

**COMMONWEALTH OF PENNSYLVANIA
GOVERNOR'S OFFICE
PENNSYLVANIA HUMAN RELATIONS COMMISSION**

B.R.,	:	
	:	
Complainant	:	
	:	
v.	:	PHRC Case No. 202202048
	:	
Hettinger Tattoo, LLC &	:	
Kyle Hettinger,	:	
Respondents	:	

STATEMENT OF THE CASE

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RECOMMENDATION OF HEARING EXAMINER

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STATEMENT OF THE CASE

TAMARA SHEHADEH-COPE, HEARING EXAMINER. A public hearing was held in this matter in Berks County, Pennsylvania, on July 11, 2024. Complainant B.R.¹ filed a Complaint in PHRC Case No. 202202048 on or about May 8, 2023 and an Amended Complaint on or about October 23, 2023 against Hettinger Tattoo, LLC and Kyle Hettinger (“Respondents”). The Complaint alleged that Respondents discriminated against Complainant on the basis of disability when they denied Complainant service and access to their commercial property because he was HIV-positive. Respondents filed a timely Answer denying the allegations set forth in the Complaint. Complainant was represented by Ronda B. Goldfein, Esquire, and Adrian Lowe, Esquire. The Respondents were represented by Stephen H. Price, Esquire. Michelle L. Smith, Esquire, and Morgan Williams, Esquire, represented the Commonwealth’s interest in the case.

¹ Per Complainant’s request, he is named by the pseudonym “B.R.” and his real name redacted from the record of proceedings.

FINDINGS OF FACT²

1. Complainant is B.R.. (“Complainant”).
2. Complainant B.R. is an individual living with Human Immunodeficiency Virus (“HIV”).
C.E. 14.
3. HIV is a bloodborne pathogen. *Id.*
4. Respondents are Hettinger Tattoo, LLC, and Kyle Hettinger (Hettinger, Respondent Hettinger or collectively “Respondents”).
5. Hettinger is the sole owner of Hettinger Tattoo, LLC.
6. Hettinger Tattoo, LLC operates as a business at 2248 Perkiomen Avenue, Mount Penn, PA 19606. C.E. 14
7. Hettinger Tattoo, LLC is a tattoo studio that offers its services to the public. *Id.*
8. Complainant was first diagnosed with HIV in the year 2000. Tr. 19.
9. Complainant testified that he is now in care for HIV and it is undetectable. Tr. 21.
10. Complainant has never been advised by his doctor not to get a tattoo because he has HIV.
Tr. 21.
11. Complainant was also recently diagnosed with diabetes. He was never advised by his doctor not to get a tattoo because of his diabetes. Tr. 22.

²Explanation of Abbreviations

Tr.= Hearing Transcript

J.E.= Joint Exhibit

C.E.= Complainant Exhibit

R.E.= Respondent Exhibit

J.S.= Joint Stipulations

12. In December of 2022, Complainant was considering getting a tattoo of a phoenix to symbolize rebirth and rejuvenation, and to commemorate surviving his HIV diagnosis. Tr. 22, 23.
13. On December 23, 2022, Complainant messaged Respondent Hettinger through Facebook Direct Message requesting a tattoo of a phoenix. C.E. 1; C.E. 14.
14. Complainant knew of Hettinger because he was “[his] really good friend’s brother” whom he regarded as a talented artist and to whom he wanted to give his business to. Tr. 23.
15. On January 3, 2023, Respondent Hettinger wrote a Facebook Direct Message in response to Complainant’s request, “I do not tattoo anyone with a known bloodborne pathogen. It is too high of a risk for myself and my business.” C.E. 1; C.E. 14.
16. On January 3, 2023, Hettinger was aware that Complainant was living with HIV. C.E. 14.
17. Complainant testified that he felt “incredulous” and “angry” at reading the message from Kyle Hettinger. Tr. 25, 26.
18. Respondent Hettinger did not ask Complainant about his health, nor did he provide a screening questionnaire prior to denying Complainant’s request. Tr. 25.
19. Complainant then replied to Hettinger, stating that he would give him until the following day at 5 PM to change his “offensive and discriminatory policy” before he “pulled the trigger on the lawyers”. C.E. 1; Tr. 27.
20. Respondent Hettinger did not reply to Complainant’s message. Tr. 27.

