within 90 days from the approval of probable cause, or if the case is not in the final stages of conciliation, the case will be referred for public hearing.

H. Public Hearing

If conciliation efforts fail, the case will be placed on the Commission's public hearing docket. 43 P.S. § 959(d); 16 Pa.

Code § 42.101(a).

1. Who Hears the Case - When the case is placed on the public hearing docket, the Chairperson of the Commission will appoint either a three-Commissioner panel or a hearing examiner to hear the case. 16 Pa. Code § 42.101(c).
 - a. If a panel is appointed to hear the case, one of the permanent hearing examiners serves as the legal advisor to a Commission panel. They are totally separate from the staff counsel who give legal assistance to complainants. See 16 Pa. Code § 42.2(12). See also *Thorp, Reed & Armstrong v. PHRC*, 361 A.2d 497 (Pa. Commw. Ct. 1976).
 - b. The panel of three Commissioners may be waived and only one Commissioner need sit if both sides agree. 16 Pa. Code § 42.102(a).
2. Pre-Hearing Discovery - Once the case is placed on the public hearing docket, both parties may engage in pre-hearing discovery, 16 Pa. Code § 42.42(b); including interrogatories, 16 Pa. Code §§ 42.44 and 44.45; depositions, 16 Pa. Code § 42.51; subpoenas for documents, 16 Pa. Code 42.48 and 42.49; and requests for admissions, 16 Pa. Code § 42.55. The Commission's Special Rules of Administrative Practice and Procedure provide that certain documents, such as internal Commission documents, investigator and attorney work product, and records of conciliation efforts, are exempt from pre-hearing discovery. 16 Pa. Code § 42.58.
3. Pre-Hearing Conference
 - a. The pre-hearing conference is attended by counsel for both parties and the Hearing Examiner or, if the case is before a panel of Commissioners, the Chairperson of the panel, sitting with the panel advisor.
 - b. At the pre-hearing conference, the parties should be prepared to make stipulations of fact and law, exchange lists of exhibits and witnesses, stipulate to the authenticity and/or admissibility of exhibits and make discovery requests. The parties should also have some idea as to how long they will need to present their case.
 - c. When a case is scheduled to be heard by a panel, it is at the pre-hearing that the parties are asked if they are willing to accept a single Commissioner to hear the case. See § V.H.1.b., above.
 - d. Dates are set for the close of discovery and the public hearing. 16 Pa. Code § 42.102(a).
 - e. The parties may agree to waive the public hearing and submit the case on briefs. Such waiver must be in writing and signed by all of the parties. 16 Pa. Code § 42.101(d).

4. Public Hearing

- a. Held in the county in which the alleged act of discrimination occurred. 43 P.S. § 959(d).
- b. The complainant may be represented by a Commission attorney, private counsel or a designated agent ("an individual who is a paralegal under the supervision of a practicing attorney." 43 P.S. § 954(r) or The Complainant may appear without counsel.

Note: The Commission attorney, in fact, represents the "complaint," as opposed to the complainant. There may be times when the two interests diverge, at which time the Commission attorney will inform the complainant, who may then wish to obtain private counsel.

- c. Respondent may appear with or without counsel. 43 P.S. § 959(e).
- d. The hearing examiner has no duty to advise a party not represented by counsel how to go about getting a document admitted into evidence. *News-Chronicle v. PHRC*, 672 A.2d at 402-03.

"Generally, a party choosing to represent itself in a legal proceeding must, to some reasonable extent, assume the risk that its lack of expertise and legal training will prove its undoing. (Cite omitted)." *Id.*, at 403.

- e. PHRC is not bound by the strict rules of evidence. 43 P.S. § 959(e).

- (1) "The liberal rules of evidence relating to administrative agencies give such agencies broad discretion in admitting or excluding evidence[.] (Cite omitted)." *News-Chronicle*, 672 A.2d at 402 (Pa. Commw. Ct. 1996).

