

COMMONWEALTH OF PENNSYLVANIA  
GOVERNOR'S OFFICE  
PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROSALIND BROWN  
Complainant

v.

DAIRY FARMERS OF AMERICA  
Respondent

PHRC Case No. 200702246  
EEOC Charge No. 17F200860785

STIPULATIONS OF FACT

JOINT STIPULATIONS OF FACT

FINDINGS OF FACT

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OPINION

RECOMMENDATION OF PERMANENT HEARING EXAMINER

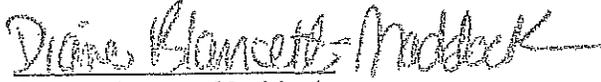
FINAL ORDER

### STIPULATIONS OF FACT

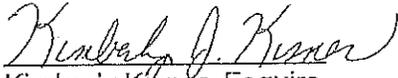
The following procedural facts are submitted by all parties to the above captioned matter and no further proof thereof shall be required at hearing:

1. The Complainant herein is Rosalind Brown, an adult female, residing in West Middlesex, PA, Mercer County, Pennsylvania (hereinafter Complainant).
2. The Respondent herein is Dairy Farmers of American, Inc. with a location at 82 North Street, West Middlesex, PA 16159 and at all times relevant hereto, having four (4) or more employees. Respondent is an "employer" within the meaning of the Pennsylvania Human Relations Act.
3. On December 10, 2007, Complainant filed a verified Complaint with the Pennsylvania Human Relations Commission (hereinafter PHRC) alleging Respondent terminated her due to her sex.
4. On March 14, 2008, Respondent filed a Response to Averments denying that Complainant's sex was the reason for the discipline issued that resulted in termination.,
5. On February 12, 2009, following investigation into Complainant's allegations, PHRC staff made a finding of probable cause to credit the allegations of discrimination based on sex. Respondent continues to deny the allegations of sex discrimination.
6. Respondent was notified of the finding of probable cause to credit the allegations of sex discrimination and was invited to enter into conciliation.
7. Efforts to resolve the complaint of sex discrimination by means of conference, conciliation and persuasion were unsuccessful and on June 22, 2009, the PHRC approved a public hearing and the parties were so notified.

STIPULATED TO:



Diane Blancett-Maddock  
Assistant Chief Counsel  
Counsel for the Commission



Kimberly Kisner, Esquire  
Counsel for Respondent

### JOINT STIPULATIONS OF FACT

1. DFA hired Complainant as a laborer on or about in June 25, 2001.
2. DFA terminated Complainant on September 20, 2007, for violation of policy.
3. In 2006 and 2007, Respondent possessed a disciplinary policy "Employee Conduct Rules." (Joint Exhibit 6.)
4. Prior to her termination from employment, Complainant had not received any disciplinary action for violation of DFA's Employee Conduct Rules.
5. DFA has a policy prohibiting discrimination on the basis of sex or any other protected status. During Complainant's employment with DFA, she received training from the company on prohibited discrimination. (Joint Exhibit 1, pages 14-15) This training included training on how an employee could raise a complaint of prohibited discrimination. Id.
6. Prior to her Complaint of Discrimination filed with the Pennsylvania Human Relations Commission, Complainant did not make any complaint of discrimination to DFA internally or to any federal or state agency.

### **COMPLAINANT/HARDIN INCIDENT:**

7. On September 20, 2007, Complainant was involved in an incident in DFA's locker room with a co-worker, Celeste Hardin.
8. The argument between Complainant and the co-worker began with a verbal confrontation before becoming a physical confrontation.
9. Following the incident, DFA's Human Resources Manager, John DeCola, asked witnesses to complete written statements of what they observed. Several witnesses reported they saw the women fighting. (Joint Exhibit 4)

10. After receiving the witness statements and consulting with DFA's Corporate Human Resources Department, John DeCola determined Complainant and her co-worker, Celeste Hardin, engaged in a Group I infraction no. 6, "fighting on company premises or any other act during production time or on company property intended to inflict bodily harm or threatened bodily harm." Pursuant to the Employee Conduct Rules, a Group I infraction results in discharge from employment.
11. Complainant, who was familiar with the handbook, testified she knew the consequences of her actions and knew she would be terminated from employment. (Joint Exhibit 1, page 42)