21. Complainant testified that Respondent Hettinger's actions left him feeling "sad" and feeling more trepidatious about trusting people with information about his HIV diagnosis. Tr. 28.
22. Complainant also testified that what happened between him and Hettinger caused some slight divisions with his friends and community. Tr. 29.
23. Respondent Hettinger has a speech impediment in the form of stuttering. Tr. 56.
24. Hettinger testified that his stuttering is exacerbated by anxiety. *Id.*
25. Respondent Hettinger also testified that he does not tattoo based on any health risks or concerns. Tr. 57.
26. Respondent Hettinger testified that as an example, he had a potential client with a liver transplant inquire about a tattoo, and he had him reach out to a doctor who recommended against it. *Id.*
27. Respondent Hettinger testified that he also denies clients if he thinks he could hurt them due to heightened anxiety. Tr. 57, 58.
28. Respondent Hettinger testified that Complainant's HIV was part of the reason that he said no to tattooing him. He testified that a larger part of the reason was that he did not like who Complainant was after meeting him and having a bad first impression of him. Tr. 60.
29. Expert witness Dr. Luis Montaner, D.V.M., M. Sc. D. Phil. testified that careers facing the probability of contact that could compromise one's health have instituted several occupational barriers to prevent transmission which include but are not limited to face mask and glove use, preventing needles from being used twice, as well as educating personnel on the risks of bloodborne pathogens and protective measures against them. Tr. 41, 42.

30. Dr. Montaner testified that the whole premise of the practice of prevention is the assumption that anyone could have a pathogen and the need to take precautions in the event that they do. But “you would still proceed with the practice regardless of your knowledge of whether the individual... has a risk or doesn’t have a risk.” Tr. 43.
31. Universal Precautions is an approach to infection control that treats all human blood and certain human body fluids as if known to be infectious for HIV, HBV, and other bloodborne pathogens. C.E. 14.
32. Respondent Kyle Hettinger has been trained annually since 2014 by ProTraining in Universal Precautions for providing tattoo services and maintaining a tattoo studio. C.E. 14; C.E. 9; C.E. 10.
33. ProTraining is an online, video-based training that provides certification in Universal Precautions, CPR and other health related matters. *Id.*
34. Respondent Kyle Hettinger uses Universal Precautions for providing tattoo services and maintaining a tattoo studio. *Id.*

CONCLUSIONS OF LAW

1. The PHRC has jurisdiction over Complainant, Respondents, and the subject matter of the Complaint under the Pennsylvania Human Relations Act (PHRA or the Act).
2. The parties and the PHRC have fully complied with the procedural prerequisites to convene a Public Hearing.
3. Complainant is a person within the meaning of the Act.
4. Respondents are people within the meaning of the Act.
5. Hettinger Tattoo, LLC is a public accommodation for purposes of PHRA Section 5(i). J.S. 14.
6. 2248 Perkiomen Avenue is a commercial property for purposes of PHRA Section 5(h). J.S. 15.
7. Pennsylvania enacted the PHRA to prevent and eliminate unlawful discrimination on the basis of race, color, religious creed, ancestry, age, sex, national origin, handicap or disability in various settings, including public accommodations and commercial property.
8. Courts generally interpret the PHRA in accord with its federal counterparts, including but not limited to the Fair Housing Act (“FHA”) and the Americans with Disabilities Act (“ADA”).
9. The PHRA and the ADA define the term “handicap or disability” with respect to a person, as: (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 an impairment; or (3) being regarded as having such an impairment.
10. Complainant is a person with a disability (HIV) within the meaning of the ADA and the PHRA.

11. Direct evidence of discrimination is evidence that is sufficient to demonstrate the Complainant's protected class was the basis for Respondents' adverse action.
12. Complainant has offered sufficient evidence to demonstrate that Complainant's disability was the basis for Respondents' denial of service and access to the commercial property.
13. Where direct evidence is shown, the burden of persuasion shifts to Respondents to show the same decision would have been made absent a discriminatory motive.
14. Respondents have not shown that the same decision would have been made absent a discriminatory motive.
15. Complainant is entitled to damages.
16. The PHRC has broad discretion in fashioning a remedy and their actions are entitled to deference by a reviewing Court.
17. The PHRC may award actual damages, including damages caused by embarrassment and humiliation.
18. Embarrassment and humiliation damages encompass claims of emotional distress.

OPINION

This case arises out of a Complaint filed by B.R. (“B.R.” or “Complainant”) against Kyle Hettinger and Hettinger Tattoo, LLC (“Hettinger” “Respondent Hettinger” or “Respondents”). Complainant’s PHRC Complaint was filed on or about May 8, 2023, at PHRC Case Number 202202048. An Amended Complaint was filed on or about October 23, 2023. The Complaint alleged that Respondents discriminated against Complainant on the basis of disability when they denied Complainant service and access to their commercial property because he was HIV-positive.