- (2) A hearing examiner may refuse "to admit a document on the basis that it was unsigned, unverified and did not contain sufficient indicia that [the purported author of the document] made the statement." *Id.*

- f. Testimony is taken under oath and transcribed. 43 P.S. § 959(e).
- g. At the conclusion of the public hearing, the Commission usually requests the parties to file post-hearing briefs. 16 Pa. Code § 42.121.

5. Commission Decision

- a. After post-hearing briefs have been submitted, and the record is closed, the hearing panel or hearing examiner submits to the entire Commission its recommended findings of fact, conclusions of law, legal opinion and order.
- b. In addition to reviewing these, all Commissioners

who vote on a case must also review the record of the case. *Department of Transportation v. PHRC*, 510 Pa. 401, 508 A.2d 1187 (1986).

- c. The entire Commission reviews and votes on these cases at a public Commission meeting. The Commission may approve, modify or reject the recommendation. 43 P.S. § 959(g). "[I]t is up to the Commission to determine the weight and credibility of the evidence." *Pennsylvania State Police v. PHRC*, 561 A.2d 1320, 1322 (Pa. Commw. Ct. 1989). "[T]he Commission is empowered to substitute its findings of fact for that of its appointed hearing officers." *Id.* at 1323.
- d. If the Commission finds in favor of the respondent, it dismisses the complaint. If the Commission finds in favor of the complainant, it has broad remedial discretion. *Murphy v. PHRC*, 506 Pa. 549, 486 A.2d 338 (1985); *Albert Einstein Medical Center v. PHRC*, 486 A.2d 575 (Pa. Commw. Ct. 1985).

6. Remedies, 43 P.S. § 959(f).

- a. In fashioning a remedy, the victim of discrimination is entitled to "make whole" relief, which will restore the victim to his/her pre-injury status. *Albermarle Paper Company v. Moody*, 422 U.S. 405, 95 S. Ct. 2362 (1975); *Williamsburg Community School District v. Com., PHRC*, 512 A.2d 1339 (Pa. Commw. Ct. 1986).
- b. Usual remedies in employment cases include, but are not limited to, back pay, hiring, promotion, retroactive seniority, front pay, compensation for lost benefits, reimbursement of certifiable travel expenses in matters involving the complaint, compensation for loss of work in matters involving the complaint, any other verifiable, reasonable out-of-pocket expenses caused by the discrimination, and affirmative action. 43 P.S. § 959(f)(1).
- c. It is within the Commission's discretion to decline to allow the employer an offset for unemployment compensation benefits collected by the employee. *Orweco Frocks, Inc. v. PHRC*, 537 A.2d 897 (Pa. Commw. Ct. 1988); *Williamsburg Community School District v. PHRC*, 512 A.2d 1339 (Pa. Commw. Ct. 1986).
- d. "The question of mitigation of damages is a matter which lies within the sound discretion of the Commission. *Albert Einstein Medical Center v. PHRC*, 486 A.2d 575 (Pa. Commw. Ct. 1985)." *Consolidated Rail Corp. v. PHRC*, 582 A.2d 702 (Pa. Commw. Ct. 1990).
- e. The PHRC may award interest on its monetary awards. *Brown Transport Corp. v. PHRC*, 578 A.2d 555 (Pa. Commw. 1990); *Consumer Motor Mart v. PHRC*, 529 A.2d 571, 572 n.1 (Pa. Commw. Ct. 1987).

- f. The PHRC may award nominal damages for the breach of a settlement agreement, where it has found a breach of the agreement but was unable to attribute any of the complainant's claimed damages to the respondent's breach. *Mechensky v. PHRC, McGraw-Edison v. PHRC*, 578 A.2d at 596 (Pa. Commw. Ct. 1990). *Accord 51 I & N, Inc. v. Roser*, 24 Phila. 98, 1992 Phila. Cty. Rptr. LEXIS 21 (Pa. C.P. 1992).
- g. The Commission does not have the authority to award damages for mental anguish and humiliation. *PHRC v. Zamantakis*, 478 Pa. 454, 387 A.2d 70 (1978).
- h. Punitive damages may not be awarded under the PHRA. *Hoy v. Angelone*, 554 Pa. 139, 720 A.2d 745 (1998).