#### **THE BALLARD/SMOOT INCIDENT:**

12. DFA hired Renwick Smoot on November 5, 2004. Respondent hired Bruce Ballard on January 31, 2005.
13. Prior to their three-day suspensions, neither Mr. Ballard nor Mr. Smoot had received any disciplinary actions for violation of the Employee Conduct Rules.
14. On or about October 24, 2006, Mr. Smoot and Mr. Ballard argued over who was responsible for a 20-pound block of cheese. During the course of their shift, each individual took the cheese and placed it on the other's skid.
15. Mr. Ballard reported he was hit in the mouth with the block of cheese.
16. DFA's Human Resource Manager, John DeCola collected employee statements regarding the incident. (Joint Exhibit 5)
17. In his statement, Mr. Ballard alleged Mr. Smoot hit him in the mouth intentionally with the cheese. Mr. Smoot denied the allegation, claiming it was unintentional.
18. No other employee reported witnessing Mr. Ballard being hit with the cheese, and therefore, no other employee could confirm whether it was intentional (as Mr. Ballard alleged) or unintentional (as Mr. Smoot claimed).

### COMPLAINANT'S COMPLAINT AND THE PHRC'S INVESTIGATION:

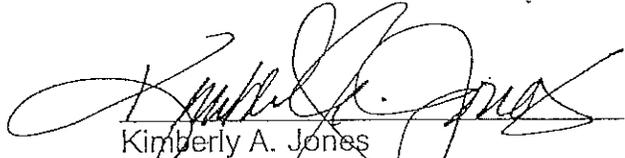
19. David Codori, Human Relations Representative II, conducted an investigation into the Complainant's charge of discrimination on behalf of the Pennsylvania Human Relations Commission.
20. DFA provided Codori the witness statements it obtained when investigating the Smoot/Ballard incident as well as the Brown/Hardin incident. In short, Codori was provided the information the company had when it made its disciplinary decision with respect to each incident. (Codori depo, page 34)
21. Codori testified he interviewed the individuals who provided witness statements in the Brown/Hardin incident as well as the Smoot/Ballard incident. (Codori depo, at page 29)
22. None of the witnesses Codori interviewed about the Smoot/Ballard incident could state whether Smoot intentionally struck Ballard with the cheese block or whether it was an accident. (Codori depo pages 34, 36-37, and 40)
23. Codori testified following his on-site interviews, he usually returns to his office and prepares a more comprehensive summary of the interviews. He did not prepare such a summary in this case. (Codori depo, page 52) Moreover, throughout his deposition, Mr. Codori could not read many of his own hand-written notes from the witness interviews conducted. (Codori depo, pages 35-52)
24. Codori also interviewed John DeCola by telephone. During the interview, DeCola explained to Codori that Ballard claimed the incident was intentional while Smoot claimed it was a mistake. DeCola further explained he did not have any additional information from his investigation of the Smoot/Ballard incident indicating whether it was intentional or if, in fact, it was a mistake. (Codori depo, pages 54-55)

25. DeCola informed Codori during his investigation of the Brown/Hardin incident, witnesses indicating they were both fighting. As a result, DeCola explained he saw the Brown/Hardin incident differently than the Smoot-Ballard incident. Specifically, in the Brown/Hardin case, witnesses corroborated the two women were fighting whereas he did not have corroboration of intent in the Smoot/Ballard situation. (Codori depo, pages 55-56)
26. Despite the information DFA provided, Codori testified he did not agree with the conduct rule DFA identified in assessing discipline for Smoot/Ballard. (Codori depo, page 69)

**COMPLAINANT'S MITIGATION:**

27. At the time of her termination from employment in 2007, Complainant's hourly rate of pay was \$14.35 per hour.
28. Complainant earned \$33,136.33 in 2006 from DFA.
29. Complainant earned \$29,993.00 in 2007 from DFA.
30. In 2007, Complainant received \$5,528.00 in unemployment benefits.
31. In 2008, Complainant earned \$20,536.11 from her subsequent employer, Markowitz Enterprises, Inc.
32. In 2008, Complainant received \$3,232.00 in unemployment benefits.
33. In 2009, Complainant's hourly rate of pay is \$10.60 per hour. Through September 13, 2009, Complainant earned \$13,571.75.
34. In 2009, Complainant received weekly unemployment compensation benefits in the amount of \$276.00 from September 14, 2009-December 4, 2009.
35. If Complainant remained in her position with DFA in 2008, the rate of pay would have increased to \$14.78 per hour.
36. If Complainant remained in her position with DFA in 2009, the rate of pay would have increased to \$15.15.