PHRC staff investigated the Complaint and found probable cause to credit Complainant’s allegations of discrimination. The PHRC and the parties attempted to resolve the case through conference, conciliation, and persuasion. The hearing was held on July 11, 2024 in Berks County, Pennsylvania. Complainant was represented by Ronda B. Goldfein, Esquire, and Adrian Lowe, Esquire. The Respondents were represented by Stephen H. Price, Esquire. Michelle L. Smith, Esquire, and Morgan Williams, Esquire, represented the Commonwealth’s interest in the case. Post-hearing briefs were due by the parties in August of 2024.

Pennsylvania enacted the Pennsylvania Human Relations Act (PHRA) to prevent and eliminate unlawful discrimination on the basis of “race, color, religious creed, ancestry, age, sex, national origin, handicap or disability” in various contexts, including public accommodations and commercial property. See generally 43 P.S. §§ 952, 955. The parties have jointly stipulated to Respondents being both a commercial property and public accommodation. J.S.

Section 5(i)(1) of the PHRA provides in relevant part,

It shall be an unlawful discriminatory practice... for any person being the owner, lessee, proprietor, manager, superintendent, agent, or employee of any public accommodation... to.. [r]efuse, withhold from, or deny to any person because of his... handicap or disability... either directly or indirectly... any of the accommodations, advantages, facilities, or privileges of such public accommodation.

Section 5(h)(3) of the PHRA provides in relevant part,

It shall be an unlawful discriminatory practice... for any person to... discriminate against any person... in furnishing facilities, services, or privileges in connection with the ownership, occupancy or use of any... commercial property because of the... handicap or disability... of any person.

Section 5(e) of the PHRA provides in relevant part,

It shall be an unlawful discriminatory practice... for any person, employer, or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unlawful discriminatory practice... or to attempt, directly or indirectly, to commit any act declared by this section to be an unlawful discriminatory practice.

While the Pennsylvania courts are not bound in their interpretations of Pennsylvania law by federal interpretations of parallel provisions in federal law, courts generally interpret the PHRA in accord with its federal counterparts. *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996). In this case, the language of the relevant provisions of the PHRA outlined above are identical to relevant provisions of the Fair Housing Act (FHA).

Complainant argues that he should prevail because Respondents treated him differently based on his disability. In the context of disability, the federal counterpart to the PHRA is the Americans with Disabilities Act (“ADA”).

The PHRA and the ADA define the term “handicap or disability” with respect to a person, as: (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 an impairment; or (3) being regarded as having such an impairment. 43 P.S § 954.

Complainant was first diagnosed with HIV in the year 2000, and as of the date of public hearing has had “undetectable” levels of the pathogen. Tr. 19, 21. Courts have long held that HIV is considered a disability under the ADA, even when the infection has not yet progressed to the symptomatic phase, as it is a physical impairment that substantially limits major life activities including but not limited to reproduction, talking, walking, and digestion. See *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Doe v. County of Centre, PA*, 242 F.3d 437 (2001). This is supported by the regulations, which also include the operation of major bodily functions such as the immune system as examples of substantially limited major life activities. See 42 U.S.C.A. §12102. It is clear that regardless of detection levels, Complainant having HIV makes him a member of a protected class; disability.

Complainant can prove disparate treatment claims based upon his disability using either direct evidence or circumstantial evidence. See *Doe v. C.A.R.S. Prot. Plus*, 527 F.3d 358, 364 (3d Cir. 2008). Direct evidence is evidence that is sufficient to demonstrate the Complainant’s protected class was the basis for Respondents’ adverse action. *Frantz v. Ferguson Enters.*, 2009 U.S. Dist. LEXIS 6241, 6-7 (E.D. Pa. Jan. 26, 2009). Where direct evidence is shown, the burden of persuasion shifts to the Respondents to show the same decision would have been made absent a discriminatory motive. *Id.* In the absence of direct evidence, courts apply a burden shifting framework to determine whether unlawful discrimination has taken place.

Complainant alleges that Respondents’ discrimination is proven through both direct and circumstantial evidence. Direct evidence of discrimination is evidence that is so revealing of a discriminatory animus that it is not necessary to rely on a presumption from the *prima facie* case to shift the burden to defendant. *Prise v. Alterwoods Group, Inc.*, 657 F.Supp.2d 564,

587 (W.D.Pa. 2009). In order to succeed on a claim based on direct evidence, a complainant need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that membership in a protected class was a motivating factor for the adverse action. *Spanish Council of York, Inc. v. PHRC*, 879 A.2d 391, 399 (fn. 19) (Pa.Cmwlth. 2005).