I. Appeals

1. Appeal as of Right to Commonwealth Court by a Petition for Review.
 - a. Either, or both, the complainant or respondent may appeal the Commission's decision.
 - (1) If the complainant prevails and the respondent appeals, Commission counsel represents the Commission's decision and the complaint. Complainant may choose to intervene, in which case s/he must use private counsel (or s/he may appear *pro se*).
 - (2) If the respondent prevails, the Commission will not represent the complainant on appeal.
2. Discretionary Appeal to the Pennsylvania Supreme Court
3. Standard for Review

The "court must affirm [a] commission adjudication unless [the] commission violated constitutional rights, made findings of fact not supported by substantial evidence or committed an error of law." *Harrisburg School District v. PHRC*, 466 A.2d 760, 762 (Pa. Commw. Ct. 1983). *Accord First Judicial District of Pa. v. PHRC*, 702 A.2d at 592-93, 446 Pa. 258, 727 A.2d 1110 (Pa. Commw. Ct. 1997); *United Brotherhood of Carpenters and Joiners of America, Local 261*, 693 A.2d 1379, 1382 n.5 (1997); *Drew v. PHRC*, 688 A.2d 274, 277 n.5 (Pa. Commw. Ct. 1997); *News-Chronicle v. PHRC*, 672 A.2d 400, 401 n.2 (Pa. Commw. Ct. 1996); *Borough of Economy v. PHRC*, 660 A.2d 143, 146 (Pa. Commw. Ct. 1995), *allocatur denied*, 543 Pa. 696, 670 A.2d, 43 (1995); *George Clay Steam Fire Engine and Hose Company v. PHRC*, 639 A.2d 893 (Pa. Commw. Ct. 1994), *allocatur denied*, 540 Pa. 614, 656 A.2d 120 (1995); *Shoemaker v. PHRC*, 634 A.2d 919, 920 (Pa. Commw. Ct. 1993), *City of Pittsburgh v. PHRC*, 630 A.2d 919 (Pa. Commw. Ct. 1993), *reh'g denied*, ___ A.2d ___ (Pa. Commw. Ct. 1993); 1993 Pa. Cmwlth. LEXIS 621 (Pa. Cmwlth Oct. 4, 1993), *allocatur granted*, 537

Pa. 653, 644 A.2d 738 (1994), *appeal dismissed*, 538 Pa. 318, 648 A.2d 326 (1994); *Robert Wholey Co., Inc. v. PHRC*, 146 Pa., 702 n.3, 606 A.2d 982, 983 n.3 (Pa. Commw. Ct. 1992), *allocatur denied*, 532 Pa. 659, 615 A.2d 1314 (1992); *Lincoln Realty v. PHRC*, 598 A.2d 594, 597 (Pa. Commw. Ct. 1991).

- a. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Further, substantial evidence supporting a finding of ... discrimination may be circumstantial and based on inferences. *Consumer Motor Mart v. PHRC*, 529 A.2d 571 (Pa. Commw. Ct. 1987)." *Brown Transport Corp. v. PHRC*, 578 A.2d 555 (Pa. Commw. Ct. 1990), *accord Borough of Economy, supra*, 660 A.2d at 47.
- b. "[T]he Commission is the sole judge of the credibility of witnesses and it decides what evidence should be accepted as fact, what weight should be given to the evidence, and what inferences are to be drawn from the evidence." *Pittsburgh Board of Public Education v. Pennsylvania Human Relations Commission*, 563 A.2d 581, 583 n.4 (Pa. Commw. Ct. 1989) (cite omitted)." *Pennsylvania State Police v. PHRC (PSP v. PHRC)*, *supra*, 583 A.2d 50 (Pa. Commw. Ct. 1990).
- c. "The Commission, as the trier of fact, was free to reject any evidence which it believed was fallacious, and it is not an error of law, nor a misapplication of the *McDonnell Douglas* analytical frame-work for it to do so." *Consolidated Rail Corp. v. PHRC*, 582 A.2d 702 (Pa. Commw. Ct. 1990). It is the PHRC's task to weigh the evidence, both direct and circumstantial, to credit and discredit testimony, to draw inferences and make ultimate findings of fact as to whether a violation of the PHRA occurred. *PSP v. PHRC*, 542 A.2d 595 (Pa. Commw. Ct. 1988); *Brown Transport Corp.*, 578 A.2d 555 (Pa. Commw. Ct. 1990) "[C]redibility determinations are within the province of the Commission and these determinations may be based on demeanor as well as conflicts in testimony." *Robert Wholey Company, Inc. v. PHRC*, 606 A.2d at 985 (Pa. Commw. Ct. 1989). *Accord H.S.S. Vending Distributors v. PHRC*, 639 A.2d 953 (Pa. Commw. Ct. 1994).
- d. The courts consider the Commission "a recognized expert in discrimination matters whose judgment will not be lightly substituted. See *Orweco Frocks v. PHRC*, 537 A.2d 897 (Pa. Commw. Ct. 1988)." *Johnstown Redevelopment Authority v. PHRC*, 556 A.2d 479, 482 (Pa. Commw. Ct. 1989), *aff'd.*, 527 Pa. 71, 588 A.2d 497 (1991); *H.S.S. Vending Distributors v. PHRC*, 639 A.2d at 956; *Robert Wholey Company, Inc. v. PHRC, supra*.