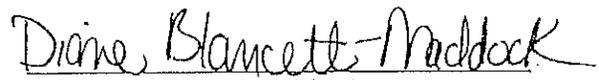
Respectfully submitted,



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### FINDINGS OF FACT\*

1. Rosalind Brown (hereinafter "Complainant") is an adult female residing in West Middlesex, PA. (SF 1)
2. Dairy Farmers of America (hereinafter "Respondent") at all times relevant hereto, is an employer within the meaning of the Pennsylvania Human Relations Act (hereinafter "Act"). (SF 2)
3. The Respondent hired the Complainant as a laborer on or about June 25, 2001. (JSF 1)
4. In 2006 and 2007, the Respondent had a disciplinary policy titled "Employee Conduct Rules." (JSF 3; JE 6)
5. Under the Employee Conduct Rules, a Group I Infraction No. 6 involves "fighting on company premises or any other act during production time or on company property, intended to inflict bodily harm or threaten bodily harm." (JSF 10)
6. Under the Employee Conduct Rules a Group II Infraction No. 8 is "engaging in physical activity such as would cause an interruption in work; horseplay, scuffling, throwing things or running." (JSF 10)
7. Prior to her termination, the Complainant had not received any disciplinary action for violating any of Respondent's Employee Conduct Rules. (JSF 4)
8. On September 20, 2007, Complainant was involved in an incident with co-worker, Celeste Hardin (hereinafter "Hardin") which resulted in Complainant's discharge. (JE 11-12)
9. Soon after her shift commenced, the Complainant confronted Hardin in the women's locker room. (JSF 7)

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

SF	Stipulations of Fact
JSF	Joint Stipulations of Fact
JE	Joint Exhibits

10. The argument with Hardin began with a verbal confrontation before becoming a physical confrontation. (JSF 8)
11. Subsequent to the incident, Respondent's Human Resources Manager, John DeCola (hereinafter "DeCola") asked witnesses to complete written statements regarding what they saw. (JSF 9)
12. Several of the witnesses indicated that the women were fighting. (JE 4)
13. After reviewing the witness statements and consulting with Respondent's Corporate Human Resources, DeCola applied a Group I Infraction No. 6 to the incident involving Complainant and Hardin. (JSF 10)
14. The Complainant testified that she was familiar with the rules and that if the incident was determined to be a Group I Infraction No. 6 she would be terminated from employment. (JSF 12)
15. The Respondent hired Renwick Smoot (hereinafter "Smoot") on November 15, 2004 and Bruce Ballard (hereinafter "Ballard") on January 31, 2005. (JSF 12)
16. For an extended period of time, Smoot and Ballard had serious ongoing problems with each other in the workplace. (JE 5)
17. During the entire morning of October 24, 2006, Smoot and Ballard were engaged in an extended verbal confrontation over a 20 lb. block of cheese. (JE 5)
18. The extended verbal confrontation centered around whose skid (Smoot's or Ballard's) the block of cheese belonged. (JE 5)
19. During his deposition, Ballard testified that Smoot, while in a rage, picked up the block of cheese and intentionally jammed it into his face. (JE 5)
20. Robert Rice (hereinafter "Rice") provided a statement which indicated that "all morning they [Smoot and Ballard] had been at each other." (JE 5)
21. Rice stated that the block of cheese hit Ballard in the mouth. (JE 5)