In this case, the evidence shows that Complainant was refused a tattoo on the basis of his disability. After Complainant messaged Respondent Hettinger to inquire about getting a tattoo of a phoenix, Hettinger's response was "[B.R.], I do not tattoo anyone with a known bloodborne pathogen. It is too high of a risk for myself and my business." C.E. 1; C.E. 14. This message from Hettinger was jointly stipulated to by the parties. This was also the final response from Hettinger in that exchange and it was not preceded by any inquiries into the health of B.R., indicating that Hettinger had already known of B.R.'s diagnosis. Tr. 25. Hettinger testified that the reason for the denial was also largely due to his dislike of B.R. Tr. 60. However, he also simultaneously confirms that B.R.'s disability was still a reason for the denial, and this is the sole reason that is reflected in the actual exchange between the two individuals. We find that Complainant has succeeded in showing direct evidence of discriminatory animus on the part of Respondents.

Respondents assert Complainant's disability presented a safety risk to Hettinger, who would not be able to safely do his job. Tr. 73. However, there was no individualized assessment to determine whether Complainant's health would pose a risk to Hettinger. Respondents allege that there was no opportunity to ask Complainant to confirm with his doctor to determine whether he could safely be tattooed. Tr. 60. However, Hettinger had already explicitly stated in writing that he would not tattoo Complainant due to his

bloodborne pathogen before asking any questions indicative of an assessment of any kind. He did not provide a screening questionnaire or inquire into Complainant's health before denying the service. Tr. 25, 26. Respondent Hettinger has testified to having done this with other clients before; specifically, Hettinger testified to seeking clearance from a client's doctor following a liver transplant. Tr. 57. However, this same treatment was not afforded to Complainant. Therefore, Respondents fail to establish this defense.

Respondents also states that Hettinger should instead be accommodated for his disabilities by allowing him to deny services to clients that make him anxious. Tr. 60. However, Respondents have not provided any legal authority or evidence to support this assertion, nor have they provided any evidence relating to Hettinger's disabilities and how his heightened anxiety might impact his work. We also note again that no assessment of any kind was made for Complainant in order to determine whether Hettinger could perform his job, only the knowledge that Complainant was HIV-positive. For these reasons, this argument also fails to establish a defense.

Nothing in the record shows that Respondents would have made the same decision absent a discriminatory motive. It is apparent that it was the knowledge of Complainant's disability that was the direct cause of the denial of services by Respondents. We therefore find in favor of the Complainant and turn to the issue of damages.

Section 9(f)(1) of the PHRA provides in pertinent part:

If, upon all the evidence at the hearing, the Commission shall find that a respondent has engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its finding of fact, and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including, but not limited to reimbursement of certifiable travel expenses in matters involving the complaint,... and any other verifiable, reasonable out-of-pocket expenses caused by such unlawful discriminatory practice, provided that, in those

cases alleging a violation of Section 5(h)... the Commission may award actual damages, including damages caused by humiliation and embarrassment, as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

The purpose of the remedy is not only to restore the injured party to their pre-injury status and make her whole but also to discourage future discrimination. *Williamsburg County School District v. Pa. Human Relations Comm'n*, 512 A.2d 1339 (Pa. Comwlth 1986). In his post-hearing brief, the Complainant has requested emotional distress damages and the imposition of a civil penalty against Respondents.

In determining whether the evidence of emotional distress is sufficient to support an award, we must look at both the direct evidence of emotional distress and the circumstances of the act that allegedly caused the distress. *McGlawn v. Pa. Human Rels. Comm'n*, 891 A.2d 757, 777. Courts have held that the size of an intangible damage award is largely intuitive and is a matter over which the jury or the trial judge sitting without a jury has a great deal of discretion. *Laudon v. Loos*, 694 F. Supp. 253, 255 (E.D. Mich. 1988). In *Cole v. Todd Toms, et. al.* PHRC # 202102052, the Commission summarized some of the most important factors it uses in determining an amount for emotional distress damages. (1) Whether Complainant suffered physical harm or threat of physical harm in addition to harm to their mental health; (2) The nature of the evidence offered to describe the harm (e.g. testimony by the Complainant, testimony by others, expert testimony); (3) Whether Complainant sought or otherwise received treatment for the injury; (4) Whether the discrimination was a single act or was ongoing; and (5) Whether the Complainant was particularly susceptible to being injured by discrimination due to their personal history. We also consider the overall egregiousness of Respondent's behavior toward Complainant in determining the extent of emotional distress suffered.