J. Enforcement of Orders

1. Final Orders - Where issues arise concerning the extent to which a final order has been complied with, the Commission may convene an enforcement hearing. If the Commission concludes, after the hearing, that compliance has not occurred, judicial enforcement may be sought either in the common pleas court where the violation occurred and the original public hearing was held or in the Commonwealth Court. The transcript of the enforcement hearing before the Commission is entered of record in the court in an action to enter judgment against the non-complying respondent.
2. Conciliation Agreements Entered as Final Orders - Conciliation Agreements and Consent Orders (housing) are enforceable as final orders entered after public hearing.
3. Settlement Agreements Between Complainant and Respondent Not Entered as Final Orders - PHRC has the authority to interpret and enforce provisions of settlement agreements. *News-Chronicle v. PHRC*, 672 A.2d 400 (Pa. Commw. Ct. 1996); *Mechensky v. PHRC, McGraw-Edison v. PHRC*, 578 A.2d 589, 594 (Pa. Commw. Ct. 1990).
4. Doctrine of Commercial Impracticality - For an employer to breach a settlement agreement under the doctrine of commercial impracticability, the employer "must show not only that performance under the contract would result in a loss, but also that the loss would be especially severe and unreasonable." *News-Chronicle* 672 A.2d at 402, citing, *Dorn v. Stanhope Steel, Inc.*, 368 Pa. Super, 557, 586, 534 A.2d 798, 813 (1987), *allocatur denied*, 518 Pa. 656, 544 A.2d 1342 (1988).
5. Petition for Entry of Judgment - Enforcement of a final order is by Petition for Entry of Judgment presented either to the common pleas court in the county where the public hearing was conducted or the violation occurred or the Commonwealth Court. The transcript of any enforcement hearing, public hearing, or the Conciliation Agreement/Consent order and Final Order entered by the Commission following conciliation are entered of record in the proceeding.
6. Execution of Judgment; Issuance of Writ - The Commission, in appropriate circumstances, may execute upon the judgment obtained in the common pleas court or Commonwealth Court in accordance with the Rules of Civil Procedure governing execution process.

K. Challenges to the Commission's Jurisdiction

1. PHRC Decides Jurisdiction - It is for the Commission to decide whether it has jurisdiction over the merits of a controversy.
 - a. If the Commission decides it does have jurisdiction, a respondent must exhaust administrative remedies and cannot appeal to Commonwealth Court until the issuance of a final order by the Commission. *Pittsburgh Board of Public Education v. PHRC*, 820 A.2d 838, 841-42

(Pa. Commw. Ct. 2003) (denial of motion for summary judgment); *PHRC v. Lansdowne Swim Club*, 526 A.2d 758 (Pa. Commw. Ct. 1987) (Commission investigation); *McGraw-Edison Co. v. PHRC*, 529 A.2d 81 (Pa. Commw. Ct. 1987) (preliminary hearing).