22. James Diefenderfer (hereinafter "Diefenderfer"), another Respondent employee, provided a statement indicating that Smoot and Ballard were arguing earlier. (JE 5)
23. Diefenderfer's statement indicated that the two of them were throwing the slab of cheese at each other. (JE 5)
24. The argument escalated to a point, where Diefenderfer heard Ballard say "go ahead and hit me." (JE 5)
25. Diefenderfer's statement further provided that after hearing the above statement, Ballard walked by his Diefenderfer's area holding his mouth. (JE 5)
26. Ballard's work helmet was lying on the ground. (JE 5)
27. As Ballard left the work area, his nose and mouth were bleeding. (JE 1, p94)
28. DeCola's deposition stated that, after an investigation, he determined that the incident involving Smoot and Ballard was "he said and he said and there was no other supporting evidence from anybody." (JE 2, p29-30)
29. DeCola further stated that he determined that the male employees engaged in a Group II Infraction, No. 8. (JE 2 p24)
30. Because DeCola applied Group II Infraction No. 8, Smoot and Ballard received three-day suspensions without pay. (JE 2, p24)
31. By deposition, Dr. Barbara Keaton (hereinafter "Keaton"), an expert witness for Complainant, testified that no reasonable person who received the documentation DeCola had received could have concluded that a person throwing, shoving or pushing a 20-lb block of cheese into another person's face did not intend to hurt them. (JE 3, p65)
32. Dr. Keaton further testified, in the area of workplace violence, employers often minimize violence committed by men resulting in a discriminatory application of discipline in the workplace. (JE 3)

33. Dr. Keaton testified that there is often an organizational culture "that men engaging in physical activity, that's more acceptable than for females who should be more nurturing and passive and not act in an aggressive manner. So, there is a stronger distaste for women behaving in that manner." (JE 3, p69)

## CONCLUSIONS OF LAW

1. The Pennsylvania Human Relations Commission has jurisdiction over the parties and subject matter of this case.
2. The parties and the Commission have fully complied with the procedural prerequisites to a Public Hearing.
3. The Complainant is an individual within the meaning of the Pennsylvania Human Relations Act. (hereinafter "Act")
4. The Respondent is an employer within the meaning of the Act.
5. In order to establish a *prima facie* case of sex discrimination, the Complainant must show:
  - a. she is a member of a protected class;
  - b. she was qualified for the position she held;
  - c. she suffered an adverse employment action; and
  - d. others not in Complainant's protected class were treated differently.
6. The Complainant has set forth a *prima facie* case of sex discrimination.
7. The Respondent has met its burden of producing evidence of a legitimate non-discriminatory reason for its action.
8. The Complainant has established by a preponderance of the evidence that Respondent's articulated reason is pretextual.
9. Whenever the PHRC concludes that a Respondent has engaged in an unlawful practice, the PHRC may issue a cease and desist order and order such affirmative relief as in its judgment will effectuate the purposes of the PHRA.

## OPINION

This case arises out of a complaint filed by Rosalind Brown (hereinafter "Complainant") against Dairy Farmers of America (hereinafter "Respondent") on or about December 8, 2007 at PHRC Case No. 200702246. The Complainant alleges that she was discriminatorily terminated from her position with the Respondent on the basis of her sex, female. Complainant further alleges that her termination was in violation of the Pennsylvania Human Relations Act (hereinafter "Act") of October 27, 1955, P.L. 74, as amended, 42 P.S. Section 955(a).

The Pennsylvania Human Relations Commission (hereinafter "PHRC") investigated the Complainant's allegation and, at the conclusion of the investigation, found that probable cause existed to credit the Complainant's allegation. Therefore, the PHRC attempted to eliminate the alleged unlawful, sex-based termination through conference, conciliation and persuasion, but such efforts proved unsuccessful. Subsequently, the PHRC notified the parties that the matter had been approved for Public Hearing.

In the instant case, Commission Counsel and Respondent Counsel agreed to submit this case on briefs in lieu of a Public Hearing. Pursuant to this agreement, the parties have jointly submitted depositions of witnesses, witness statements and exhibits. Additionally, the argument on behalf of the Complainant was presented on brief by PHRC Assistant Chief Counsel, Diane Blancett-Maddock. Kimberly A. Jones Esquire and Kimberly J. Kisner, Esquire presented the Respondent's argument on brief.

In a case involving a disparate treatment allegation, we often apply a system of shifting burdens of proof, which is "intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1982). The Complainant must carry the initial burden of establishing a *prima facie* case of discrimination. Allegheny Housing Rehabilitation Corp. v PHRC, 516 Pa. 124, 532 A.2d 315(1987); McDonnell Douglas Corp. v Green, 411 U.S. 792, 802 (1973). Once a

Complainant meets the initial burden, the Respondent must articulate a legitimate non-discriminatory reason for its action. Once a Respondent articulates a legitimate, non-discriminatory reason for its action, the Complainant must prove that the stated reason was merely a pretext for sex discrimination. Clearly, the ultimate burden is on the Complainant to persuade by a preponderance of the evidence that she was the victim of unlawful sex discrimination.