With regards to factors 1 and 2, Complainant provided credible testimony speaking to the emotional distress that this experience caused him. Complainant testified that he felt incredulous and stunned upon reading Respondent Hettinger's message stating that he does not tattoo anyone with a bloodborne pathogen. Tr. 25. He also testified to feeling sad and angry about the message. Tr. 26. Complainant also felt sad and disappointed at not receiving any further response from Hettinger, because he knew he was going to have to "go into battle over this." Tr. 27, 28. Complainant expressed disappointment that in 2024, people were not better educated and more informed. Tr. 28. He also stated that he would be very trepidatious about trusting people with information about his medical conditions, and that this ordeal has caused slight divisions with his friends and community. Tr. 28, 29. Complainant stated that he will not be getting the tattoo that was supposed to symbolize rejuvenation and rebirth because "it would just be a reminder of this whole debacle." Tr. 29. Regarding factor 3, Complainant did not seek nor receive treatment relating to the distressing event. Regarding factor 4, the discrimination experienced was a single act by Hettinger in refusing to provide services to Complainant. In looking at factor 5, Complainant testified that he had experienced homophobia in the past but had never been discriminated against on the basis of his being HIV-positive. Tr. 28.

The Commission therefore finds that \$5,000.00 is an appropriate amount in emotional distress damages.

Complainant also requests the imposition of a civil penalty against Respondents. Section 9(f)(2) of the PHRA provides in pertinent part:

Such order may also assess a civil penalty against the respondent in a complaint of discrimination filed under Sections 5(h) or 5.3 of this Act (i) in an amount not exceeding ten thousand dollars (\$10,000) if the respondent has not been adjudged to have committed any prior discriminatory practice..."

In determining the amount of a civil penalty, the factors to consider are: (1) the nature of the violation; (2) the degree of culpability; (3) Respondent's financial resources; (4) the goal of deterrence; and (5) other matters as justice may require. *McGlawn v. Pennsylvania Hum. Rela. Comm'n*, 891 A.2d 757, 779.

The burden of producing evidence of financial resources falls upon Respondents because such information is peculiarly within Respondents' knowledge. A civil penalty may be imposed without consideration of a Respondent's financial situation if a Respondent fails to produce evidence that would tend to mitigate the amount to be assessed. *Campbell v. United States*, 365 U.S. 85, 96 (1961).

Here, the evidence establishes that Respondents discriminated against Complainant on the basis of his disability when they refused to provide him service and access to their commercial property because Complainant was HIV positive. Respondents have not provided evidence of financial resources and therefore the exact financial circumstances of Respondents are unknown. There is also no evidence showing that Respondents have a history of violations. Therefore, \$1,000 is the appropriate amount for the civil penalty. An order follows.

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Respondents	:	

RECOMMENDATION OF THE HEARING EXAMINER

Upon consideration of the entire record in the above-captioned matter, the Hearing Examiner finds that Complainant has proven that Respondents discriminated against him by denying him service and access to commercial property in violation of Section 5 of the PHRA. It is, therefore, the Hearing Examiner's recommendation that the attached Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. If so, approved and adopted, the Hearing Examiner further recommends issuance of the attached Final Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

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Kyle Hettinger,	:	
Respondents	:	

FINAL ORDER

AND NOW, this 27th day of January, 2025, 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 approved the foregoing Findings of Fact, Conclusions of Law, and Opinion of the Hearing Examiner. Further, the Commission adopts said Findings of Fact, Conclusions of Law, and Opinion into the permanent record of this proceeding, to be served on the parties to the Complaint and hereby


ORDERS

1. Respondents Hettinger Tattoo, LLC and Kyle Hettinger cease and desist from discriminating against individuals due to their disability.
2. That, within sixty (60) days of the effective date of this Order, Respondents shall pay Complainant the lump sum of \$5,000.00, which amount represents compensatory damages of embarrassment and humiliation Complainant suffered.
3. That, within sixty (60) days of the effective date of this Order, Respondents shall deliver to PHRC Counsel, Michelle Smith, a check payable to the Commonwealth of

Pennsylvania, in the amount of \$1,000.00, which represents an assessment of a civil penalty pursuant to Section 9(f)(2)(i) of the PHRA.


4. That, within sixty (60) days of the effective date of this Order, Respondents shall report to the PHRC on the manner of its compliance with the terms of this Order by letter addressed to Adrian Garcia, Director of Enforcement, Pennsylvania Human Relations Commission, 333 Market Street, 8th Floor, Harrisburg, PA 17101.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: 

M. Joel Bolstein
Chairperson

Attest:



O/B/O Commissioner Mayur Patel