b. When there is "a controlling question of law as to which there are substantial grounds for difference of an opinion, and ... an immediate appeal from the order may materially advance the ultimate determination of the matter[,]" the Commonwealth Court may hear an appeal of an interlocutory (not final) order. See *Court of Common Pleas of Erie County, Pennsylvania (6th Judicial District), Juvenile Probation Department v. PHRC*, 653 A.2d 1312 (Pa. Commw. Ct. 1994), *aff'd*, 546 Pa. 4, 682 A.2d 1246 (1996); *accord Frampton v. PHRC*, 669 A.2d 473 (Pa. Commw. Ct. 1995); see 42 Pa. C.S. § 702(b); Pa. R.A.P. 1311.

2. Pre-Emption and the NLRA and LMRA - The Pennsylvania Supreme Court has held that the National Labor Relations Act and the Labor Management Relations Act do not preempt the PHRA. *Driscoll v. Carpenters Dist. Council*, 525 Pa. 205, 579 A.2d 863 (1990). *Accord Frog, Switch & Manufacturing Co. v. Commissioner Carl E. Denson, et al. [PHRC]*, No. 1:CV 01-1746 (M.D. Pa. Feb. 6, 2003).
3. PHRC Jurisdiction Involving Court Employees - The PHRC has no jurisdiction over court employees because of the separation of powers doctrine, to adjudicate any complaints against the judicial branch. Under the Pennsylvania Constitution, the "judicial branch" includes "all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace" Art V, Section 10(c). *First Judicial District of Pennsylvania v. PHRC*, 556 Pa. 258, 727 A.2d 1110 (Pa. Commw. Ct. 1997). In *First Judicial District, the Supreme Court specifically overrules County of Allegheny v. Wilcox*, 465 A.2d 47 (Pa. Commw. Ct. 1983).
4. PHRA and Other State Statutes - PHRC does not have the power to declare portions of the State Employees' Retirement Code invalid. Although the Commission does not have the power to declare a later-enacted state statute invalid as discriminatory, nor may the Commission rely on a general provision of the PHRA in conflict with a specific provision of another statute, the Commission does have the authority to make appropriate recommendations to the Legislature. *State Employees' Retirement Board v. PHRC*, 622 A.2d 412 (Pa. Commw. Ct. 1993).

L. Filing De Novo Complaints in the Courts of Common Pleas

1. No Direct Recourse to the Courts of Common Pleas Under Section 12(b), 43 P.S. § 962(b), of the PHRA.
 - a. A complainant must first file a timely complaint with PHRC or s/he will be foreclosed from asserting those claims in the court of common pleas. *Vincent v. Fuller*, 532 Pa. 547, 616 A.2d

969, 974 (1992). *Accord Campanaro v. Pennsylvania Electric Co.*, 440 Pa. Super, 519, 656 A.2d 491, 492 n.1 (1995), *reargument denied*, April 21, 1995, *allocatur denied*, 542 Pa. 639, 666 A.2d 1049 (1995). There is no direct access to the courts of common pleas.

b. The PHRA provides a statutory remedy that precludes assertion of a common law tort action for wrongful discharge based upon discrimination in the courts of common pleas. 43 P.S. § 962(b) is meant to preserve certain municipal ordinances and other laws, not to allow circumvention of the Commission in the processing of discrimination complaints. The Commission has an expertise in this area which the courts of common pleas lack. Furthermore, as a general rule, there is no common law cause of action against an employer for termination of an at-will employment relationship. *Clay v. Advance Computer Applications, Inc.*, 522 Pa. 86, 559 A.2d 917 (1989). *Accord Jacques v. Akzo International Salt Co.*, 422 Pa. Super. 419, 619 A.2d 748 (1993); *M.A.E. v. Doe & Roe*, 388 Pa. Super. 589, 566 A.2d 285 (1989).