The initial question is whether the Complainant has established the requisite *prima facie* case. In McDonnell Douglas, the United States Supreme Court held that a plaintiff may prove a *prima facie* case of discrimination in a failure to hire case by demonstrating:

- a. that he belongs to a racial minority;
- b. that he applied for and was qualified for a job for which the employer was seeking applicants;
- c. that, despite his qualifications, he was rejected; and
- d. that after his rejection, the position remained open and the employer continued to seek applicants.

Although the McDonnell Douglas test and its derivatives are helpful, they are not to be rigidly, mechanically, or ritualistically applied. The elements of a *prima facie* case will vary substantially according to the differing factual situations of each case. McDonnell Douglas, 411 U.S. at 802. They simply represent a "sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Shah v General Electric Co., 816 F2d 264, 43FEB, 1018 (6<sup>th</sup> Cir. 1987).

In the instant case before the Commission, the Complainant alleges that she was discriminated against on the basis of her sex, female. Specifically, the Complainant contends she was terminated for fighting while males were not terminated for fighting. Using the McDonnell Douglas model analysis, the Complainant, in order to set forth a *prima facie* showing, must establish:

- (a) she is a member of a protected class;
- (b) she was qualified for the position;
- (c) she suffered an adverse employment action; and
- (d) others not in Complainant's protected class were treated differently. Action Industries v PHRC, 518 A.2d 610, 612 (Pa Commonwealth Ct. 1986)

The Complainant sets forth a *prima facie* showing in the instant case. The Complainant is a member of a protected class, she was qualified for the position she held, and was subjected to an adverse employment action when she was terminated from her position as a laborer for the Respondent. Lastly, others not in Complainant's protected class were treated differently. Specifically, the Complainant and another employee were terminated for fighting, while two males who were fighting resulting in an injury to one of them, were only given three-day suspensions. Consequently, the Complainant has met her burden of establishing a *prima facie* case of a sex based termination.

As previously indicated, once the Complainant has met her burden of establishing a *prima facie* case, the burden shifts to the Respondent to articulate a legitimate non-discriminatory reason for its action. In the instant case, Respondent articulates a legitimate non-discriminatory reason for its termination of the Complainant, i.e. fighting on premises during work time in violation of the Employee Conduct Rules. Accordingly, the shifting burden analysis goes back to the Complainant to prove, by a preponderance of the evidence, that Respondent's articulate reason is pretextual and she was the victim of intentional sex discrimination. Burdine, 450 U.S. 248, 256

In order to analyze this case properly, it is necessary to briefly describe the two incidents that provide the backdrop to this complaint. In 2006, two male employees were involved in an incident that allegedly escalated into a physical incident in which one of the employees tossed a 20-pound block of cheese at another employee striking him in the face. After an investigation, the Respondent issued a disciplinary action that resulted in three-day suspensions for the male

employees. In September of 2007, two female employees were involved in an argument that resulted in the Complainant being struck in the face by the other female employee. After an investigation, the Respondent issued a disciplinary action that resulted in the discharge of the two female employees.

In order to prove her complaint by a preponderance of the evidence, the Complainant must show pretext. The Respondent's Employee Conduct Rules in regard to discipline is divided into Group I and Group II offenses. (JE 6) The offenses in Group I result in immediate discharge, while Group II offenses result in less severe discipline involving a warning before termination. The female employees were disciplined under the Employee Conduct Rules, Group I, Infraction No. 6 "Fighting on company premises or any other act during production time or on company property intended to inflict bodily harm or threaten bodily harm." (JS 4) The male employees were disciplined under Employee Conduct Rules, Group II, Infraction No. 8 – "Engaging in physical activity such as would cause an interruption in work; horseplay, scuffling, throwing things or running."

Both of these incidents were investigated by John DeCola ("DeCola") and he made the determination that the females would be terminated and the male employees were to be given three-day suspensions. Since DeCola made the decisions, it is important to carefully review his deposition testimony in regard to the two incidents. DeCola testified that, in regard to the males, "no one could give him anything concrete." (JE 29)

DeCola consistently referred to this incident as a "he said he said and there was no other supporting evidence from anybody." DeCola not only interviewed the males involved in the incident, he obtained written statements from them and several others. A review of Ballard's statement presents clear evidence as to Ballard's version. There was clearly an ongoing contentious dispute between Smoot and Ballard on the production floor. Interestingly, DeCola testified that he had been aware that Smoot and Ballard were arguing throughout the day. Ballard's statement indicates that "Smoot picked up the cheese, walked toward me and jammed

the block of cheese into my face." More specifically, Ballard states "he picked it up and walked toward me swearing and in a rage and from about two to three feet away jamming it into my face (mouth area)." Ballard's witness statement clearly contends that "it was not an accident; it was intentional."

Robert Rice ("Rice") another employee, who provided DeCola with a written witness statement clearly states the two were throwing the block of cheese back and forth and it hit Bruce [Ballard] in the mouth. Another Respondent employee, James Diefenderfer also, provided DeCola with a written statement. He confirmed that Ballard and Smoot had been arguing earlier and were throwing the block of cheese back and forth throughout the morning. Diefenderfer stated, "the next thing I heard was Bruce say go ahead and hit me. Then Bruce walked by holding his mouth and his helmet was lying on the ground."

A review of DeCola's deposition demonstrates his reluctance and almost avoidance to properly consider the evidence in front of him.

DeCola knew that this conflict between Smoot and Ballard had been ongoing and he did nothing to discern the cause of the conflict. The record reflects that DeCola is unclear as to the person who is the floor supervisor. The incident involving the male employees occurred on the production floor not the locker room. One would surmise that an incident that would clearly impact production would have heightened importance, not less importance. DeCola's investigation into the incident involving Smoot and Ballard seemed lackluster at best.

It is clear that Ballard was injured and that Smoot was responsible for throwing the cheese.

DeCola, readily determined the incident with the female employees was a Group I Infraction No. 6 violation resulting in discharge. However, with respect to the incident involving male employees, the evidence shows he was intent on viewing the incident as far less than what it was.

At one point, DeCola even balked at saying the cheese actually hit someone, even though both parties admit that the cheese hit Ballard. In the face of the written statements, DeCola persisted in depicting the incident between the men as a verbal argument. Under the circumstances, it was not reasonable for DeCola to conclude that the incident between the men was an unintentional act of "horseplay" rather than an intentional act "intending to inflict bodily harm or threaten to intend physical harm." Quite clearly, DeCola ignored the aggressive behavior of the two males to avoid discharging them. In essence, DeCola employed far more stringent standards against the female employees. DeCola, in effect, did give the males a "free pass" while instituting the harsher discipline with the female employees.

There is no legitimate business reason for holding the male employees to the more lenient Group II Infraction No. 8 while instituting Group I Infraction No. 6 for the female employees.

The record reflects the clear intent of the Respondent, through DeCola, to minimize the aggressive conduct of the male employees. DeCola was aware that the confrontation with Smoot and Ballard had gone on for hours on the production floor. Remarkably, at no point did a supervisor intervene and attempt to stop the behavior. Moreover, DeCola did not even seem interested why the confrontation was allowed to continue all morning. The end result of DeCola's disparate application of work rules is that the Complainant was the victim of an unlawful sex-based termination under the PHRA.

Accordingly, we now move to consideration of an appropriate remedy. Section 9(f) of the PHRA provides in pertinent part:

If, upon all evidence at the hearing, the Commission shall find that a Respondent had engaged in or is engaging in any unlawful discriminatory practice as defined in this Act, the Commission shall state its findings of fact, and shall issue and cause to be served on such Respondent an order requiring such Respondent to cease and desist from such unlawful discriminatory practice and to take such affirmative action, including but not limited to, reimbursement of certifiable travel expenses in matters involving the complaint, hiring, reinstatement...with or without back pay...and any other verifiable reasonable out-of-pocket expenses caused by such unlawful

discriminatory practice....as, in the judgment of the Commission, will effectuate the purposes of this act, and including a requirement for report of the manner of compliance.

In employment cases, the function of any remedy is not to punish the Respondent, but simply to make a Complainant whole by returning the Complainant to the position in which she would have been absent the discriminatory practice. PHRC v Alto-Reste Park Cemetery Assoc., 306 A.2d 881 (Pa. Supreme Ct. 1973) The remedy is intended to eradicate the unlawful discriminatory practice. In the instant case, the Respondent should be ordered to cease and desist from discriminating against individuals because of their sex. Also, in the instant case, neither the Complaint nor Commission Counsel has requested reinstatement into the position with Respondent.