(1) "The federal courts, applying Pennsylvania law, have also found preemption of the common law claim by statute." *Bruffett v. Warner Communications, Inc.*, 692 F.2d 910 (3d Cir. 1982); *Pierce v. New Process Company*, 580 F. Supp. 1543 (W.D. Pa. 1984)." *Jacques*, 619 A.2d at 753.

(2) Where the plaintiff does not allege discrimination, but, rather, alleges constructive discharge because of unpleasant working conditions created by defendant which were specifically intended to harm her, plaintiff may initiate an action in the court of common pleas without filing a PHRA complaint. *Soldo v. Nowlin, t/a ABE Mobile Locksmiths*, 46 Lehigh L.J. 273 (1994) (emphasis in original). The Court distinguishes *Soldo* from *Clay* because, in *Clay*, the plaintiff alleged discrimination, in *Soldo*, she did not.

(3) In a case of tortious interference with a prospective business relationship, instead of a wrongful discharge based on violation of a public policy against discrimination, the Dauphin County Court of Common Pleas held that complainant's claim existed independently of her sex discrimination complaint under the PHRA and was not preempted. *Fischer v. Mountainview Racing Assn., Inc.*, No. 3240 S. 1992 (June 1, 1993) (opinion not reported).

2. Filing a De Novo Complaint - Pursuant to 43 P.S. § 962(c)(1) of the PHRA, a *de novo* complaint may be filed in the appropriate court of common pleas if the PHRC dismisses the complaint, or has failed to resolve the

complaint to the complainant's satisfaction within one year after filing. One year after the filing of the complaint, the PHRC notifies the complainant of his/her right to go into the court of common pleas.

- a. The requirements of 43 P.S. § 962(c)(1), are not met if a complainant voluntarily withdraws or terminates the complaint before the year is up, even if the termination is in deference to a proceeding arising out of the same facts that has been filed with EEOC. *Fye v. Central Transportation, Inc.*, 487 Pa. 137, 409 A.2d 2 (1979); *Schweitzer v. Rockwell International, et al.*, 402 Pa. Super. 34, 586 A.2d 383 (1990).
- b. The one year requirement of 43 P.S. § 962(c)(1) is not met where the complainant tries to go into the court of common pleas with both an original complaint which has met the one year requirement and a related complaint which has not (e.g., retaliation). In that case, the court has jurisdiction over the original complaint, but not over the second complaint. *Snyder v. Pennsylvania Association of School Retirees*, 389 Pa. Super. 261, 566 A.2d 1235 (1989).
- c. Actions brought under 43 P.S. § 962(c)(1) "shall be filed within two years after the date of notice from the Commission closing the complaint." 43 P.S. § 962(c)(2).
- d. The complainant must serve on the Commission a copy of any complaint filed pursuant to 43 P.S. § 962(c)(1). 43 P.S. § 962(c)(2).
- e. There is no right to a jury trial in a trial *de novo* brought in the court of common pleas under 43 P.S. § 962(c), of the PHRA. *Wertz v. Chapman Township*, 55 Pa. 630, 741 A.2d 1272 (1999).
- f. Punitive damages may not be awarded under the PHRA. *Hoy v. Angelone*, 554 Pa. 139, 720 A.2d 745 (1998).
- g. "The Court shall serve upon the Commission any final order issued in any action brought under" 43 P.S. § 962(c)(1). 43 P.S. § 962(c)(4).
- h. Attorneys Fees - After a trial in a case brought under 43 P.S. § 962(c)(1), "the court may award attorney fees and costs to the prevailing plaintiff," 43 P.S. § 962(c.2), or "to the prevailing defendant if the defendant proves that the complaint was brought in bad faith." 43 P.S. § 962(c.3).

In *Hoy v. Angelone*, *supra*, the Pennsylvania Supreme Court held that, although a trial court may award attorney fees in cases where the complainant has been successful in alleging a violation of the PHRA, it is not required to do so. The award is at the discretion of the court. However, in making the determination as to whether or not to award attorneys fees and costs,

the court may not take into account the substantial expenditure of financial resources made in the unsuccessful defense against the PHRA claim.

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*** Commentary is provided by Christopher A. Tinari, Esquire in Italic print.*