Next, we move to the issue of back pay. When a Complainant shows an economic loss, back pay should be awarded absent special circumstances. See Walker v. Ford Motor Co. Inc., 684 F.2d 1355, 29 FEP Cases 1259 (11<sup>th</sup> Cir. 1982) Also a proper basis for calculating loss of earnings need not be mathematically precise but must simply be a "reasonable means to determine the amount the Complainant would have probably earned..." PHRC v Transit Casualty Insurance Co., 340 A.2d 624 (Pa Commonwealth Ct. 1975), *aff'd* 387 A.2d 58 (1978)

In the instant case, the Complainant seeks back pay from September 20, 2007 until December 4, 2009 when the record was officially closed. The parties have stipulated to the Complainant's base salary from 2006, her interim earnings and hourly increases the Complainant would have received had she remained in her position with the Respondent. The following analysis reflects the Complainant's lost wages for the relevant time period.

## WAGE LOSS SUMMARY

2006	Base Salary	\$	33,136.33	
2007	Base Salary	\$	33,136.33	
	- 2007 Earnings through Date of Termination		<u>29,993.00</u>	
	<b>2007 Net Lost Wages</b>			<b>\$ 3,143.33</b>

2008	Average Yearly Work Hours		2309.15 hours	
	(Base Salary \$33,136.33) ÷ (Rate/Hour \$14.35)			
	(2309.15 hours) X (\$14.78/hour)	\$	34,129.24	
	Interim 2008 Earnings		<u>20,536.11</u>	
	<b>2008 Net Lost Wages</b>			<b>\$ 13,593.13</b>

2009	Projected Base Salary	\$	34,983.62	
	(Yearly Hours 2309.15) X (Rate/Hour \$15.15/hour)			
	Projected Weekly Salary	\$	672.76	
	(Projected 2009 Salary \$34,983.62) ÷ (52 Weeks)			
	Calculated Weeks to Case Closure		48	
	(January 1, through December 4)			
	(48 Weeks) X (Rate/Week \$672.76)	\$	32,292.48	
	Interim 2009 Earnings	\$	<u>13,571.75</u>	
	<b>2009 Net Lost Wages</b>			<b>\$ 18,720.73</b>

**LOST WAGES FROM DATE OF  
TERMINATION TO DATE OF CASE  
CLOSURE, DECEMBER 4, 2009**

**\$ 35,457.19**

COMMONWEALTH OF PENNSYLVANIA

GOVERNOR'S OFFICE

PENNSYLVANIA HUMAN RELATIONS COMMISSION

ROSALIND BROWN  
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RECOMMENDATION OF PERMANENT HEARING EXAMINER

Upon consideration of the entire record in the above captioned matter, the Permanent Hearing Examiner finds that the Complainant has proven discrimination in violation of Section 5(a) of the Pennsylvania Human Relations Act. It is, therefore, the Permanent Hearing Examiner's Recommendation that the attached Stipulations of Fact, Joint Stipulations of Fact, Findings of Fact, Conclusions of Law, and Opinion be approved and adopted. Furthermore, the Permanent Hearing Examiner recommends the issuance of the attached Final Order.

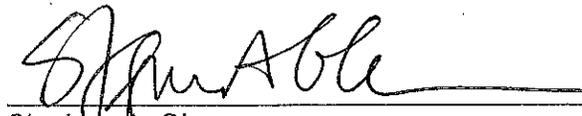
March 14, 2011  
Date

Phillip A. Ayers  
Phillip A. Ayers  
Permanent Hearing Examiner

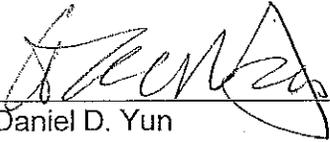


3. That the Respondent shall pay additional interest on the back pay award at the rate of six percent per annum, calculated from September 20, 2007 until the payment is made.
4. That the Respondent shall report the means by which it will comply with this Order, in writing to Diane Blancett-Maddock, PHRC Assistant Chief Counsel, Pittsburgh Regional Office, within thirty days of the date of this Order.

PENNSYLVANIA HUMAN RELATIONS COMMISSION



Stephen A. Glassman  
Chairperson



Dr. Daniel D. Yun  
Secretary